THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2014

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

September & October, 2014

Vol. LXIII (V)

Pages: HC 1 to 1315

Mode of Citation : I L R 2014 (V) 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.

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FULL TEXT OF THE SPEECH DELIVERED BY HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CHIEF JUSTICE, HIGH COURT OF HIMACHAL PRADESH, AT PALAMPUR, ON 13TH SEPTEMBER, 2014.

Hon"ble Mr.Justice Sanjay Karol & Madam Karol, Hon"ble Mr.Justice Tarlok Singh Chauhan, Hon"ble Mr.Justice Sureshwar Thakur, Judicial Officers, Senior Advocates, Advocates, Authorities of ICAR-IHBT, Mediators, Para Legal Volunteers, Press and Media, distinguished guests on the dais, off the dais:

I feel deeply privileged to inaugurate the State Conference on "Mediation & State Meet of Para Legal Volunteers", which is aimed at to understand the concept and framework for mediation, process of mediation, techniques of mediation, role and qualities of mediators and the values and culture of individual litigants.

2. If we go back into the history, Mediation is ancient and has deep roots in our country. In old days, people used to resolve their disputes at the community level.

3. Now, the economic growth and globalization has led to explosion of litigation in our country. No doubt, our judicial system is one of the best in the world, but it is also criticized due to long delays in the resolution of the disputes. Hence, the need of Alternative Dispute Resolution mechanisms, like Mediation, is felt.

4. The concept, implementation and successful continuation of the Mediation programme at District Level can be broadly classified into the following seven stages:

(1) Introduction of the Concept

(2) Training

(3) Establishment of Centres

(4) Referral & Implementation

(5) Monitoring

(6) Output Analysis; and

(7) Continuing Education.

5. Mediation can be characterized as conflict resolution by the involved parties with the help of a neutral agent, who is referred to as the Mediator. This is, in short, the essence of mediation.

6. Mediation has been used in many jurisdictions to facilitate resolution of cases through trained Mediators, who explore, with litigants, the many avenues of settling cases and reaching compromises. In fact, mediation is perceived to be a useful alternative to litigation and is considered to be a model to relieve the workload of the courts. Mediation is an innovative way of dispute resolution and directly connected with the judicial reforms. The basic assumption behind the concept of mediation is

that *dispute is healthy; not solving a dispute is dangerous*. The reason for conflicts is very often not that people do not want to solve their conflicts, but rather that they just do not know how to do that. During the course of mediation, the mediator takes care of the process; the involved parties take care of their topics and contents. The mediator helps the parties to express their feelings, emotions and ideas and takes care of balance between the parties. Settlement through mediation is voluntary, practical, amicable and fair; in mediation parties retain the right to decide for themselves, whether to settle disputes and the terms of any settlement. Tools of negotiation one learns during the mediation process may help in other situations of life too.

7. Mahatma Gandhi in his autobiography, "The Story of My Experiments with Truth", while writing about his experiences in South Africa, said and I quote:

"My joy was boundless. I had learnt the true practice at law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."

8. Mediation attempts to change dispute from "win-lose" to "win-win". It is a non-adversarial process of helping people to come to an agreement. Mediation is advantageous in numerous ways, such as:

1. The parties have control over the mediation in terms of – firstly its scope i.e. the terms of reference or issues can be limited or expanded during the course of the proceedings; and secondly, its outcome i.e. the right to decide whether to settle or not and the terms of settlement.

2. Mediation is participative, i.e. the parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

3. Mediation is voluntary and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

4. Mediation procedure is speedy, efficient and economical.

5. Mediation procedure is simple and flexible. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

6. Mediation process is conducted in an informal, cordial and conducive environment.

7. Mediation is a fair process. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

8. The Mediation process is confidential.

9. The Mediation process facilitates better and effective communication between the parties which is crucial for a creative and meaningful negotiation.

10. Mediation helps to maintain/improve/restore relationships between the parties.

11. Mediation always takes into account the long term and underlying interests of the parties at each stage of the dispute resolution process – in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

12. In mediation the focus is on resolving the dispute in a mutually beneficial settlement.

13. A mediation settlement often leads to the settling of related/connected cases between the parties.

14. Mediation allows creativity in dispute resolution. Parties can accept creative and non-conventional remedies which satisfy their underlying and long term interests.

15. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

16. Mediation promotes finality. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

17. Refund of court fees is permitted as per rules in the case of settlement in a court referred mediation.

9. Any programme for mediation cannot be effectively implemented unless and until there is adequate awareness among the consumer of justice. Thus, it is our bounden duty to create awareness among Advocates, Judges and litigant public by using trained Mediators so as to enable them to understand the intricacies of mediation. Role of the parties, advocates and mediators is vital in resolving the entire conflict between the parties through mediation. Thus, the solution lies not only in the hands of judges and justices but in each and every citizen in order to achieve “Justice for all, and by all”.

10. Mediation has a great potential for providing satisfying solutions to disputes. In addition, mediation and other forms of Alternate Dispute Resolution (“ADR”) mechanisms may provide lawyers and other professionals with a possible avenue for diversification.

11. Development of Para Legal Services is another step towards easy access to justice for all stakeholders. National Legal Services Authority has formulated modalities and has prescribed that the District Legal Services Authority has to identify about 50 volunteers at District Level and about 25 volunteers at Taluk Level and training is to be imparted to such volunteers. Para Legal Volunteers are to be identified from the following target groups:

i) Advocates, Teachers and Lecturers of Government and Private School & Colleges of all levels.
ii) Anganwadi Workers.
iii) Private or Government doctors and other Government employees.
iv) Field level officers of different departments and agencies of the State and Union Governments.
v) Students of graduation and Post graduation in Law, Education, Social Services and humanities.
vi) Members of a political Service oriented Non-Governmental Organizations and Clubs.
vii) Members of Women Neighbourhood Groups,

Maithri Sanghams.

viii) Educated Prisoners serving long term sentences in Central Prison and District Prison
ix) Social Workers and volunteers, volunteers of Panchayat Raj and Municipal Institutions.
x) Members of Co-operative Societies.
xi) Members of Trade Unions.
xii) Any other person which the District Legal Services Authority or Taluk Legal Service Committee deems fit to be identified as Para Legal Volunteers.

12. During training programmes, exposure is to be provided to the Para Legal Volunteers for generating legal awareness in respect of constitutional and statutory rights and duties, general civil, criminal and procedural laws, as well as qua the following special issues:

i) Women
ii) Children
iii) Students
iv) Farmers
v) Industrial and Agriculture labour
vi) Prisoners
vii) Victims of natural disaster
viii) Physically challenged, including persons suffering from Mental disorder and mentally retarded persons.
ix) Victims of Trafficking i.e. women and children as well as those suffering from HIV/AIDS.
x) Members of Scheduled Castes and Scheduled Tribes.
xi) Bonded Labour
xii) Consumers
xiii) Senior Citizens.
xiv) And other beneficiaries under Legal Services Authority Act.

13. While imparting training to the Para Legal Volunteers, following topics are to be covered:

(i) Hindu Marriage Act, Christian Marriage Act, Muslim Women's Protection Act and Special Marriage Act. (ii) Child Marriage Restraint Act, 1929.
(iii) Family Court Act, 1994.
(iv) Guardian and Wards Act, 1890
(v) Hindu Minority and Guardianship Act.
(vi) Maternity Benefit Act.
(vii) Medical Termination of Pregnancy Act.
(viii) Dowry Prohibition Act.
(ix) Dowry Harassment
(x) Section 125 Cr.P.C.
(xi) Harassment of working women.
(xii) Protection of Women from Domestic Violence Act, 2005.
(xiii) Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.
(xiv) Consumer Protection Act
(xv) Labour Welfare Laws
(xvi) Procedure for claiming compensation under Fatal Accidents Act, Motor Vehicles Act, Workmen"s Compensation Act and compensation from Railway Accident Claims Tribunal.
(xvii) Bonded Labour (Abolition) Act, 1976.
(xviii) F.I.R.
(Xix) Arrest – Bail.
(xx) Rights of Prisoners.
(xxi) Fundamental Rights of accused including prisoners.
(xxii) Fundamental Duties of accused including prisoners.
(xxiii) Registration and Stamp Duty.
(xxiv) Promissory Notes
(xxv) Revenue Laws
(xxvi) *Nyaya Sankalp* programme undertaken by National Legal Services Authority in collaboration with United Nations Development Programme entitled TAHA (Trafficking and AIDS/HIV).

(xxvii) Entitlements conferred on special groups by Governments under various schemes, orders and legislations.
(xxviii) Public Interest Litigation.
(xxix) Lok Adalats, A.D.R. system, Free Legal Services under Legal Services Authorities Act.
(xxx) Any other topic or Act the District Legal Services Authority and Taluk Legal Services Committee deem it necessary, including those related to local problems.

14. We are also in the process of framing policy as to what procedure has to be adopted for imparting training to the Para Legal Volunteers; moral duties of Para Legal Volunteers and their disqualifications; and also identification of Para Legal Volunteers in Jails.
15. The Para Legal Volunteers can reach the remote areas of the entire State and educate the people. They are the soul and heart of the entire Scheme and they will play an important role for achieving the aim and object enshrined in the Legal Service Authorities Act, 1987 and the Rules & Regulations framed thereunder.

16. I hope and trust that if a collective effort is made with dedication and humanity, we will certainly achieve the aim, object and purpose of mediation at the earliest.

17. I will conclude with the words of Abraham Lincoln, who once said and I quote:

"Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time."

18. Thanking you all for being with us in the spirit of court reforms and continuing judicial education.

-sd-
(Justice Mansoor Ahmad Mir),
Chief Justice.

FULL TEXT OF THE SPEECH DELIVERED BY HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CHIEF JUSTICE, HIGH COURT OF HIMACHAL PRADESH on ***30.8.2014, at Manali.***

Chapter 1 of the Motor Vehicles Act, for short "***the Act"***, contains the definition of ***"drivers", "driving licence", "gross vehicle weight", "heavy goods vehicles", "heavy passengers vehicle", "light motor vehicle", "maxicab", "medium goods vehicle", "medium passengers motor vehicle", "motorcab", "motorcar", "motor vehicle" "omnibus", "public service vehicle", "semi trailer", "tractor", "transport vehicle", "unladen weight".*** Amongst other definitions, these are the definitions which the Tribunals have to deal with, while deciding the motor accidents claims cases and have to interpret these definitions, while keeping in view the mandate, purpose, aim and object for the grant of compensation.

2. **Chapter 2** of the Act deals with what is the ***necessity of driving license***, requirements for issuing driving license of different kind of motor vehicles and what is the responsibility of owner of the vehicle under the Act when the vehicle is being driven by the driver in contravention of or in breach of Sections 3 and 4 of Chapter 2, of the Act, i.e., ***necessity for driving license*** and ***age limit in connection with driving of motor vehicles***.

3. Section 3 of the Act specifically provides that no person can drive any motor vehicle on any public place unless he holds an effective driving licence with authorization/endorsement to drive a ***"transport vehicle",*** in terms of section 3 of the Act. Section 4 of the Act provides that no person below the age of ***eighteen years*** shall drive a motor vehicle on any public place, provided that a motorcycle with engine capacity not exceeding 50cc may be driven in a public place by a person, after attaining the age of sixteen years. Sub-clause 2 of Section 4 of the Act provides that person below the age of **21** years subject to exceptions contained in Section **18** of the Act, can drive a "***transport vehicle***" in a public place.

4. Section 5 of the Act mandates that no owner or person having control over or in charge of a motor vehicle shall cause or permit any person to drive the vehicle, who is not having license in terms of Sections 3 and 4 of the Act. Section 6 provides restrictions of holding a driving license. Sub-clause 3 of Section 6 provides that Licensing Authority having the jurisdiction referred to in sub-section (1) of Section 9 of the Act has the power to add to the classes of vehicles, which the driving license authorizes the holder to drive. Section 7 of the Act deals with the ***restrictions on the granting of learner's licences for certain vehicles*** and Section 8 of the Act provides how to apply for issuance and grant of learner's driving license. Section 9 of the Act deals with grant of driving license and what are the pre-requisites for making an application, as per the prescribed format.

5. Section 10 of the Act deals with the "***Form and Contents of License to drive"***. It provides that the Driving License has to be issued as per format prescribed by the Central Government.

6. Sub-clause 2 of Section 10 of the Act provides that driving licence must expressly contain that what type of vehicle, the driver is competent to drive. The driver must be having licence to drive one or more of the following kind of vehicles:

"motor cycle without gear", ***"motor cycle with gear", "invalid carriage", "light motor vehicle", "transport vehicle", "road roller",*** motor vehicle of a ***specified description***.

7. Section 11 of the Act provides ***how to make additions to driving license***.

8. I have determined the issue that the driver can drive light motor vehicle without the endorsement of (PSV) in terms of Sections 3 and 10 of the Act. I have discussed Section 2 sub-clause 2, Section 2 (47), Section 2 (21) and other definitions, i.e. Section 2 (16), 2 (17), 2 (18), 2 (20), 2 (23), 2 (24), 2(25),2(26), 2(28),2 (29), 2(30) and 2 (33), in the series of judgments which are also reported. (FAO **No. 54 of 2012** titled **Mahesh Kumar and anr. vs. Smt. Piaro Devi and others** decided on 25.7.2014, ***FAO No. 129 of 2012*** a/w connected matters titled ***Varinder vs. Darshana Devi and others*** decided on 8.8.2014).

9. In sub-clause 2 of Section 10 of the Act, following kinds of vehicles are not included;

"***heavy goods vehicle", "heavy passengers goods vehicle", "maxicab" "medium goods vehicle", "medium passenger motor vehicle" "omnibus"***. but does contain the word "***light motor vehicle".***

10. The "***light motor vehicle"*** is defined under Section 2 (2) of the Act which provides that ***"Light motor vehicle"*** means a "transport vehicle" or "omnibus "the gross vehicle weight of either of which or a ***motor car*** or ***tractor*** or ***road-roller*** the unladen weight of any of which, does not exceed 7,500 kilograms.

11. The word ***"transport vehicle"***, is included in Section 2 (21) of the Act and it is not included, rather used in other definition of the vehicle. The **judgments delivered** on this point are: ***FAO No. 129 of 2012*** a/w connected matters titled ***Varinder vs. Darshana Devi and others*** decided on 8.8.2014 wherein light motor vehicle and medium goods vehicle under Section 2(21) of the Act, has been discussed. The "Light motor vehicle" includes a "transport vehicle."

12. Section 2(23) of the Act defines "medium goods vehicles" -means any "goods carriage" other than a "light motor vehicle" or a "heavy goods vehicle. Section 2 (47) of the Act defines "Transport Vehicle, which reads as under:

"2(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle."

13. The definitions of ***"medium goods vehicle"*** and ***"light motor vehicle"*** have been discussed by the Supreme Court in ***Annappa***

Irappa Nesaria 2008 AIR SCW 906 and by the Himachal Pradesh High Court in ***FAO No. 54 of 2012*** titled ***Mahesh Kumar*** vs. ***Piaro Devi***, decided on 25th July, 2014 same principles have been laid down. In **FAO *320 of 2008 Dalip Kumar and another vs. NIAC Ltd.*** decided on 6.6.2014, it has been held that "Light motor vehicle" under Section 2 (21) means: a "transport vehicle" or "omnibus" the gross vehicle weight of either of which or a motorcar or tractor or road roller the unladen weight of which does not exceed (7500) Kilograms, Refer: **(2008) 3 SCC 464, titled National Insurance company. Ltd. vs. *Annappa Irappa Nesaria,* 2009 ACJ 1411 titled *OIC vs. Angad Kol and others* and 2011 ACJ 2115, titled National Insurance Co. Vs. Sunita Devi.**

14. In **FAO *196 of 2008* Sarwan Singh vs. Bimla Sharma** decided on 30.5.2014, it has been held that it is to be pleaded and proved that the driver was having license to drive one kind of vehicle, was found driving another kind of vehicle and that was the cause of accident in view of ***National Insurance Co. Ltd.*** vs. ***Swaran Singh and others,*** reported in ***AIR 2004 SC 1531***

15. ***Chapter 10*** of the Act deals with the ***liability without fault in certain cases.***

16. The aim and object of this chapter is to provide immediate relief to the victims of a vehicular accident and without going into trial. The tribunal has to record, *prima facie,* satisfaction, in terms of the documents placed on record, i.e., FIR, Death Certificate/Postmortem report, injury certificate, disability certificate, particulars of driver, owner, insurance policy, in order to achieve the purpose for grant of compensation to the victims of a vehicular accident who do not prey to the social evils and should get redressal of their grievances without any delay.

17. The apex Court in a case reported in (**1991) ACC 306 (SC)** titled **Shivaji Dayanu Patil and another vs. Smt. Vatschala Uttam More** laid down the guidelines how to grant interim relief/interim award in terms of Section 140 of the Act. I, as a Judge of Jammu and Kashmir High Court, while dealing with the case reported in (**2011) 3 ACC page 411** titled ***National Insurance Co. Ltd. Vs. Nasib Chand***, laid down the principles of law relating to interim relief/interim award.

18. The apex Court in a latest judgment reported in **2012 AIR SCW,** page 10, titled **NATIONAL INSURANCE COMPANY LTD.** *VERSUS* **SINITHA & ORS.,** has discussed the mandate of Sections 140 and 163-A of the Act and principles of "no fault liability" and held that claimant is not to establish fault or wrongful Act, negligent act or default of the offending vehicle.

19. There were divergent opinions whether interim compensation/relief awarded under Section 140 is appealable and revisable. In **YALLWWA & ORS** *VERSUS* **NATIONAL INSURANCE CO. LTD. & ANR,** reported in **2007 AIR SCW 4590,** it has been held that it is appealable.

20. Section 144 of the Act provides that these provisions are having overriding effect, i.e. Sections 142 and 143 of the Act.

Overloading cases:

21. The Supreme Court has laid down guidelines in the cases:

22. ***B.V. NAGARAJU VERSUS M/S. ORIENTAL INSURANCE CO. LTD., DIVISIONAL OFFICE, HASSAN,*** reported in **1996 ACJ 1178, *NATIONAL INSURANCE CO. LTD*** *Versus* ***ANJANA SHYAM & ORS.,*** reported in ***2007 AIR SCW 5237, UNITED INDIA INSURANCE CO. LTD. VERSUS K.M. POONAM & ORS.*** reported in **2011 ACJ 917,** and ***National Insurance Co. Ltd. vs. Reena Devi and others*,* **reported in 2013 ACJ 1195.,** how and what method is to be adopted to grant compensation in overloading cases.

23. Chapter 11 of the Act provides that what is the necessity of having ***insurance cover***. Sections 147 and 149 of the Act deals with what are the defenses available to the insurer in case a breach is committed by the insured. The insurer has to plead and prove breach, if any committed by the owner/insured.

24. Section 157 of the Act provides that in the case of transfer of ownership of the vehicle, the certificate of insurance and the policy shall be deemed to have been transferred in favour of the transferee and cannot be a ground to defeat the liability of 3rd party risk: Ref: **AIR 1996 SC 586** titled **M/S. COMPLETE INSULATIONS (P) LTD** *VERSUS* **NEW INDIA ASSURANCE CO. LTD., AIR 1999 SC 1398**, titled **G. GOVINDAN** *VERSUS* **NEW INDIA ASSURANCE CO. LTD. AND OTHERS** and ***AIR 2003 SC 1446***, titled **RIKHI RAM AND ANOTHER** *VERSUS* **SUKHRANIA AND OTHERS.**

25. Section 158 of the Act mandates that owner- insured, driver and insurer have to produce license, insurance policy, driving license, route permit and other documents before the police and the police is under legal obligation to submit all the particulars to the concerned Tribunal in terms of Section 158 (6) of the Act within 30 days and in terms of Section 166 (4), the Tribunal has to treat that report as claim petition filed, is mandatory. The purpose of this provision is to reach to the victims of a vehicular accident, as early as possible. I have recently held to this effect in **FAO No.117 of 2008** titled ***Seema Devi vs. Som Raj and others*** decided on 22.8.2014. The apex Court in **General Insurance Council & Ors. vs. State of Andhra Pradesh & Ors** reported in **2007 (4) ACC 385** in **JAI PRAKASH** *VERSUS* **NATIONAL INSURANCE COMPANY LIMITED AND OTHERS** reported in **(2010) 2 SCC 607** issued directions to the Police Authorities to implement Section 158(6) and 196 of the Act. The directions were also given to the Claims Tribunals to comply with the provisions of Section 166(4) of the Act.

26. Section 163-A of the Act provides ***structured formula and schedule***. The apex Court in a recent judgment titled **PUTTAMMA & ORS.** *VERSUS* **K. L. NARAYANA REDDY & ANR.,** reported in **2014 AIR SCW 165**, held that it has become redundant by efflux of time and directed

the Central government to make proper amendments while keeping in view the price escalation and other socio-economic factors. In **Kalpanaraj & Ors v. Tamil Nadu State Transport Corpn**. reported in **2014 AIR SCW 2982,** the Supreme Court granted one lac compensation under the heads " loss of estate, "loss of expectation of the life" etc., is a departure of the ***Second Schedule***.

27. Chapter 12 of the Act deals with how the Claims Tribunal has to grant compensation in fault liability.

28. The apex Court has laid down guidelines in case Smt. ***Sarla Verma and ors. versus Delhi Transport Corporation and anr.*** *reported in* ***AIR 2009 SC 3104*** and upheld by the larger Bench of the Apex Court in **Reshma Kumari and others versus Madan Mohan and anr.** reported in **2013 AIR SCW 3120**, that what should be the multiplier, is a guiding factor.

29. The apex Court held that what are the grounds of defences available to the insurer and how it is to be pleaded and proved. In **National Insurance Co. Ltd.** *vesus* **Swaran Singh** reported in **AIR 2004 SC 1531,** paras 84 to 105 deals with all types of cases and para 105 in particular contains gist how the insurer can be allowed to avoid the liability.

30. The apex Court in a latest judgment reported in ***Pepsu Road Transport Corporation vs. National Insurance Co. Ltd. (2013) 10 SCC 217,*** para 10 held: that if the owner has made efforts and satisfied himself about the validity of the driving license, he cannot be asked to go here and there and insurer has to be asked to pay the amount and satisfy the claim. The apex Court has also laid down guidelines that the insurer has to plead and prove that the owner has committed willful breach.

31. I have been observing that Tribunals are relying upon the judgments, which have been reversed or overruled by the Supreme Court and also by the High Court of Himachal Pradesh.

32. In ***FAO No. 9 of 2007 titled National Insurance co. Ltd. Vs. Smt. Teji Devi and others***, alongwith connected matter, decided on **22.8.2014**, I held that when the person who had hired the vehicle for transporting his goods for selling and was returning in the same vehicle, cannot be said to an unauthorized/ gratuitous passenger till he reaches the place from where he had hired the vehicle. The same view had been taken in the case titled **National Insurance Co. Ltd. vs. Kamla and others,** reported in **2011 ACJ 1550,** while referring to the judgment of the apex Court in **NIC co. ltd vs. Cholleti Bharatamma 2008 ACJ 268 (SC).**

33. It is also beaten law of the land that the law laid down later in point of time by the Bench of the High Court in ***2011 ACJ 1550 HP,*** supra holds the field. In the judgment reported in 2011 ACJ 1550 (HP) titled **National Insurance Co. Ltd. vs. Kamla and others,** the leaned Judge discussed the case law which was holding field at that time and took the contrary view, of the judgment in **National Insurance Co. Ltd. v. Maghi Ram 2010 ACJ 2096 (HP)** while referring ***Cholleti Bharatamma's*** case supra.

34. In **National Insurance Co. Ltd vs. Deepa Devi and ors,** reported in **2007 AIR SCW 7882,** the apex Court has set aside the judgment made by the Division Bench of the High Court of Himachal Pradesh, whereby the liability was fastened upon the owner, State Government and the insurer jointly and severally to satisfy the award. In that case, the vehicle was requisitioned by the Government during Assembly Elections met with an accident during the said period and the owner, State Govt., and the insurer were held liable jointly and severally to satisfy the award. The apex Court set aside the same and held only the State liable.

35. The apex Court in a judgment reported in ***(2013) 10 SCC 646*** titled ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another,*** laid down that the Tribunals have to decide the cases, while keeping in view the principles of pre-ponderance of probabilities and strict proof is not required. The strict proof of pleadings in terms of Evidence Act and Code of Civil Procedure is not required because it is not an adversial litigation and the Tribunals or the High Courts have to keep in view what is the purpose, aim and object for the grant of compensation**.** Also referred: **N. K. V. BROS. (P.) LTD** *VERSUS* **M. KARUMAI AMMAL AND OTHERS ETC** reported in **AIR 1980 SC 1354, Sohan Lal Passi vs. P. Sesh Reddy and others,** reported in **AIR 1996 SC 2627** and **Smt. Savita vs. Bindar Singh and others**, reported in **2014 AIR SCW 2053**.

36. The apex Court in various judgments right from 1980 held that the purpose for the grant of compensation has to be achieved without any delay. The niceties of law, procedural wrangles and tangles and hyper- technicalities have no role to play. The High Court of Himachal Pradesh in ***FAOs No. 339*** *and* ***340 of 2008 National Insurance Co. vs. Parwati and others,*** decided on 3.1.2014**,** ***FAO 172 of 2006*** titled ***Oriental Insurance Co. Ltd. vs. Shakuntala Devi and others***, decided on 7.3.2014 *and* **FAO *396 of 2012*** titled ***Asha & others vs. Moti Ram and others***, decided on 16.5.2014, has also laid down the same principles.

37. In **Fahim Ahmad and ors vs. United India Insurance Co. Ltd.** reported in **2014 AIR SCW 2045**, and **Reshma Kumari & ors vs. Madan Mohan & anr.** reported in **2013 AIR SCW 3120**, the apex Court held that insurer has not only to plead the breach of the conditions of policy but has also to prove the same by adducing evidence. Also see: the case of: ***Chairman Rajasthan State Road Transport Cor. Vs. Smt. Santosh & Ors.*** *reported in* ***2013 AIR SCW 2791***, ***National Insurance Co. Ltd.*** **vs.** ***Swaran Singh and others*** , reported in ***AIR 2004 SC 1531 and*** **BIMLA DEVI & ORS.** ***VERSUS*** **HIMACHAL ROAD TRANSPORT CORPN. & ORS.** reported in **2009 AIR SCW 4298**. Judgment delivered by the High Court of Himachal Pradesh in ***tractor case,*** **FAO No**. ***320 of 2008,*** titled ***Dalip Kumar and another vs. National insurance Co. Ltd.*** decided on 6.6.2014, ***FAO No. 306 of 2012 Prem Singh and others versus Dev Raj and others*** decided on 18.7.2014 and ***FAO No. 393 of 2006 titled New India Insurance Co. Vs. Bandana Devi and others***., decided on ***28.3.2014.***

38. **The bouncing of Cheque of premium amount.** ***Section 64 VB Insurance Act*** provides that information about bouncing of

the cheque is to be given to the owner and cancellation of policy is to be conveyed to the insured. The insurer has to satisfy the award, If accident takes place till the requisite information is given and conveyed to the insured-owner.

39. The High Court of Himachal Pradesh in **FAO No**. ***316 of 2008*** titled ***M/s New Prem Bus Service vs. Laxman Singh*** decided on 23.5.2014, held that the Insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is to be held liable, in terms of judgments in ***New India Assurance Co. vs. Rula and others*** reported in ***AIR 2000 SC 1082, Deddappa & ors Vs. The Branch Manager, National Insurance Co. Ld.*** reported in ***2007 AIR SCW 7948***, ***United India Insurance Co. Ltd vs. Laxmamma & ors.*** reported in ***2012 AIR SCW 2657***. The High Court of Himachal Pradesh also in FAO No.***383 of 2012*** titled **NIC** vs. **Kanta and others** decided on 22.8.2014, **FAO No**. **35 of 2009** titled **NIC vs. Smt. Anjana Sharma and others** decided on 4.7.2014 **and FAO No. 444 of 2009** *titled* **United India Insurance Co. Ltd. vs. Smt. Sanjana Kumari and others** decided on **11th July, 2014,** has held the same principles.

40. What is the effect if the license has expired on the date of accident? Section 15 (3) of the Act provides that license is to be renewed within one month. ***If application for renewal of license is made within a period of 30 days from the date of expiry, it is renewed automatically.***

41. The question may also arise if a license is renewed later in point of time from the date of its expiry, what is its effect.

42. I have discussed all the principles in a case title ***Vinod Kumar vs. UIAC Ltd and another*** (**FAO No**. ***291 of 2007)*** decided on 11.7.2014. The apex Court in **2008 AIR SCW 6512** **titled Ram Bab Tiwari vs. UIIC Ltd**- ***Motor Vehicles Act, 1988*** has also discussed the entire law.

43. In ***Vinod Kumar's case supra***, it has been held that if a license was not renewed on the date of the accident but was renewed thereafter, with effect from the date of expiry, the insurer is liable.

44. The Bombay High Court in case titled **Emperor vs. Ramdas Nathubhai Shah, A.I.R. (29) 1942 Bombay 216** held that no offence is committed by the driver if a license was not renewed on the date when the concerned authority has made surprise checks, though it was renewed thereafter.

45. The IRDA has issued guidelines on "comprehensive policy", "package policy" and "Act Policy" and insurer has been asked not to contest the claim petition and satisfy the award and if appeals are filed, withdraw the appeals.

46. The Supreme Court has given details of all those judgments and also discussed IRDA policy in ***National Insurance Co. Ltd.***

Vs. Balkrishnan another 2012 AIR SCW 6286. The High Court of Himachal Pradesh in **FAO No**. ***226 of 2006*** titled **UIIC Ltd. Vs. Kulwant Kaur,** decided on 28.3.2014 has discussed. The "Package policy". The "package policy" covers the liability of third party also, insured and the occupant also. The legal heirs were held to maintain claim petition and are within their rights to claim compensation. The concept and purpose of "comprehensive policy"/ "Package policy" and "Act policy" defined and held that "comprehensive policy"/ "package policy" covers occupant of the insured vehicle, third party and the owner-insured also in terms of judgment in ***National Insurance Co. Ltd. Vs. Balkrishnan another,*** reported in ***2012 AIR SCW 6286***. I have also delivered the judgment in J & K High Court in ***New India Assurance Co. Ltd. Vs. Shanti Bopanna and others*** reported in **2014 ACJ 219** and this High Court of Himachal Pradesh in ***FAO No. 135 of 2011***, titled ***New India Assurance company Ltd. vs. Smt. Rittu Upadhaya and others*** decided on 20.12.2013, discussed all circulars/guidelines, effect of Act policy, "comprehensive policy" and "package policy" and held that the occupant is covered by the "Comprehensive Insurance Policy".

47. If the claimants have not questioned the adequacy of compensation, the appellate Court has jurisdiction to enhance the compensation in view of ***Nagappa vs. Gurudayal Singh and others,*** reported in ***AIR 2003 SC 674***, ***APSRTC v. M Ramadevi and others*** reported in ***2008 AIR SCW 121***, ***Ningamma vs. United India Insurance Co. Ltd.,*** reported in ***2009 AIR SCW 4916, and Sanobanu Nazirbhai Mirza vs. Ahmedabad Municipal Transport Service,*** reported in ***2013 AIR SCW 5800.***

48. I have also gone through various judgments of the Motor Accidents Claims Tribunals of Himachal Pradesh, which were dismissed, because the accused has been acquitted in those cases, which is not the ground for dismissal of the claim petition. To convict a person, there must be a proof beyond reasonable doubt and for grant of compensation being non-adversial litigation, it can be decided by applying the principle of pre-ponderance of probabilities. The apex Court in case titled **Dulcina Fernandes & ors vs. Joaquim Xavier Cruz.** reported in (***2013) 10 SCC 646*** held that the plea of negligence on the part of the first respondent, who was driving the pick-up van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt.

49. The High Court of Himachal Pradesh has delivered judgments on this point in case ***FAO No. 471 of 2010 titled New India Assurance Co. vs. Rabhal Ram,*** decided on 1.8.2014, ***FAOs No. 339*** and ***340 of 2008*** titled ***NIC versus. Parwati and others*** decided on 3.1.2014 and ***FAO No. 133 of 2010*** titled ***Bajaj Allianz General Insurance Co. Ltd. vs. Ganga Devi &*** others decided on 18.7.2014. The apex Court in case titled ***NKV Bros. (P) Ltd vs. M. karumai Ammal and others AIR 1980 SC 1354*** reported in **AIR 1980 SC 1354**, laid down the same principles.

50. The apex Court in ***Dulcina Fernandes's*** case supra held that the claim petitions cannot be treated or seen as an adversial litigation between the litigating parties to the dispute. It is the duty of the Tribunal to determine the claim petitions, as early as possible.

-sd-
(Mansoor Ahmad Mir),
Chief Justice

Special guidelines in terms of Section

158 (6) of the Act.

As per statistics, India has large number of road accidents in the world and more than one lac people die in road accidents in a year. I have been observing in the State of Himachal Pradesh that every day the accidents take place and so many people die and sustain injuries. The most of the victims of the accidents are poor persons, who board the bus and who cannot afford their own vehicle. Most of the persons are illiterate, ignorant of their rights and have to wait for many months to take first aid, medical aid and other things, thereafter file claim petitions. The insurance company(ies) take the grounds to defeat the claim petition, which is the matter of serious concern and what I have been observing, while hearing appeals in the High Court of Himachal Pradesh more than 10 years old, appeals are pending for so many reasons, particularly service of driver, owners, production of driving license, particulars of driving license, particulars of road permit, route permit and insurance policy.

2. The Motor vehicles Act has gone through a sea changes and for that purpose, Section 158 (6) of the Motor Vehicles Act, 1988 has been introduced and apex Court has discussed what is the purpose of amendment in: **Dhannalal** vs. **D. P. VIJAYVARGIYA AND OTHERS AIR 1996 SC 2155**, **GENERAL INSURANCE COUNCIL & ORS** *VERSUS* **STATE OF ANDHRA PRADESH & ORS,** reported in ***AIR 2007 SC 2696 titled Jai Prakash versus National Insurance co. Ltd***. reported in ***(2010) 2 SCC 607.***

3. I have laid down guidelines in case **FAO No.117 of 2008** titled ***Seema Devi vs. Som Raj and others.,*** decided on 22.8.2014, and asked all the authorities concerned to follow the mandate in letter and spirit and report compliance without any deviation.

4. The Tribunal must exercise the powers to treat the police report in terms of the mandate of Section 158 (6) of the Act, as claim petition. They can ask the police to submit report, if they fail to do so, they can also ask the Magistrate to ensure compliance of Section 158 (6) of the Act, while granting remand.

-sd-
(Mansoor Ahmad Mir),
Chief Justice.

SUBJECT INDEX

'B'

'C'

holder does not dispute that the properties are self-acquired and that the applicant is the legal representative of the original judgment debtor, properties of applicant could not be attached and put to sale.

Title: UCO Bank vs. Sandhya Devi and others Page-1127

Code of Civil Procedure - Section 96- Appeal- held, that the judgment can be questioned by way of an appeal, even if, the same had been implemented.
Title : State of H.P. and others Vs. Prem Lal Page-1167

Code of Civil Procedure, 1908- Section 100- In case of concurrent finding of fact recorded by Trial Court and Appellate Court, the High Court should be slow to interfere with them unless and until the findings so recorded are perverse.
Title: Mohar Singh and others vs. Krishan Chand and others. Page-127

Code of Civil Procedure, 1908- Section 100-A - Letters Patent Appeal is not barred against the order passed by the Single Judge before the High Court.
Title: M/s Mukut Hotels and Resorts Private Limited Vs. M/s Khullar Resorts Private Limited & other Page-1221

Code of Civil Procedure, 1908- Section 115- Review- power of review is to be exercised sparingly on the ground of error apparent on the face of the record- the error should be such as can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning- held, that there was no error apparent on the face of the record- the plea that order is illegal can be taken by filing appeal before the Appellate Court and not by filing the review petition.
Title: Nirmla and others vs. Financial Commissioner (Appeals) and Ors.
Page-433

Code of Civil Procedure, 1908- Order 8, Rule 1 – Trial Court struck off the defence of the defendant for not filing the written statement within a period of 90 days- Held, that the provisions of Order 8 Rule 1 providing the time period of 90 days is not mandatory- The delay can be condoned on the basis of sufficient cause- In the present case, mother of the petitioner had died and they must have been busy with the post death rituals and ceremonies which would lead to delay- Further held that the Court must be liberal in such matters as the litigant does not benefit by delayed filing of the written statement, rather, he runs a risk of his case being thrown out due to delay – Since the petitioner had sufficient reason for not filing the written statement in time, hence they are permitted to file written statement subject to payment of ₹ 2500/-.
Title: Mahinder Singh and another vs. Prem Chand and others
-Page-790

Code of Civil Procedure, 1908- Order 14- Issues- plaintiffs claimed that they had become owner by way of adverse possession- Court framed an issue, Whether the plaintiffs are owners in possession of the suit land

- held, that when the plaintiff had raised mutually inconsistent pleas, an omnibus issue cannot be framed to determine these pleas- plaintiff could have been asked to opt either of the pleas-further held that the plaintiff could not have filed a civil Suit for seeking declaration that he had become the owner by way of adverse possession as adverse possession can be used as a shield and not as a sword.

Title: Sher Singh & Ors. Vs. Virender Singh and Ors. Page-1301

Code of Civil Procedure, 1908 -Order 20 Rule 5- **Code of Criminal Procedure**, **1973**- Section 354 -Judgment- Magistrate awarding maintenance @ ₹ 1500/- per month which was reduced by Additional Sessions Judge to ₹ 1200/- by saying that ₹ 1500/- per month appeared to be on higher side and keeping in view the facts in totality ₹ 1200/- per month was an appropriate maintenance- held, that the Learned Additional Sessions Judge had not given any reason to reduce the maintenance- it is the duty of the judge to disclose the reasons to make it known that there was due application of mind.

Title: Kesari Devi vs. Karam Singh Chandel -Page- 256

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filing a civil suit claiming himself to be the owner in possession of half of the land and in possession of remaining half of the land as Gair Marussi Tenant- defendants claiming that their predecessor had filed an application for resumption of land which was allowed- held, that when the plaintiff had not challenged the resumption order and the possession was being delivered on the basis of such order, the plaintiff has no prima facie case to seek any injunction- application dismissed.

Title: Paras Ram vs. Ramesh Chand Page-26

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit for declaration that he had become owner by way of adverse possession- defendant asserted that he had become the owner by way of registered sale deed- held, that adverse possession is to be used as a sword and not as a shield- it cannot furnish a cause of action- defendant had spent huge amount towards construction- therefore, in these circumstances, plaintiff is not entitled for the relief of injunction.

Title: Har Bhajan Singh vs. Krishan Das Verma Page-8

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filing a suit seeking injunction to restrain the defendant from forcibly occupying and raising construction over the best portion of three storied building – the Court appointing a Mediator for resolving the dispute before whom the party arrived at a settlement- defendant filed objection to the settlement in the Court- held, that there is no scope of filing of objections to the report of the Mediator- the Court is required to take steps by giving notice and hearing the parties to effect the compromise.

Title: Jiwan Lal Sharma vs. Kashmir Singh Thakur Page-23

Code of Civil Procedure, 1908- Order 39, Rule 1 & 2- plaintiffs/applicants claimed that the Forest Department had constructed 14-15 feet wide road by spending 7.00 lakh and that the Defendants are threatening to dig and close the same- The defendants

denied that any road was constructed and asserted that the plaintiffs had started creating a new jeepable road- Held, that there was no entry of the road in the revenue record, which would falsify the case of the plaintiffs that any road was constructed by the Forest Department- Forest land cannot be used for non-forest purposes without seeking permission under the provisions of Forest Conservation Act, 1980, therefore, the plaintiffs are not entitled for the relief of injunction.

Title: M/s Carnoustie Eco-Resorts Pvt. Limited and others vs. Sanjay Kumar and others Page-753

Code of Civil Procedure, 1908-Order 41 Rule 27- An application was filed for placing on record a judgment in the previous suit, which was not decided by the Appellate Court- held, that non adjudication of the application had prevented the plaintiff from claiming that defendants are estopped from asserting adverse possession, which has resulted in failure of justice, therefore, matter remanded to the Trial Court with the direction to decide the application filed under Order 41 Rule 27 CPC.

Title: Gayatri Devi & Ors. vs. Bhawani Singh & Ors. Page-1047

Code of Criminal Procedure, 1973- Section 162 **-** Testimony of PW-12 an eye witness was contradictory and suffered from improvement as he had omitted to disclose to the police that he had received the telephonic call on which he had gone to the spot, that the deceased had assaulted the accused on his face and had subsequently tendered apology to the accused, that the accused were leading a crowd of 30 to 35 persons including the family members of the accused, accused 'M' was carrying Danda and accused 'Y' was wielding Sickle, which would show that his testimony was false and could not be relied upon.

Title: State of Himachal Pradesh vs. Ajay Kumar and others.-Page-666

Code of Criminal Procedure, 1973- Section 227- The prosecutrix filed an FIR stating that she had gone to the hospital along with her son- The accused was on night duty- The prosecutrix was asked to sit in the Doctor's duty room- The accused offered tea to the prosecutrix- the prosecutrix felt giddiness after taking tea - The accused gave her injection and raped her- She became pregnant- Charge sheet filed but no charge was framed by the learned Additional Sessions Judge against the accused for the offences punishable under Section 376 (2)(d) and 506 IPC – revision was filed against the order framing charge-held that the allegations in the FIR show that the prosecutrix was a consenting party- The FIR was filed belatedly and there was no sufficient ground for concluding that the accused had committed the offences punishable under Section 376 (2) (d) and 506 IPC- Further held that the Court is not to act as a mouthpiece of the prosecution but has to sift the evidence in order to find out whether there was sufficient reasons to frame the charge against the accused- Petition dismissed.

Title: State of H.P.vs. Bhupinder Singh -Page- 274

Code of Criminal Procedure, 1973- Section 306 – pardon was tendered by CJM to two accused and the case was also tried by her- it was contended that after tendering the pardon, accused has to be committed to the Court of Sessions, irrespective of the fact whether it is triable as

a warrant trial or a Sessions trial- held, that the Court of Chief Judicial Magistrate, Shimla was a designated Court to hear and try matters arising out of investigation conducted by the CBI, therefore, accused could not have been committed to the Court of the Sessions or the case could not have been transferred to any other Courts.

Title: Dilesh Kumar vs. Central Bureau of Investigation & Ors. Page-108

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).

Title: Mahesh Puri vs. State of H.P. Page-925

Code of Criminal Procedure, 1973- Section 313- Statement recorded under Section 313 Cr.P.C is not substantive piece of evidence, but it can be used to corroborate the prosecution version- it can be used in conjunction with the prosecution evidence but no conviction can be recorded on the basis of statement recorded under Section 313 Cr.P.C.

Title: Rajesh Kumar vs. State of H.P. Page-113

Code of Criminal Procedure, 1908- Section 374- Practice and Procedure-In an appeal the Appellate Court is duty bound to appreciate the evidence on record and if two views are possible the benefit of the reasonable doubt has to be extended to the accused.

Title: Joban Dass vs. State of Himachal Pradesh Page- 387

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- the Appellate Court should not set aside the judgment of acquittal when two views are possible- the Court must come to the conclusion that the view of the Trial Court was perverse or otherwise unsustainable- the Court is to see whether any inadmissible evidence has been taken into consideration and can interfere only when it finds so.

Title: State of Himachal Pradesh vs. Chanalu Ram Page- 367

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- the Appellate Court should not set aside the judgment of acquittal when two views are possible- the Court must come to the conclusion that the view of the Trial Court was perverse or otherwise unsustainable- the Court is to see whether any inadmissible evidence has been taken into consideration and can interfere only when it finds so.

Title: State of H.P. vs. Brij Mohan Page- 322

Code of Criminal Procedure, 1973- Section 391 **–**The case of the prosecution is based on the circumstantial evidence- The deceased was found in the kitchen- The house was found closed from all the sides- No

evidence was led by the prosecution to prove as to who was present at the time of the death- Held, that additional evidence is necessary to establish who was present at the time of death to dispose of the case effectively.

Title: State of H.P. vs. Hema Devi wife of Sh. Dila Ram Page-801

Code of Criminal Procedure, 1973- Section 397- An FIR was registered against the petitioner- petitioner alleged that a sum of ₹ 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.

Title: Sanjeev Kumar vs.State of H.P. (Cr.MMO No.173 of 14) Page-929

Code of Criminal Procedure, 1973, Section 401- Revision against order of acquittal- Complainant filed a complaint stating that she saw the accused standing at the door of the cowshed of 'D'- There was fire inside the cowshed- Held, that the complainant had made improvements in her statement- She had stated in the Ruka that she saw the accused standing at the door of the cowshed, whereas she stated in the court that she saw the accused coming out of the cowshed- There was discrepancy regarding time at which the accused was seen- There was enmity between the complainant and the accused- Independent witnesses were not examined- Cowshed of the father of the accused was adjacent to the cowshed of the 'D' which would make it unlikely that the accused would put cowshed of 'D' on fire at risk of the cowshed of his father- In these circumstances, the acquittal was justified.

Title: Dharam Singh vs. State of H.P. & Anr. Page- 279

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the accused for commission of offences punishable under Sections 302, 326-A, 307, 325, 504, 452, 506 read with Section 34 IPC- Held that the applicant being female is entitled to special privilege- Investigation is complete and presence of accused is not required- therefore, bail application is allowed and the applicant is released on bail.

Title: Ram Pyari wife of Shri Balak Ram vs. State of H.P. Page-889

Code of Criminal Procedure, 1973 - Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 316, 498A, 325 read with Section 34 IPC- Held, that at the time of granting bail the Court should consider the nature of seriousness of offence, nature of evidence, circumstances peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being

tampered with and larger interests of the public and State- The object of granting bail is not punitive- Bail is rule and committal to jail is an exception- The petitioner was kept in column No. 12 of the challan, therefore, it would be expedient to release him on bail-Bail granted.

Title: R.D.Sharma S/o late Sh. Hem Raj Sharma vs. State of H.P.

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Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Sections 376, 354-A, 406, 506 IPC- held, that the Court has to consider the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- further held, that the offences of rape were increasing in society and the Court should be sensitive while dealing with such cases- the Court has to presume that prosecutrix had not consented to the sexual intercourse- the Court should not decide whether the offence was committed at the time of granting bail or not and it would not be expedient to release the petitioner on bail till the testimony of the prosecutrix is recorded during the trial.

Title: Anil Kumar vs. State of H.P. Page- 384

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Section 376, 504 and 506 of I.P.C.- some recoveries were to be effected, the report from FSL was awaited but other investigation was complete- Held, that Prosecutrix was aged 35 years and as per the allegations the accused had sexual relations with her for 1-1 ½ years- This shows that the Prosecutrix was a consenting party- No complaint was ever made by her to any relative, hence prima facie the allegations against the accused did not constitute any offence- Bail granted.

Title: Mohit Saini vs. State of Himachal Pradesh -Page- 430

Code of Criminal Procedure, 1973- Section 438- At the time of granting bail, the Court has to see the nature of seriousness of offences, nature of evidence, circumstances peculiar to the accused, presence of the accused in the trial or investigation, reasonable apprehension to witnesses, and larger interests of the State- Grant of bail is the rule and committal to jail is an exception- Since the investigation was complete and the conclusion of the Trial would take some time- hence, bail granted.

Title: Daya Thakur wife of Sh. Dina Ram Thakur vs. State of H.P.

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Code of Criminal Procedure, 1973- Section 438- At the time of granting bail, the Court has to see the nature of seriousness of offences, nature of evidence, circumstances peculiar to the accused, presence of the accused in the trial or investigation, reasonable apprehension to witnesses, and larger interests of the State- Grant of bail is the rule and committal to jail is an exception- Since the investigation was complete

and the conclusion of the Trial would take some time- hence, bail granted.

Title: Sushil Thakur son of Sh. Dina Ram Thakur vs. State of H.P.

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Code of Criminal Procedure- Section 439- An FIR was registered against the bail applicants for the commission of offences punishable under Sections 313, 376, 354-B of the IPC and Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act- the age of the prosecutrix at the time of incident was 18 ½ years and she is alleged to have conceived a child from accused P – however, accused P and C forcibly aborted the child carried by her - matter was reported to the police belatedly- held, that the delay in reporting the matter would show that the allegations made by her were not true and she was a consenting party- prima facie, no offence is constituted against the applicants P and C- Bail granted.

Title: Balbir Singh vs. State of H.P. Page-1098

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 is 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.

Title: Madan Lal vs. State of H.P. Page- 976

Code of Criminal Procedure, 1973- Section 439- FIR for the commission of offence punishable under Section 304/34 IPC was registered against the petitioners- held that while granting bail, the Court has to see the nature and gravity of the accusation, severity of the punishment in the case of conviction, nature of supporting evidence, reasonable apprehension of tampering of the witness or apprehension of threat to the complainant and prima facie evidence in support of the charges- offence punishable under Section 304/34 IPC is a grave offence- petitioner was a habitual offender against whom three cases had already been registered and other petitioners had created an atmosphere of fear due to which deceased died of heart attack- conduct of the petitioners would disentitle them to be released on bail- petition dismissed.

Title: Pyara Singh vs. State of Himachal Pradesh -Page-332

Code of Criminal Procedure, 1973- Section 482– An FIR was registered against the accused for the offences punishable under Sections 341, 323, 325, 504, 147, 149 IPC- Parties entered into a compromise- Held, that the continuation of criminal proceedings would amount to abuse of process of law- The offences are of personal nature and quashing the proceedings would bring out peace and amity between two sides.

Title: Ravinder Singh alias Laddi and others vs. State of H.P. and another -Page-855

Code of Criminal Procedure, 1973- Section 482- Parties had entered into a compromise and had decided not to pursue the case- held, that when the matter has been compromised, and where wrong was done to the victim and not to the society, FIR can be quashed on the basis of compromise.

Title: Shashi Pal vs. State of H.P. & Ors. Page-1033

Constitution of India, 1950- Article 12- Whether a Writ Petition is maintainable against the Jogindra Central Cooperative Bank Ltd. – held, that Bank is discharging similar duties and functions as H.P. State co-op. Bank and is also engaged in banking business- since, H.P. State Co.-op. Bank has already been held to be not a State in ***C.K. Malhotra vs. H.P. State Coop Bank and others 1993 (2) Sim.L.C 243***- therefore, Jogindra Central Co. Operative Bank will not fall within the definition of the State.

Title: Laxmi Narain & Ors. Vs.Kuldeep Singh & Ors. Page-149

Constitution of India, 1950- Article 14- Equal pay for equal work- Petitioner claiming that the post of Junior Translator in H.P. State Administrative Tribunal is similar to the post sanctioned and created in various other departments- he is entitled to the pay scale as was being granted in other departments- held that while determining parity the Court has to consider factors like the source and mode of recruitment/appointment, qualifications, nature of work, value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. - the similarity of designation or nature of work is not sufficient to grant equal pay - the petitioner had not laid any foundation to establish that functions, responsibilities and duties of the posts were similar- therefore, he is not entitled for the pay equal to the other person.

Title: The Principal Secretary (Personnel) & another vs. Pratap Thakur Page- 313

Constitution of India, 1950-Article 14**-** cannot be used for perpetuating any illegality as it does not envisage negative equality - it can only be used when equals similarly circumstanced are discriminated without any rational basis.

Title: Varinder Singh vs.State of HP & ors Page- 427

Constitution of India, 1950- Article 226 –An advertisement was issued for filling the post of constable- The petitioner was placed at serial No. 1 in the waiting list- One post for Scheduled Caste category of ward of freedom fighter remained unfilled- The reserved post for Scheduled Caste category of freedom fighter, if not consumed was to be filled up from the scheduled caste category (sub-category unreserved)- The petitioner made a representation for consideration of his case, which was rejected- Held, that the post of ward of freedom fighter was added to the un-reserved category in other districts- Case of the petitioner was to be treated at par with these candidates, Hence the petition is allowed and the respondents are directed to appoint the petitioner as Constable under Scheduled Caste category (sub-category unreserved).

Title: Ravinder Kumar vs. State of H.P. and others -Page-739

Constitution of India, 1950- Article 226- Deputy Commissioner, Mandi had sought names for training of Patwari from Director, Sainik Welfare, Himachal Pradesh- Director, Sainik Welfare, Himachal Pradesh conveyed that his office was busy in conducting the interview of various posts- no recommendation was sent by him- held, that the respondent No. 3 could not have refused to send the name of the petitioner on the pretext that he was busy in other selection process-respondents No.3 and 4 directed to sponsor the name of the petitioner for training of the patwari, if found suitable.

Title: Devinder Singh vs. State of Himachal Pradesh and others Page-1043

Constitution of India, 1950- Article 226- Encroachment proceedings were initiated against the petitioner under Section 163 of Himachal Pradesh Land Revenue Act, which resulted in the eviction- Appeal was preferred, which was allowed and the matter was remanded to Ld. A.C. 2nd Grade- fresh demarcation was conducted and the petitioner was found to be an encroacher- again order of ejectment was passed- petitioner preferred an appeal before Learned District Judge, which was dismissed as not maintainable- held, that petitioner had taken a plea in his reply that the land was granted in Nautor- therefore, his plea that he had raised a plea of adverse possession which was not considered by Learned Assistant 2nd Grade was not acceptable- merely making a bald assertion that a person has become the owner by way of adverse possession is not sufficient and he must place on record, some prima facie material in support of his allegations- when the petitioner had claimed Nautor, there was no question of his becoming owner by way of adverse possession- petition dismissed.

Title: Hem Raj Vs. State of H.P. Page- 1282

Constitution of India, 1950- Article 226- High Court had issued a direction in Jeet Ram Sharma vs. State of H.P. CWP no. 791 of 1995 decided on 14.11.1995 directing the Secretary (Health) to issue direction to CMO and BDO to maintain a seniority list of DDT Beldars, to publish the same in the notice board and the office of the CMO and start making appointments according to the seniority- petitioner filed a petition that the directions were not complied with- held, that there is no positive evidence that the seniority lists were prepared and were published in the notice board- hence, the state directed to comply with the directions.

Title: Jai Singh vs. H.P. State and others Page-41

Constitution of India, 1950- Article 226- High Court had issued a direction in Jeet Ram Sharma vs. State of H.P. CWP no. 791 of 1995 decided on 14.11.1995 directing the Secretary (Health) to issue direction to CMO and BDO to maintain a seniority list of DDT Beldars, to publish the same in the notice board and the office of the CMO and start making appointments according to the seniority- petitioner filed a petition that the directions were not complied with- held, that there is no positive

evidence that the seniority lists were prepared and were published in the notice board- hence, the state directed to comply with the directions.

Title: Jeet Ram Sharma vs. H.P. State and others Page-45

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-905

Constitution of India, 1950- Article 226- **Himachal Pradesh Motor Vehicles Taxation Act, 1972**- Section 50- Petitioner filed a petition challenging the order passed by the Competent Authority under Himachal Pradesh Motor Vehicles Taxation Act, 1972- held, that Section 50 of Himachal Pradesh Motor Vehicles Taxation Act, 1972 provides remedy of appeal, therefore, Writ Petition is not maintainable.

Title: Jitender Singh vs. State of H.P. & others Page-1118

Constitution of India, 1950- Article 226- Himachal Pradesh Public Service Commission issued an advertisement for the post of Lecturer - Petitioners contended that constitution of the Selection Committee was not according to the notification issued by the UGC- three subject experts were invited- H.P. University was also not associated in the selection as per instructions issued by the UGC- one of the experts was the guide of some of the candidates- held, that petitioner had not mentioned as to how many candidates had participated and how many candidates were selected who remained under the supervision of expert- committee consisted of three members and, therefore, the allegation of favouritism could not be accepted.

Title: Amrit Lal Sharma & Ors. Vs. State of H.P. & Ors. Page-1157

Constitution of India: Article 226- Municipal Corporation Act, 1994- Section 170- M.C. Shimla passed a resolution revising the water rates for domestic water connection within and outside the area of Municipal Corporation- the State Government issued a notification regarding the increased water rates- held, that Section 170(2) of M.C. Act provides that the rates of the domestic supply shall be fixed by the Government- Section 85 of the Act empowers the Corporation to levy a fee and user charges for the services provided by it- provision of Section 170(2) excludes the applicability of the Section 85- therefore, Municipal

Corporation had no authority to pass the resolution and State was not competent to notify the water rates.

Title: Paryatan Avam Jan Kalyan Samiti vs. State of H.P.&Ors. Page-137

Constitution of India, 1950- Article 226- Petitioner, a member of Child Welfare Committee, was removed from the office on the ground that she had failed to attend the meeting and to put her signatures on the attendance and proceedings register- Petitioner contended that she had passed orders and the removal was unjustified- Held, that the petitioner had issued the orders for age determination of a child in her individual capacity which is against the Constitution of District Child Welfare Committee- She was to work with the Chairperson and other members of the District Child Welfare Committee and not individually- she had not attended the meetings and had not put her signatures on the registers-hence, her removal was justified.

Title: Monika Singh vs. State of H.P. and Others -Page-628

Constitution of India, 1950- Article 226- Petitioner, a postgraduate in Hindi, was appointed as Lecturer in a private College- The State Government decided to take over the College- The services of the petitioner were taken over as Lecturer School cadre, while the petitioner claimed that his services should have been taken over as Lecturer College cadre- Held that as per the notification the services of only those qualified teachers could have been taken over who had been appointed one year prior to the issuance of notification- Since, the petitioner had put in five months of service; therefore, his services could not have been taken over in terms of notification-petition dismissed.

Title: Varinder Singh vs. State of H.P. and others -Page-427

Constitution of India, 1950- Article 226- Petitioner, a Society, established a College for running B. Ed course on regular basis- the inspection was conducted and the Inspection Committee pointed out that list of existing teaching faculty approved by university, documents verifying that the salary to the teaching staff was being paid through cheques were not submitted and the size of multipurpose hall was only 1510.4 sq. feet against 2000 sq. feet as required under NCTE norms- petitioner stated that two teachers were appointed by H.P. University while remaining were appointed on ad-hoc basis- size of the hall was being increased- affiliation of the institute was cancelled- held, that the teachers occupy an important position in the society, therefore, the trainee teachers must be given qualitative training and the Training Institutes should possess all the required facilities including well qualified and trained staff- the institute had not taken steps to fill up the posts in accordance with instructions/guidelines issued by UGC- advertisement was issued in the newspaper but no posts were filled up- posts were subsequently filled up without issuing a fresh advertisement and thus, appointment was not proper.

Title: Ramanujam Royal College of Education vs. National Council for Teacher Education and others

Page- 343

Constitution of India, 1950- Article 226- Petitioner, a School Managing Committee, filed a writ petition against the transfer of Respondent No. 3 with the prayer to set aside the same- held, that the matter of transfer and posting are purely administrative matters and the Court should not interfere with them unless the decision is arbitrary, discriminatory, malafide or actuated with bias- The Government has unfettered power to effect transfer and to decide as to how, when, where and why a particular employee is required to be posted- the courts should not substitute their own decision in transfer-the aggrieved person should approach the higher authorities instead of rushing to the courts.

Title: School Managing Committee, Government High School, Mahog, Tehsil Theog, District Shimlavs. State of H.P. & Anr. -Page- 396

Constitution of India, 1950- Article 226- Petitioner applied for the job under the policy of project affected area- No job was offered to him, consequently he filed a writ petition- The petition was disposed of with the direction to the Deputy Commissioner to look into the representation made by the petitioner- The petitioner was called by the Deputy Commissioner and representatives of the company were asked to look into the matter, however, the claim of the petitioner was rejected on the ground that he was offered the post of Supervisor and he absented- held, that as per the attendance register the petitioner was appointed as Supervisor- However, the petitioner absented giving rise to an inference of voluntarily abandonment of service- Petition dismissed.

Title: Sunil Kumar Negi vs. State of H.P. and Ors. Page- 414

Constitution of India, 1950- Article 226- Petitioner applied for the post of Head Masters (School Cadre) Class-II (Non-Gazetted)- but he was not called for interview as he had passed M.Ed.- Advertisement provided that the candidate must have 2nd Class Master's Degree in Arts/Science or its equivalent from a recognized University- held, that M.Ed. is a professional qualification- the duration of B. Ed is one year, whereas, the duration for M.Ed. is two years- therefore, M.Ed. cannot be considered to be equivalent to M.A.

Title: Praveen Kumar vs. State of Himachal Pradesh & Ors. Page-17

Constitution of India, 1950- Article 226- petitioner claimed that her husband was working as a guide in a hotel- she received some message on her mobile phone that her husband was lying unconscious at police station, Sadar Shimla- she came to Shimla and found her husband unconscious in police station, Sadar- police arranged for the ambulance and put the husband of the petitioner in the same - he was taken to IGMC and thereafter to PGI - Police conducted the investigation but the petitioner was not satisfied with the same- She filed a Writ Petition which was allowed- certain directions were passed by the Hon'ble High Court - an appeal was preferred against the judgment- held, that the matter was pending investigation and it was not proper to record firm findings regarding the guilt of the police officials leaving no room for the police officials to urge to the contrary- findings so recorded would amount to taking over the reigns of the disciplinary authorities and/or the Criminal Court.

Title: State of H.P. Vs. Sakshi Sharma and others Page-1169

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition 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-970

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking a direction that the pension and the other retiral benefits be granted to him and he be enrolled as the member of ECHS- petitioner was discharged from the Army on 30.6.1970 and he had given a representation to the President of India on 9.10.2006- his petition was dismissed on the ground that delay from 30.6.1970 till 9.10.2006 was not explained- held, that the delay is an important factor and has to be taken into consideration while granting the relief under Article 226 of the Constitution of India- there is no infirmity in the order passed by the Court- Appeal dismissed.

Title: Inderjit Kumar Dhir vs. State of HP and others Page-142

Constitution of India, 1950- Article 226 – Petitioner had filed a civil suit before the learned Sub Judge, which was decreed- State preferred an appeal before the learned District Judge, Kangra, who set aside the judgment and decree and transferred the matter to the District Collector, Kangra, to decide the suit in accordance with Sections 3 & 4 of the H.P. Village Common Land (Vesting and Utilization) Act, 1974- The Collector held that the respondents had become the owners of the land under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972- A Review petition was filed before the Sub-Divisional Officers exercising the powers of Collector which was beyond limitation- However, the Sub Divisional Officer reviewed the order- Petitioner filed an appeal before the Divisional Commissioner who dismissed the same- Held, that the earlier order was passed by the Sub Divisional Officer exercising the powers of the Collector on 1.6.1999, Review petition was filed in the year 2005- Limitation prescribed under Section 9-A of the H.P. Village Common Lands (Vesting and Utilization) Amendment Act, 2001 is 90 days- No Notice was issued prior to the review of the order, therefore, the earlier order was a nullity which could not be cured by the subsequent orders.

Title: Khushi Ram & ors. vs. State of H.P. & anr. Page-626

Constitution of India, 1950- Article 226- Petitioner had made allegations against the police officials claiming that they had beaten her husband- held, that the petition involved the adjudication of the complicated question of facts, which could not be decided in exercise of power of judicial review.

Title: State of H.P. Vs. Sakshi Sharma and others Page-1169

Constitution of India, 1950- Article 226- Petitioner had submitted an application for grant of nautor land on 16.7.1969 which was rejected on 19.1.1972- appeal was preferred which was allowed on 27.6.1973- case was remanded to SDO (Civil) who rejected it on 4.8.1993- appeal was filed which was allowed on 19.12.1994 and nautor land was sanctioned in favour of petitioner- appeal was preferred before Deputy Commissioner which was allowed- petitioner filed an appeal before Divisional Commissioner who allowed the same and remanded the matter to Deputy Commissioner- appeal was preferred which was allowed and the matter was remanded to Deputy Commissioner, Mandi who allowed the appeal and upheld the grant- again an appeal was preferred before Divisional Commissioner who dismissed the same- Revision was allowed by the Financial Commissioner on the ground that nautor land could not have been granted in favour of the petitioner as there was a ban as per order dated 19.3.1990- held, that the order dated 19.3.1990 was not applicable to the grant- since, the matter was pending in the appeal, therefore, his case was covered under the exception and it was wrongly held that he was not entitled to the grant.

Title: Lalman Vs. State of Himachal Pradesh and others. Page-1294

Constitution of India, 1950- Article 226- Petitioner pleaded that he had completed 8 years of service as daily wager and is entitled for regularization of his services- held, that regularization depends upon the vacancy and can be made on the recommendation of the selection committee constituted by Appointing authority- respondent specifically pleaded that no vacancy for mason was available against which petitioner could be regularized- petitioner had also not mentioned that any vacant post was available, therefore, respondent could not be directed to regularize the services of the petitioner- however, respondent directed to regularize the service of the petitioner as and when any vacancy would arise.

Title: Ramesh son of Sh Dil Bahadur vs. State of H.P. & Ors.Page-1102

Constitution of India, 1950 - Article 226- Petitioner retired from the society and was paid a sum of ₹3,32,454/- towards gratuity- remaining amount of₹1,27,766/- was not paid- leave encashment amounting to ₹1,25,966/- was also not paid- held, that the petitioner had a right to get retiral benefits immediately on his superannuation- respondent directed to pay the balance gratuity amount and leave encashment.

Title: Partap Singh Mehta vs. The Himachal Fruit Growers Cooperative Marketing and Processing Society Limited Page-1045

Constitution of India, 1950- Article 226- Petitioner was allotted 9 jobs of channelization of Bata River - respondent issued a notice inviting e-tender for restoration of rain damages to channelization of Bata River - respondent asserted that some work was allotted to the petitioner- petitioner had completed some of the work but had not completed remaining work- some damage was caused to the work executed by the petitioner for which the tender was issued- held, that petitioner has no right to restrain the State from issuing the tender for the damages caused in the year 2013.

Title: Sohan Pal Singh vs. State of H.P. & Ors. Page-1225

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 against which petitioner could be regularized-hence the petitioner cannot be regularized.

Title: Bansi Ram vs. State of H.P. Page-981

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 regular 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-993

Constitution of India, 1950- Article 226 –Petitioner was appointed as a Clerk – He was to be promoted as Junior Assistant- However, he was charge-sheeted and penalty of censure was imposed upon him- He was again charge-sheeted and penalty of stoppage of two increments was imposed – The petitioner made representations for consideration of his case on the completion of 10 years of service, but it was rejected on the ground that the penalty had been imposed upon him- Held, that the penalty of stoppage of two increments and censure are minor penalties which do not stand against consideration of an employee for promotion.

Title: Naresh Kumar Vaidya vs. State of Himachal Pradesh and another.

-Page-710

Constitution of India, 1950- Article 226- Petitioner was appointed as a Peon- he is suffering from chronic schizophrenia- his wife applied for compassionate appointment- held, that wife of the petitioner was receiving more than ₹ 1 lakh as income- hence, she is not entitled for compassionate appointment as per rule- Further, the order compulsorily retiring the petitioner has been set aside and therefore, she cannot claim compassionate appointment in such circumstance.

Title: Paras Ram vs. State of H.P. Page-29

Constitution of India, 1950- Article 226- Petitioner was dismissed from the service for entering into second marriage during subsistence of his first marriage-his compassionate allowance was fixed with effect from 1.9.1979- initially petitioner accepted the allowance, however, he filed an application after 26 years, which was dismissed- held, that in view of Rule 41 of the Central Civil Services (Pension) Rules, 1972, a person who is dismissed from the service, forfeits his pension and gratuity but is entitled to Compassionate Allowance- Writ Petition dismissed.

Title: Sant Ram Badhan vs. The Senior Deputy Accountant General (A & E)& Ors. Page-1097

Constitution of India, 1950- Article 226- Petitioner was engaged as a language teacher as per resolution dated 16.06.2004-After sometimes, she was asked not to come to the school- Respondents contended that the appointment of the petitioner was not in accordance with the recruitment and promotion rules and was merely a stop gap arrangement on temporary basis- it was further contended that she was not appointed as per the procedure and as per the Recruitment and Promotion Rules and her services were rightly terminated- Held, that there was no recital in the resolution dated 16.06.2004 that the applications were invited for the post of language teacher or any advertisement was issued- Appointment to any public post without any notice to the general public is contrary to the Recruitment and Promotion Rules- Appointment of the petitioner to the post of language teacher was a stop gap arrangement which would not confer any right upon the petitioner to continue in the post-petition dismissed.

Title: Kiran Mai wife of Shri Nand Kishore vs. State of H.P. and others Page-647

Constitution of India, 1950- Article 226- Petitioner was engaged as a Gardner after completing the training- he was not regularized- according to the petitioner, respondents were taking the work of the clerk from him- 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 to 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-966

Constitution of India, 1950- Article 226- petitioner was facing a departmental inquiry and penalty of censure was imposed upon him –his case was considered for promotion by a Departmental Promotion Committee but was kept in a sealed cover- held, that the penalty of censure does not amount to minor penalty in view of instruction 16.13 contained in chapter 16 of the Hand Book on Personnel Matters and promotion could not have been denied to the petitioner on the basis of penalty of censure.
Title: Board of Directors of H.P. vs. Chet Ram and Anr. Page-1232

Constitution of India, 1950- Article 226- Petitioner was found in unauthorized occupation of the premises and was ordered to be evicted from the same- he filed an appeal before Divisional Commissioner Shimla along with an application under Section 5 of Limitation Act- Divisional Commissioner dismissed the application seeking condonation of delay- held, that counsel for the petitioner was present on 31.12.2012 which would show that petitioner was aware of passing of the order- counsel could have filed appeal before the Divisional Commissioner in view of his Vakalatnama- further, his plea that he was taking treatment at Delhi was not acceptable as the illness and advise of the Doctor asking the petitioner not to go out from Delhi was not placed on record- Writ petition dismissed.
Title: Surya Parkash vs. State of H.P & others Page-1298

Constitution of India, 1950- Article 226- Petitioners and one 'K' appeared before the Interview Board for the post of Anganwari worker- 'K' was given appointment- Petitioner filed an appeal before the Deputy Commissioner who held that neither the petitioner nor 'K' was eligible for appointment and directed to conduct fresh interviews - An appeal was preferred before the Deputy Commissioner and the post was given to one 'S'- Petitioner preferred a writ petition- The matter was remanded to the Deputy Commissioner who called for the report of the Naib Tehsildar and rejected the appeal filed by the petitioner- Further appeal preferred before the Deputy Commissioner was also rejected- The petitioner filed a writ petition before the Hon'ble High Court, which was allowed and the selection was quashed- 'S' filed an LPA against the order of the Hon'ble High Court- Held that Petitioner had not even laid any claim to the post before the Sub- Divisional Magistrate and she had staked her claim to the post before the Hon'ble High Court for the first time- the fact that the petitioner had not laid any claim to the post earlier would show that she had abandoned her right and she could not have raised the claim for the first time in the writ petition.
Title: Smt. Sukanya Devi vs. Smt. Karmi Devi & ors. -Page- 402

Constitution of India, 1950- Article 226- Petitioners were appointed as Agriculture Inspectors and were re-designated as Assistant Development Officers (Agriculture)- the benefit of Proficiency Step Up was granted to them but it was modified and the petitioners were held entitled to the

notional benefit from the date of the completion of 8 years and to the monetary benefit with effect from the date of the passing of the departmental examination- held, that the Proficiency Step Up is not to be released to an officer unless he has passed the departmental examination.

Title: State of H.P. and another vs. Vidya Sagar Page-1228

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-978

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-905

Constitution of India, 1950- Article 226- Petitioners, who were appointed against the disability quota, claimed that they should be considered for appointment on regular basis from the date of their appointment on contractual basis- held, that in view of mandate of Supreme Court of India of granting reservation to persons with disability, direction issued to the opposite party to consider the case of the petitioners and to take action within 8 weeks.

Title: Ashwani Kumar vs. Himachal Pradesh State Electricity Board & others Page-1126

Constitution of India, 1950- Article 226- Petitioners working as Fishermen had challenged the order of the State Government providing Matriculation as minimum qualification for promotion to the post of Fisheries Field Assistants- According to the petitioners there was no qualification in the un-amended 1986 Rules for promotion- Nature of duty of Field Assistants and Fishermen were similar, and the order of the State Government providing for Matriculation as qualification was wrong, arbitrary- Held that framing of Rules prescribing the mode of selection including the qualification for a particular post is within the domain of the Executive/ Rule making authority- Courts and Tribunals cannot prescribe the qualification nor can they interfere with the qualification prescribed by the employer- Courts cannot direct the authority to make appointment by relaxing the rules- Since the petitioners are not eligible as per the rules therefore, the petition is not maintainable.

Title: Pawan Kumar and others vs. State of HP and another Page-447

Constitution of India, 1950- Article 226- Power to interfere with the executive decision- petitioner filed a writ petition questioning the funding to Mahila Mandal Programmes- State filing a reply that the Mahila Mandal scheme was withdrawn as the schemes was being implemented through other programmes- held, that the Court cannot interfere in the

executive decision, unless there is arbitrariness-when the decision making process is not questioned but the decision arrived at by the authority is questioned the writ, petition is not maintainable.

Title: Meena Kumari vs. Union of India & Ors. Page-179

Constitution of India, 1950- Article 226- Power of Judicial Review- Courts 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-905

Constitution of India, 1950- Article 226- Practice and procedure- Petitioners had appeared before the selection committee and had challenged its constitution after they were declared unsuccessful - held, that petitioners having participated in the selection process cannot challenge the same.

Title: Mahalakshmi Oxyplants Pvt. Ltd. Vs. State of H.P. & Anr. Page-1260

Constitution of India, 1950- Article 226- Practice and Procedure- the petitioner approaching the Court is bound to come with clean hands- if a litigant tries to pollute stream of justice by resorting to falsehood or by making false statement, he is not entitled to any relief.

Title: Ramanujam Royal College of Education vs. National Council for Teacher Education and others Page- 343

Constitution of India, 1950- Article 226- Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- The purpose of Shimla Road Users and Pedestrians (Public Safety and Convenience) Act is to restore the sanctity of the Shimla city- State had renewed 2538 permits for vehicles and 318 permits were also issued up to 21.8.2014- however, the names of the permits holders and by whom the permits were issued were not specified- State directed to furnish the list of the permit holders along with the full particulars and to restrict the plying/movement of vehicles without passes- State further directed to create more off-street and on-street parking places/parking zones- H.R.T.C. is directed to issue the permit to the taxies strictly in terms of the earlier order dated 14.10.2011.

Title: Dharam Pal Thakur vs. State of Himachal Pradesh & others Page- 309

Constitution of India, 1950- Article 226 –State Government granted 31 acres of land to the Respondent No. 5 for constructing and starting ESIC Hospital and Medical College at Ner Chowk- Respondent No. 5 submitted an application to the Central Government for establishing new Medical College- An inspection was carried out by the Medical Council of India- The Inspection Committee pointed out certain deficiencies- It was contended that the steps were taken to rectify the deficiencies and the deficiencies were not fundamental in nature- An amount of ₹7.50 crores had already been spent- Held, that in view of the larger public interest the respondent No. 5 and 7 will remove the deficiencies with a period of three months, re-inspection would be conducted within one month of the submission of the report and the

Central Government shall take steps within two weeks from the date of receipt of recommendations.
Title: T.K. Gupta vs. Union of India and Others -Page-713

Constitution of India- Article 226- State had invited tender for supplying Medical Oxygen Gas to IGMC and its associated hospital- petitioner challenged the tender on the ground that it contained conditions, which were aimed just to oust him from offering the tender and participating in the tender process- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless on the face of it, it is mala-fide, illegal, unconstitutional and the contract is made to favour a particular person- further, held, on the facts that the respondents had thought proper to incorporate the conditions in order to have a better which may conclude in the best.
Title: Mahalakshmi Oxyplants Pvt. Ltd. Vs. State of H.P. & Anr.
Page-1260

Constitution of India, 1950- Article 226 - The case of the petitioner is covered by the judgment dated 7.8.2012 passed in CWP (T) No. 12595 of 2008 and upheld in LPA No. 535 of 2012- Writ petition is disposed of with the direction to examine the case of the petitioner in the light of the judgment within a period of six weeks.
Title: Rameshwar Singh vs. State of Himachal Pradesh & others.
-Page-738

Constitution of India, 1950- Article 226- The 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 challenge the order in case, the same goes against the petitioners.
Title: Nigma Devi vs. State of H.P. and another Page-902

Constitution of India, 1950- Article 226- The case of the petitioner was transferred from Shimla Circle-I to Chandigarh- Respondents contended that in view of the transfer the writ petition had become infructuous- Held, that merely because an order has been implemented will not make the writ petition infructuous- Further held that the time spent from the date of passing of the stay order till the decision shall not be counted while computing the period of limitation.
Title:Anand Chauhan vs. The Commissioner of Income Tax Page-777

Constitution of India, 1950- Article 226- The department had issued seniority list of Excise and Taxation Officers in accordance with the judgment of Hon'ble Supreme Court of India in case titled ***Ajit Singh vs. State of Punjab, AIR 1999 SC 3471*** -pay and pension of the petitioner was fixed on notional basis- the department contended that the petitioner had not worked against the post of Assistant Excise &

Taxation Officer and he was rightly granted notional promotion- Held, that the petitioner was legally entitled for promotion w.e.f. 17.08.1999- Promotion is fundamental right of the employee under Article 16 (1) of the Constitution of India- An employee is entitled to be promoted if not disqualified as per the Annual Confidential Reports or due to pendency of disciplinary proceedings- The petitioner could not be penalized for the fault of the department- The respondent is directed to promote the petitioner w.e.f. 17.8.1999 from the date when he was granted notional promotion and to release the monetary benefits to the petitioners.

Title: Rama Nand Rathore son of Shri Shoba Ram Rathore vs. State of H.P. Page-816

Constitution of India, 1950- Article 226- The direction issued to the authorities to alleviate the suffering of the accident victims.

Title: Ajay Sipahiya & others vs. State of H.P. and others Page-140

Constitution of India, 1950- Article 226- The dispute whether the degree of Parangat from Kendriya Hindi Shikshan Mandal, Agra is recognized by the State Government for employment or not, has already been determined by the Himachal Pradesh Administrative Tribunal, in the judgment rendered in O.A. No. 498 of 1998, titled as Ms. Nisha Devi versus State of Himachal Pradesh and others wherein it was held that the degree was recognized for the purpose of employment and the writ petitioner was found eligible- The judgment has not been questioned and has attained finality, therefore, the parties are bound by the judgment- order passed in writ petition is modified accordingly.

Title: Nisha Devi vs. State of Himachal Pradesh & others Page-793

Constitution of India, 1950- Article 226-The High Court has jurisdiction to quash the decision or orders of Tribunals and statutory authorities passed in violation of the principles of natural justice- The High Court cannot convert itself into a court of appeal and cannot examine the correctness of the decisions and decide what is the proper view to be taken or order to be made- it cannot substitute its order in place of the order of the tribunal or authority, unless the order is shown to be passed on no evidence.

Title: Smt. Sukanya Devi vs. Smt. Karmi Devi &ors. Page-402

Constitution of India, 1950- Article 226- Whether a Writ Petition will lie against the Jogindra Central Co. Op. Bank- held, that although, the Writ can be issued against any person or authority, yet language of Article 226 cannot be interpreted literally to include private person to settle the private dispute- therefore, a Writ does not lie against the Jogindra Central Co. op. Bank.

Title: Laxmi Narain & Ors. vs. Kuldeep Singh & Ors. Page-149

Constitution of India, 1950- Article 226 and 14 – Petitioner claimed that he is entitled to pay scale on the pattern of his counterparts in Punjab- State contended that the Fire Department is under the control of Municipal Committee and not under the control of Government in Punjab, therefore, the pay scales in two states could not be equated- Held, that the State of Himachal Pradesh is not bound to follow the rules

and regulations, as are applicable to the employees of the State of Punjab and even if it had followed the same in the past, it is not bound to follow every change made under the rules or regulations- The petitioner had failed to mention the educational qualifications, working conditions, and other relevant factors to show that the nature of work of Fire Officers in two States was similar- Principle of equal pay for equal work cannot be applied without looking into the nature of work done by the persons working in different States.

Title: Balvinder Singh Mahal vs. State of H.P. and others Page-795

Constitution of India, 1950- Article 226, 25, 26, 48, 48A and 51A- **Prevention of Cruelty of Animals Act, 1960** – The animals sacrifice is not essential part of Hindu religion and is contrary to the basic rights of animal, hence broad directions issued for prohibiting animal and birds sacrifices in temples and public places.

Title: Ramesh Sharma vs. State of Himachal Pradesh and others Page- 491

Constitution of India, 1950- Article 227- Claim Petition was filed by the claimant before MACT, Nahan, pleading that he had sustained injury while sitting as a pillion rider- petition was allowed- Insurance Company filed a Writ Petition challenging the Award pleading that the claim petition was filed after more than 7 years of the accident- no police report was lodged regarding the accident- Insurance Company was not afforded any opportunity to verify the veracity of the accident and the application of the Insurance Company under Section 170 of M.V. Act was wrongly dismissed- held, that Writ Petition challenging the award would be maintainable only in those cases where the award on its face is perverse or is based upon fraud and Insurance Company has no remedy under Motor Vehicle Act for challenging the award- award cannot be challenged on the ground that compensation is high, excessive or unreasonable- the mere fact that the Claim Petition was filed after 7 years is not sufficient to view the claim petition with suspicion as there is no limitation for filing the claim petition.

Title: National Insurance Company Ltd. vs. Raman Mittal & anr. Page-1069

Constitution of India, 1950- Article 227- Respondent was appointed as a Stenographer Grade-III in Army Training Command and was promoted as a Stenographer Grade-I- Hon'ble Supreme Court directing in ***M. Nagraj vs. Union of India etc. 2007 (4) SCT 664*** to extend the benefit of 77th and 85th amendment of the Constitution and to re-frame the rule if necessary- no such exercise undertaken by Union of India- respondent made a representation for the implementation of the judgment but it was rejected on the ground that the judgment was only applicable to the State of U.P. and no notification was issued by DOPT- held, that the judgment of the Hon'ble Supreme Court of India was binding upon the Union of India and it was bound to implement the same.

Title: Union of India vs. Gian Singh Verma Page-6

'H'

Hindu Marriage Act, 1955- Section 2(2) **-** The District Judge passed a decree of divorce in favour of the petitioner and the respondent- However, the parties were members of Scheduled Tribes within the meaning of Section 2(2) of the Act- Held, that the judgment passed by the District Judge was void, ab initio and nullity as the provisions of Hindu Marriage Act are not applicable to members of the Scheduled Tribes.

Title:Sushma alias Sunita Devi vs. Shri Vivek Rai Page-819

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 ₹ 40,000/- per month and that she was also taking tuitions- salary statement of the petitioner showed that she was getting gross salary of ₹ 47,991/- and net salary of ₹ 40,605/-- respondent was getting gross salary of ₹ 46,658/- and net salary of ₹ 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-922

H.P. Excise Act, 2011- Code of Criminal Procedure, 1973- Section 457- Police had recovered 175 boxes of IMFL during the search of the house of Sanjeev Kumar- no permit was produced by him- he contended that the liquor was being transported from 'Kehar Wine Agency L-1 to L-14 Didwin- the vehicle went out of order at Chowki Kankri- petitioner stored liquor in his house and approached the authorities to obtain fresh authorization regarding transportation of the liquor- held, that there was no evidence regarding the transportation of the liquor to its destination- petitioner could have made an alternative arrangement for transportation of the liquor, but he stored the liquor without any permit and authorization- however, liquor should not be allowed to be stored in the police Station- therefore, liquor was ordered to be sold by way of public auction and sale proceeds were directed to be deposited in the treasury.

Title: Sanjeev Kumar vs. State of H.P. Page- 269

H.P. Land Revenue Act- Section 45- Entries in the revenue record do not confer any title in favour of any person.

Title: Mohar Singh and others vs. Krishan Chand and others. Page-127

H.P. Land Revenue Act- Sections 38 and 45- Entry in the revenue record- Plaintiff claiming to be the owner in possession of the suit land with the allegations that earlier suit land was owned and possessed by one 'K' and was inherited by his wife 'D' on his death who had executed a Will in favour of the plaintiff- defendant shown to be the owner in the column of the ownership- 'K' was recorded to be possession in the copy of Jamabandi in the year 1956-57- his status was "Bila Lagaan Batsawar Malkiyati Khud"- held, that this entry is not sufficient to construe that 'K' was the owner as the entry was never reflected in the column of the ownership- no mutation was attested in favour of 'K' on the basis of any

sale deed or conveyance - therefore, 'K' had no title and plaintiff would not become the owner on the basis of will.

Title: Dharmender Singh & Ors. Vs. Layak Ram and others Page- 67

H.P. Medical Education Service Rules, 1999- Constitution of India, 1950- Article 226- Petitioners obtained the post graduate degree in the year 1997 and 2005- they completed senior residency/ registrarship in the years 2001 and 2010- petitioners claiming that they are entitled to the selection by promotion from the date of attaining qualification – respondent contended that petitioners are entitled to promotion on the basis of merit-cum-seniority- held, that as per Rule 11 promotion to the post of Assistant Teacher is to be made by selection from those officers who are possessing the post graduate degree and having three years teaching experience- petitioner should not only be eligible but must fall within zone of consideration to get promotion- further held, that acquisition of the degree does not entitle a person to claim seniority from the day of acquisition of qualification.

Title: Dr. Shikha Sood vs. State of H.P. & another Page-197

H.P. Urban Rent Control Act, 1987- Section 14- Landlady had sought eviction of the tenant on the ground that tenants were in arrears of rent, the premises had become unsafe and unfit for human habitation- premises were required bona fide for building and rebuilding which could not be carried out without vacating the same and the tenants had committed such act which had impaired material value and utility of the premises - tenants had sublet the demised premises without the consent of the landlady- held, that the premises was located in the residential area or more than 78 years old- locality had tremendous commercial value and landlady had assets of Rs. 50-60 lacs and could take loan from Financial Institution- she had submitted the building plan to M.C. Shimla – the fact that plans have not been proved is not sufficient to dismiss the petition as sanctioned building plan is not a condition precedent for eviction of the tenant – Petition allowed.

Title: Meera Devi and others vs. Sushma Rani Aggarwal Page-1284

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought the eviction of the tenant on the ground that the demised premises is in dilapidated condition - door of the shop is rotten and is hanging in air, the ceiling of the shop is damaged which requires replacement, building is totally unsafe for human dwelling and can collapse at any time but the tenant denied this fact- held, that the witnesses of the petitioner had admitted that the shop was in good condition and there was no possibility of the shop collapsing- it did not require any immediate repair- further, landlord was residing in the same building, which showed that the condition of the building was not unsafe, hence, petition dismissed.

Title: Ram Parkash & Others vs. Surinder Singh & Others Page-1059

'I'

Income Tax Act, 1961- Section 80 IC.- Assessees are engaged in manufacturing paper insulated wires and strips of copper and

aluminum- wires are drawn from wire rods and the insulation coating is done on the wires with different chemicals- Assessing Officer held that the activity of drawing wires of thinner gauges from rods and wires of thicker gauges does not amount to manufacture or production- held, that the qualitative change effected in the raw material by various means amounts to manufacture- there is a complete transformation of raw materials into a new and different article having a different identity, characteristic and use- series of changes transform the commodity into a different commercial commodity, whereby it can no longer be recognized as the original commodity but can be recognized as a new and distinct article, therefore, the assessees are entitled to benefit of Section 80 IC.

Title: Commissioner of Income Tax vs. Pawan Aggarwal Page-1235

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- circumstantial evidence- in case of circumstantial evidence, prosecution is under legal obligation to prove the circumstances from which the conclusion of guilt is to be drawn- the circumstances should be conclusive in nature- they should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused-circumstances should exclude the possibility of guilt of any person other than the accused.

Title: State of Himachal Pradesh vs. Chanalu Ram Page-367

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- contradiction- testimony of the prosecution witness was recorded after sufficient gap of time - minor contradictions are bound to come in the statements due to lapse of time.

Title: State of H.P. vs. Krishan Kumar Page- 457

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- Deceased was found dead in her home- Father of the deceased had made a generalized statement about the ill-treatment and mal-treatment meted out to her by the accused- Father of the deceased had not attributed any specific role to the accused- No date, month or year of beatings was given- No complaint was made by the father on receiving this information from his daughter- No medical examination of the deceased was got conducted regarding injuries suffered by the deceased- The letters stated to have been written by the deceased to her father were not produced, which shows that the version of his father regarding ill-treatment and maltreatment was a concoction- Further his version that the deceased had told him about imminent threat to her life was also not acceptable as she had left for her matrimonial home subsequent to this disclosure.

Title: State of Himachal Pradesh vs.Prem Chand & Others**.** Page-657

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- PW-5 'Y' omitting to disclose that he had recognized the accused 'Y' and 'M' in the crowd, his statement is in contradiction to the testimony of PW-12 which would show that PW-5 and PW-12 were not together at the spot and had given the manufactured version qua the incident.

Title: State of Himachal Pradesh vs. Ajay Kumar and others. Page-666

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- Medical Officer stated that the weapons of offence shown to him had broken edges and were not sharp enough to cause injuries noticed by him in dead body, which would suggest that the prosecution version that injuries were caused by the accused by these weapons could not be relied upon.

Title: State of Himachal Pradesh vs. Ajay Kumar and others. Page-666

Indian Evidence Act,1872- Section 3- Appreciation of evidence- the facts can be proved by the testimony of a single witness- conviction can be sustained on the solitary evidence of the witness in a criminal case if it inspires confidence- the law of evidence does not require any particular number of witnesses.

Title: State of H.P. vs. Krishan Kumar Page- 457

Indian Evidence Act, 1872- Section 3- Proved- Court must guard against the danger of allowing conjecture or suspicion to take the place of legal proof - suspicion howsoever strong cannot take the place of proof.

Title: State of Himachal Pradesh vs. Chanalu Ram Page- 367

Indian Evidence Act, 1872- Section 24- Extra Judicial Confession- Confession in criminal cases should be voluntary in nature and should be free from any pressure- when the witnesses had not stated that the confession was voluntary, confession should not be believed.

Title: State of Himachal Pradesh vs. Chanalu Ram Page- 367

Indian Evidence Act, 1872- Section 27- As per prosecution case, a stone was recovered on the basis of disclosure statement made by the accused- however, neither the finger prints of the accused nor the blood of the deceased was found upon the stone- held, that the recovery is not sufficient to implicate the accused.

Title: State of Himachal Pradesh vs. Chanalu Ram Page- 367

Indian Evidence Act, 1872- Section 27- Search of house of 'P' was conducted during which one Kudali was recovered- Medical Officer stated that the injury noticed by him could have been caused by Darati- Held, that the recovery of Kudali was not effected pursuant to the disclosure statement or a recovery memo, therefore, the introduction of Kudali had no value in the prosecution case.

Title: State of Himachal Pradesh vs. Ajay Kumar and others. Page-666

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 traceable 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- 959

Indian Evidence Act, 1872- Section 112- The wife had given birth to a child within six months of marriage- The husband claimed that DNA test should be conducted on the child to prove the paternity- The husband had earlier filed a petition for annulment of the marriage in which it was held that the husband had failed to prove that he had no access to wife prior to the marriage- Held, that the wife had taken a specific stand that husband had access to her prior to marriage- This stand had gone un-rebutted and the findings recorded by the Additional District Judge have attained the finality, therefore, the court could not order the DNA Test as a matter of course- The court has to exercise the discretion of ordering DNA Test cautiously after weighing all pros and cons and satisfying the test of imminent need for such an order- The court cannot allow the father to bastardize the child on his mere asking.

Title:Ravi Kumar vs. Reeta Devi and another Page-771

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-937

Indian Limitation Act, 1963- Section 5- The applicant had sought condonation of delay of 121 days delay in filing the revision petition on the ground that the case was being pursued by Sh. Naresh Kumar, who had died on 30.11.2012 and after his death the matter was being pursued by Sh. Rajinder Kumar, who met with a road accident at Solan in January 2014- Held, that the applicant had relied upon the certificates bearing dates 5.2.2013 and 16.3.2013, which clearly shows that a false case was set up by the applicants, therefore, they are not entitled for the condonation of delay.

Title: Asha and others vs. Suresh Kumar and others Page-823

Indian Penal Code, 1860- Section 84- In order to take the benefit of Section 84, the accused has to prove that at the time of commission of offence, the accused by reason of unsoundness his mind was incapable of knowing the nature of act or that he was doing what was either wrong or contrary to law- In the present case, the Medical Officer had admitted that he had not seen the old record of the accused pertaining the period when the offence was committed by the accused- No eye witness had deposed about the mental condition of the accused- The evidence showed that the accused had committed the offence without any provocation and he was fully aware of the consequences, hence the accused was rightly convicted.

Title: Balwant Singh vs. State of H.P. Page-677

Indian Penal Code, 1860- Section 100 - Right of Private Defence- The suggestions were put to the prosecution witnesses that the deceased had assaulted the accused with the Darat/ Danda and the accused had shot the deceased- Held, that the right of private defence can be established if there was face to face duel between the accused and the deceased- in the present case, no witness had deposed that the accused and deceased were engaged in a duel, deceased was within a striking distance and had struck a blow on the person of the accused that would suggest that the accused and deceased were not engaged in a duel and there was no reason for the accused to fire a gunshot, therefore, the right of private defence was not available to the accused.

Title: Jagdev Ram vs. State of Himachal Pradesh Page-691

Indian Penal Code, 1860- Section 201- Essential ingredients to prove offence punishable under Section 201 IPC are that an offence was committed and accused had reasons to believe the commission of such an offence and that they had caused disappearance of the evidence to screen themselves.

Title: Rajesh Kumar vs. State of H.P. Page-113

Indian Penal Code, 1860- Section 302- Accused armed with the Danda and Darat was seen running towards his house- when the witnesses went to the spot, they found that the deceased was sitting in the field with his hands on his head and there were deep wounds on his head- accused had assaulted the deceased as the deceased used to object to the beating given by the accused to his wife- held, that the Medical evidence proved that there was severe injury on the brain, leading to shock and death which could be caused by means of danda- case of the prosecution that the deceased used to object to the beating of the wife of the accused was not established by any cogent evidence- accused had danda and Darat and he had only used Danda, which showed that he had no intention to kill the deceased, therefore, accused convicted of the commission of offence punishable under Section 304 Part-II of IPC.

Title: Hans Raj vs. State of H.P. Page-1052

Indian Penal Code, 1860- Section 302- Accused had an argument with the deceased over accompanying him- sister of the deceased went to the Ram Mandir and when she returned, she saw the accused running towards Ram Mandir- when she went to the house, her sister was found dead- a Darat smeared with blood was also lying on the spot- held, that case is based upon the circumstantial evidence- motive that the accused asked his wife to accompany him but she refused, is a weak motive to provoke a person to commit murder –there is contradiction regarding the time at which the sister of the deceased told another witness about the incident- prosecution witness had admitted that the police had applied blood on the T-shirt of the accused- witness of the recovery had not supported the prosecution case- therefore, in these circumstances, accused could not be held liable for the commission of murder.

Title: Bhisham Bahadur vs. State of Himachal Pradesh Page-1

Indian Penal Code, 1860- Section 302- Accused inflicted serious injury on his mother with a *Guava* stick causing her death- the version of the

prosecution was corroborated by the testimonies of PW-1 and PW-3- both of them also identified the stick with which the injury was caused- medical evidence also proved that the death was caused due to head injury- minor contradictions in testimonies were bound to come with the passage of time and were not sufficient to discredit the prosecution version- blood was found on the pant of the accused- these circumstances proved the prosecution case beyond reasonable doubt- Appeal dismissed.

Title: Sunil Kumar Vs. State of H.P. Page-1288

Indian Penal Code, 1860- Section 302- Deceased had gone to a Village to attend the marriage, where he had a quarrel with the accused- wife of the deceased went to the house of PW-1 after 2-3 days of the quarrel who told her that accused and deceased had visited her home- deceased had also not joined his duty- a Panchayat was called where the accused had made an extra judicial confession- matter was reported to police - the accused and deceased were last seen together on 9.7.2006- FIR was lodged on 12.7.2006 - dead body was also found on 12.7.2006- held that, the last seen theory comes into play only when time gap between the point of time when the accused and deceased were seen together and when the dead body of deceased is found is so small that possibility of any person other than the accused being the author of crime becomes impossible- the time gap between 9.7.2006 and 12.7.2006 was large and the last seen theory cannot be applied.

Title: State of Himachal Pradesh vs. Chanalu Ram Page- 367

Indian Penal Code, 1860- Section 302- Deceased went towards the pond where accused were sitting- all the accused asked the deceased 'son how are you'- deceased objected to the same as he was elder to them, on which accused abused and tried to assault the deceased- deceased was rescued by the persons present at the spot- when the deceased tried to leave the pond, the accused came and gave a blow with Khukri due to which he died- held, that accused had provoked the deceased without any reason-when the deceased had tried to leave the pond, accused came from behind and gave a blow with the sharp edged weapon on the back of the deceased- accused was conscious of the weapon he was using and the part of the body where the blow was inflicted was vital- his conduct in running away from the spot revealed his intention- case falls within Section 300 and the accused was rightly convicted for the commission of offence punishable under Section 302 IPC.

Title: Suren Pal vs. State of H.P. Page- 419

Indian Penal Code, 1860- Section 302 - The complainant, deceased, his wife and his brother were grazing cattle- The accused came with the gun and abused the complainant and the deceased- Co-accused also appeared and started abusing the complainant and the deceased and rushed towards the fields where he was shot by the accused- Held, that mere omission to state that the accused had commanded the remaining accused to pelt stones at her and that the accused had asked her husband to compromise the previous dispute is not sufficient to doubt

the testimony of the complainant, especially when the accused had admitted in his statement that he had killed the accused with the gun.
Title: Jagdev Ram vs. State of Himachal Pradesh Page-691

Indian Penal Code, 1860- Section 307 - Accused inflicted a single blow upon the head of injured with Fauda, a sharp edged weapon- Held, that a single blow was given on the head of the injured- Injured became unconscious and fell on the ground- No further injury was inflicted upon the injured and the accused left the spot- The fact that the accused had not inflicted the injured despite opportunity to do so clearly shows that they had no intention to kill the injured- No case is made out for the commission offence punishable under Section 307 IPC.
Title: State of Himachal Pradesh vs. Subhash Chand, Rajinder Paul.
Page-759

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-984

Indian Penal Code, 1860- Section 376- Prosecutrix, a student of 5th class, was raped by the accused- pregnancy test was found to be positive, but the prosecutrix had spontaneous abortion- the prosecutrix stated before the Court that accused had not done anything to her- she admitted in her cross-examination that she was making a tutored version- her mother also stated that prosecutrix had not disclosed to her that accused had raped her- her father also denied the prosecution version- medical examination did not support the prosecution version- held, that the Trial Court had rightly acquitted the accused.
Title: State of H.P. vs. Brij Mohan Page- 322

Indian Penal Code, 1860- Section 498-A - The prosecution witnesses made generalized and vague statement regarding ill-treatment- No facts which would constitute an instigation to the deceased to take her life were deposed by the witnesses- Held, that the generalized statements are not sufficient to prove that the deceased was subjected to ill-treatment and maltreatment or she was instigated to commit suicide by the accused- Accused acquitted.
Title: State of Himachal Pradesh vs. Prem Chand & Others. Page-657

Indian Penal Code, 1860- Sections 279 and 304-A- Accused driving the vehicle in a rash and negligent manner and causing death of one person- he was convicted by trial court and conviction was upheld by Appellate Court- held, that the testimony of the eye-witness was duly corroborated by site plan which showed the skid marks to the extent of 29 feet- skid marks proved that the vehicle was being driven at an excessive speed- therefore, the order passed by Trial Court was based upon the reasons and could not be interfered with.

Title: Roshan Lal vs. State of H.P. Page-187

Indian Penal Code, 1860- Sections 279, 337, 338 and 304-A- Accused was found to be driving the vehicle in a rash and negligent manner- ethyl alcohol was found in his blood to the extent of 135.41 mg% and in the urine to the extent of 167.90 mg%- held, that Section 185 of Motor Vehicle Act clearly provides that a person driving a motor vehicle having alcohol exceeding 30 mg per 100 ml is liable to punishment- accused had endangered the personal safety of others by driving the vehicle in a rash and negligent manner with alcohol in his blood- he was rightly convicted.

Title: Rajinder Singh Mehta vs. State of H.P. Page-32

Indian Penal Code, 1860- Sections 307, 325, 323, 365 read with Section 34- Complainant, his father and brother were present in a Truck- a Jeep bearing registration No. HP-24A-762 came in which accused were present-accused asked the complainant to come near the Jeep, when the complainant went near the Jeep, the accused forcibly dragged him inside the jeep - jeep was driven for some distance, the accused gave beatings to the complainant and one of the accused threatened the complainant with knife-the complainant was thrown out of the Jeep and he sustained fracture in his leg- The accused were acquitted by the Trial Court- An appeal was preferred against the order of Trial Court- Held that, the complainant had failed to raise hue and cry when he was being forcibly dragged towards Jeep which would suggest that he had voluntarily gone in the Jeep to accompany the accused- The complainant had further failed to disclose to the PW-3 the reasons for sustaining the fracture in his leg which shows that a false story was invented by the complainant to implicate the accused- PW-7 had deposed what was narrated to him by another witness who was not examined and his testimony would be hearsay- PW-9 had not supported the prosecution version, therefore, in these circumstances, the conclusion of Trial Court that the Prosecution had failed to prove its case beyond reasonable doubt was sustainable– Appeal dismissed.

Title: State of Himachal Pradesh vs. Rakesh Kumar and another Page-295

Indian Penal Code, 1860- Sections 325, 334 and 451- Petitioner was convicted by the Trial Court for the commission of offences punishable under Section 325, 324, 451 IPC- Petitioner filed an appeal which was dismissed by the learned Additional Sessions Judge- Held, that the prosecution case regarding recovery of weapon of offence was not established as witness of recovery had showed his ignorance regarding place of recovery, which establishes that he was not present at the time of preparation of memo or at the time of recovery- One independent witness stated to have seen the incident was not examined and the prosecution had only examined the plaintiff/injured- Blood smeared darat was not sent to FSL – Darat was not shown to the Doctor for seeking his opinion as to whether injury could have been caused by darat, therefore, under these circumstances, the conviction of the accused was improper and was set aside.

Title:Jeet Ram vs. State of H.P. Page-715

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 attract 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-944

Indian Penal Code, 1860- Sections 363, 366 and 376- Prosecutrix aged 17 years left her home- matter was reported to the police- prosecutrix was recovered at the instance of the accused- the evidence showed that the prosecutrix had voluntarily gone to Pandoh Colony, which was thickly populated- she had crossed Mandi town in the bus- she admitted that she was writing letters to the accused and had handed over her photographs to him-held that, these circumstances, show that the prosecutrix was not kidnapped but she had voluntarily gone with the accused.

Title: State of Himachal Pradesh vs. Hans Raj alias Raja Page-1026

Indian Penal Code, 1860- Sections 376, 452 and 506- Accused raped the prosecutrix in her home- she reported the matter to the police after three days on the arrival of her son- prosecutrix failed to disclose the incident to her daughter who arrived prior to her son- hence, the delay assumes significance- no injuries were found on her person or the person of the accused- neighbours deposing that they had not heard any cries from the house of the prosecutrix- these circumstances show that the prosecutrix was a consenting party and the acquittal of the accused was justified.

Title: State of H.P. vs. Thakur Dass Page-59

Indian Penal Code,1860- Sections 420, 467, 468, 471 and 120-B- As per prosecution case, the accused had forged a will to grab the property of the deceased- deceased had also executed a sale deed- report of Director Finger Print Phillaur proved that thumb impression on the sale deed and Will did not tally, which clearly proved that Will was forged - Sale deed was duly proved by the Registration Clerk and by attesting witness- Document Writer stated that the executant was identified by the accused- held, that Trial Court had rightly convicted the accused.

Title: State of H.P. vs. Krishan Kumar Page- 458

Indian Penal Code, 1860- Sections 436 and 506 – complainant found that his house had been set on fire- villagers trying to extinguish the fire but could not succeed – an FIR was lodged against the accused- held, that complainant had admitted that he had strained relation and litigation with the accused- PW-3 admitted that he had deposed against the accused before Learned C.J.M., Lahul Spiti- complainant and PW-3

admitted that they had made the inquiry from the villagers to ascertain the identity of the person who had put the house on fire- testimony of PW-7 was contradictory- extra judicial confession made by accused was also not proved- house of the complainant and accused are located adjacent to each other- no sane person would put the adjacent house on the fire as there is risk of the fire spreading to his house as well- in these circumstances, acquittal of accused was justified.

Title: State of Himachal Pradesh Vs. Manohar Lal Page-1306

Indian Penal Code, 1860- Sections 498-A and 306- Deceased was married to accused- He demanded dowry of ₹50,000/-, he also used to beat her- Deceased committed suicide- Held that, the version of the prosecution that accused had subjected the deceased to cruelty was duly corroborated by the testimonies of prosecution witnesses as well as the fact that the accused had tendered apology and had assured not to repeat these acts-the Prosecution case cannot be doubted due to the fact that no independent witness from locality was examined- generally, married women are subjected to cruelty inside the house and they narrate these facts to their relatives, therefore, the relatives are the best witnesses - The fact that the matter was not reported to the Police or Panchayat will not make the prosecution case doubtful as efforts are made by the relatives of a woman to keep the matrimonial life intact - However, it was not proved that the accused had abetted the deceased to commit suicide- No immediate nexus between the abetment and suicide was proved on record- The accused convicted for commission of offences punishable under Section 498-A IPC and sentenced to undergo simple imprisonment for one year and to pay fine of ₹10,000/-- The accused acquitted of the commission of offences punishable under Section 306 IPC.

Title: State of H.P. vs. Rakesh Kumar and others. Page- 610

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34 – As per prosecution, the deceased was subjected to cruelty by the accused- Mother of the deceased asserted that her daughter was admitted in the Hospital and when she went to the hospital, her daughter was dead- PW1 admitted that he had not lodged any complaint with Gram Panchayat, Pradhan or Namberdar regarding cruelty meted out to his granddaughter- Mother of the deceased admitted in her cross-examination that her daughter was not happy as her father-in-law had not given the property to her husband- She further admitted that she had reported the matter to the police out of anger- Deceased had never told her that her father-in-law and mother-in-law had beaten her- Her husband had taken her to hospital immediately after the incident-Held, that the acquittal was justified in these circumstances.

Title: State of Himachal Pradesh vs. Madan Lal and others

Page-749

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34- The deceased was married to accused - accused ill-treated the deceased for her shortcomings in performing the household chores and for not bringing sufficient dowry-she committed suicide by jumping into

a well - Held that, no specific allegations of cruelty constituting instigation to the deceased to commit the suicide were proved- Father of the deceased had deposed about generalized complaints made to him by his deceased daughter, no time or other details were given- He also deposed that the deceased and her husband had stayed in his house during Kala Mahina and Karwachauth, which shows that the relationships were not sour- PW-1 had not narrated the incident of ill-treatment to any person- PW-3 and PW-4 also made generalized allegations and had not given any specific detail- Testimony of PW-5 that the deceased had told him that she would not return to her matrimonial home as she was being ill-treated cannot be accepted as it was not deposed by PW-2- In these circumstances, the conclusion of the Trial Court that the Prosecution had failed to prove its case beyond reasonable doubt was duly supported by evidence- Appeal dismissed.

Title: State of Himachal Pradesh vs. Sanjay Kumar & Others Page- 471

Income Tax Act, 1961- Section 194 A- Income Tax Authorities issued a circular to the banks to deduct the tax on the interest accruing on the compensation deposited with them- Held, that the compensation in lieu of death of person or bodily injury does not amount to income- Interest accrued on term deposit will also not amount to income and the circular was contrary to the mandate of granting compensation-Income Tax Authorities directed to refund the amount with interest at the rate of 12% from the date of deduction till payment, within six weeks.

Title: Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others Page-782

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-980

'J'

Juvenile Justice (Care and Protection of Children) Rules, 2007- Rule, 26- Rules provide that the order of the Committee shall be signed by at least two members thus, signing the minute register is impliedly necessitated by the rules.

Title: Monika Singh vs. State of H.P. and Others Page- 628

'L'

Land Acquisition Act, 1894, Section 18- Land of the petitioners was acquired for setting up Army Transit Camp – The claimants had not led any evidence that they had raised orchard, danga and breast walls on the acquired land- Average price of the land as per the sale deed was

₹10,425/- per biswa in respect of small pieces of land, hence after necessary deduction of 40% the average value would come to ₹6,255/- per biswa and by granting appreciation @ 10% from 1991, the value would come to ₹7,505/- per biswa.
Title: Union of India vs. Chhering Tobden & ors Page –303

Land Acquisition Act, 1894, Section 18-Land was acquired for the construction of Transit Camp- As per sale deed, the land measuring 2 biswas was sold for a sum of ₹15,000, which shows that the market value of the land was ₹7,500 per biswa- Another sale deed proved that 3 biswas land was sold for ₹ 55,000, - the average value on the basis of these two transactions would be ₹ 14,730 – 40% deduction is required to be made as the land sold was in small parcels.
Title: Union of India vs. Chhering Tobden & ors Page –303

Limitation Act, 1963- Article 58 - Suit seeking declaration regarding the invalidity of the document was filed after 28 years of age of its execution- held, that the suit is barred by limitation.
Title: Giano Devi Vs. Bihari Lal & others Page-1199

Limitation Act, 1963- Section 5- Trial Court dissolved the marriage of the parties by decree of divorce dated 09.01.2013- an appeal was preferred against the decree, which was delayed by 181 days- an application for condonation of delay was filed on the ground that petitioner was exploring the possibilities of an out of Court settlement leading to delay- held, that the party seeking condonation of the delay has to show sufficient cause for condonation of delay- day to day delay is required to be explained to succeed in an application for condonation of delay- petitioner had not disclosed any particulars as to when, where and in whose presence or with whose help she had made efforts to reconcile with her husband- no prayer was ever made regarding the settlement of the dispute before trial court- no efforts were made for conciliation during the pendency of the divorce petition before the Trial Court- hence, reason advanced by the petitioner that the delay occurred due to settlement efforts could not be accepted.
Title: Bala Devi vs. Virender Singh Page- 252

Limitation Act, 1963- Section 5- Writ Petition was decided on 26.12.2012- LPA was filed against the writ after delay of one year, two months and seventy days- the appellants sought condonation of delay on the ground that they had no knowledge regarding the decision of the case- however, no date of the knowledge of the decision was given- held, that the Law of limitation binds everybody and when no satisfactory reason was given for the condonation of delay, the delay could not be condoned.
Title: H.P. State Electricity Board Ltd. & Anr.Vs. Baldev Verma Page-210

Limitation Act, 1963- Article 58- State instituting a suit on 16.1.1992 seeking declaration that decree passed on 31.5.1971 was bad being collusive- further asserting that it came to the knowledge of the plaintiff on 21.1.1990 and limitation started running from the said day- held, that Ld. A.C. 2nd Grade had ordered the correction of the revenue record in 1973- matter was carried in the appeal and the order was set aside-

further an appeal was taken to the Collector who ordered that the name of the defendant No.1 be recorded as tenant- State was represented by ADA- State was also a party in an appeal against rejection of the mutation- these facts clearly show that the State was aware of the pendency of the proceedings- hence, its plea that the State was not aware that the any proceedings were pending cannot be accepted.
Title: State of H.P. vs. Prabhu & Anr. Page-81

'M'

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 ₹ 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 ₹ 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 ₹ 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-952

Medical Negligence – Sterilization operation was performed upon the plaintiff- Subsequently she conceived and gave birth to a child- Held, that a duty has been cast upon a Doctor to act with a reasonable degree of care and skill in performing a sterilization operation- Presumption of negligence arises, when a child is born despite sterilization operation, which can be rebutted by the proof of the fact that the Doctor had adopted the permissible state of art/ latest techniques in vogue to obviate an unwanted pregnancy-since no such evidence was led therefore, payment of compensation was proper.
Title:State of H.P & another vs. Madhu Bala & another Page-743

Motor Vehicle Act, 1988- Section 140- Appeal against interim award- held, that interim award can be granted on the basis of prima facie case and there is no necessity to go into the merit- the Insurance Company had failed to establish that the interim award was bad and there was no prima facie evidence of the accident- Appeal dismissed.
Title: National Insurance Co. Ltd. vs. Jyoti Ram and anr. Page-226

Motor Vehicle Act, 1988- Section 149 - Appellant had placed on record the driving license- The Insurance Company verified the same- Driving license shows that the driver had driving license to drive 'Heavy Transport Vehicle'- Insurance company is liable to indemnify the insured.
Title: Narender Kumar vs. Rajesh Kumar & others Page-721

Motor Vehicle Act, 1988- Section 149- Claimant had proved that the deceased had purchased steel, cement and binding wires from a shop and was travelling in the offending vehicle as owner of the goods - no evidence was led by the insurer to prove that the deceased was travelling as a gratuitous passenger- held, that the version of the insurance company that the deceased was travelling as a gratuitous passenger was not proved.

Title: Oriental Insurance Company versus Smt. Prabha Devi & others Page-1134

Motor Vehicle Act, 1988- Section 149- Claimant had specifically pleaded that deceased was travelling in the vehicle as owner of the goods- owner/respondent No. 1 had not denied this fact - Insurance Company had pleaded that deceased was travelling as gratuitous passenger but no evidence was led by the Insurance Company to prove this fact- claimant had led oral and documentary evidence to prove that deceased was travelling as owner of the goods- held, that it was for the insurer to plead and prove that vehicle was being driven in violation of the terms and conditions of the Insurance policy but it had failed to do so- hence, Insurance Company was rightly held liable to pay compensation.

Title: Oriental Insurance Co. Ltd. Vs. Rattani Devi & others Page-1187

Motor Vehicle Act, 1988- Section 149- Claimant had specifically pleaded that deceased was travelling in the vehicle as owner of goods- owner did not deny the same- claimant led evidence to prove that the deceased was travelling as owner of goods and no evidence was led by the Insurance Company to prove that there was contravention of the terms and conditions of the insurance policy, therefore, Insurance Company is liable to pay compensation.

Title: Oriental Insurance Company Ltd. Vs. Krishana Devi & others Page-1281

Motor Vehicle Act, 1988- Section 149- Claimants pleaded that the deceased had embarked in the offending vehicle, loaded with cement, which met with the accident - the owner claimed that deceased was employed as a second driver/helper- held, that the deceased was not a gratuitious passenger and the Insurance policy showed that the risk of six employees besides driver was covered under the policy – hence, the Insurance Company was rightly held liable to pay the compensation.

Title: United India Insurance Company Limited vs. Smt. Samitra Devi & others Page-1144

Motor Vehicle Act, 1988- Section 149- General Power of Attorney of the owner had deposed that the driving licence of the driver was examined and steps were taken to determine whether the driver was competent to drive the vehicle or not- Held, that the owner had not committed any willful breach of terms and conditions of the policy- and the insurance company is liable to indemnify the insured.

Title:Vipan Kumar vs. Devki Devi & others Page-880

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that claim of pillion rider was not covered under the policy- held, that the policy showed that an amount of ₹ 77/- was charged for legal liability to passenger and therefore, contention of the Insurance company that risk of pillion rider was not covered under the policy cannot be accepted.

Title: National Insurance Company Ltd. vs. Raman Mittal & anr.

Page-1069

Motor Vehicle Act, 1988- Section 149- Insurance company contended that the risk was not covered on the date of accident, as the cheque issued by the insured was dishonoured due to insufficiency of funds- Held, that it was for the insurer to inform the insured that the cheque was dishonoured and to cancel the policy - in case an accident takes place in between, the insurer has to satisfy the liability.

Title:Oriental Insurance Company Ltd. vs. Dinesh Sharma and others

Page-849

Motor Vehicle Act, 1988- Section 149- Insurance policy shows that the premium was paid for 3+1 persons- Additional premium was paid for driver and employee- Held, that insurer cannot resist the claim against the occupants of the vehicle, whose risk is covered in terms of the policy.

Title: Oriental Insurance Company Limited vs. Pankaj & others

Page-726

Motor Vehicle Act, 1988- Section 149- MACT fastened the liability to pay the compensation upon the owner and driver due to the fact that driver had a license authorizing him to drive transport vehicle but he was driving heavy goods vehicle and the license was not valid- held, that gross unladen weight of vehicle was more than 7500 kilograms and, therefore, it fell within the definition of heavy goods vehicle- finding recorded by MACT that driver did not possess the valid and effective driving license did not suffer from any infirmity.

Title: Manoj Kumar vs. Sudarshana Kumari and others Page- 1018

Motor Vehicle Act, 1988- Section 149- The deceased was travelling in the vehicle for distribution of meals to the CISF Personnel deployed at Nakroda Barrier Sub Post at Bairra Dam out post- The vehicle met with an accident while returning from the post- Held, that the deceased was in active duty and was travelling with the goods in the vehicle, therefore, he cannot be called to be a gratuitous passenger.

Title:NHPC vs. Sharda Devi & others Page-844

Motor Vehicle Act, 1988- Section 149- The Driver had a valid driving license to drive the LMV- He was driving the Mahindra Pickup, gross weight of which is 2523 kilograms- Held, that the driver had a valid driving licence to drive the vehicle and endorsement of PSV was not required- Further it was not proved that the accident had taken place due to the reason that the driver was competent to drive one kind of vehicle and he was found driving different kind of vehicle- insurance company directed to pay the compensation.

Title:The United India Insurance Company Ltd. vs. Madan Lal & others

Page-868

Motor Vehicle Act, 1988- Section 149**-** The driver was competent to drive the LMV/ HTV- He was driving a truck- Held, that the driver was competent to drive the truck in terms of driving license- further, the Insurance company had not proved that insured had committed willful breach of the insurance policy, therefore, insurer is liable to indemnify the insured.

Title:National Insurance Company Ltd. vs. Ram Lal and others

Page-837

Motor Vehicle Act, 1988- Section 149- the driver was holding a license authorizing him to drive light motor vehicle - however, he was driving a bus at the time of accident having seating capacity of 42- driver was not competent to drive the vehicle - held, that the insurance company is liable to satisfy the award made in respect of third party with the right of recovery the same from the insured.

Title: Oriental Insurance Company Ltd. vs. Sanjay Kumar & Ors.

Page-1275

Motor Vehicle Act, 1988- Section 149- The owner deposed that she had checked the driving license of the driver at the time of employment- license was found fake on inquiry- held, that the owner had taken every possible steps to check the correctness of the driving license- Insurance company had not led any evidence to prove that any breach was committed by the owner- Insurance Company held liable to indemnify the insured.

Title: Oriental Insurance Company vs. Smt. Prabha Devi & others

Page-1134

Motor Vehicle Act, 1988- Section 149- The respondents contended that the vehicle was being driven by "B"- "B" also admitted in the reply filed by him that he was driving the vehicle- Motor Accident Claims Tribunal held that FIR was lodged against one "M" and report was also lodged under Section 173 (2) Cr.P.C.- Held, that Sub Divisional Judicial Magistrate had held that the State had failed to prove that "M" was driving the vehicle, consequently, "M" was acquitted- therefore, the version of the respondents that "B" was driving the vehicle is to be accepted as correct- "B" had a valid driving licence to drive the vehicle, therefore, the insurance company is liable to pay the amount.

Title: Bhawani Singh & another vs. Dhan Dev & others Page-832

Motor Vehicle Act, 1988 - Section 149- Tribunal had found that the owner had employed the driver after taking his driving test and after perusing the driving license- Driving license was also renewed by the Registration and Licensing Authority, Paonta Sahib- Held, that the owner had not committed any willful breach – The owner is not required to

make enquiries and investigation regarding genuineness of the driving license.

Title: Oriental Insurance Company Ltd. vs. Smt. Pratibha Devi and others. Page-705

Motor Vehicle Act, 1988- Section 157- Insurance Policy was valid from 18th December, 1999 to 17th December, 2000- it was issued in the name of the Anupam Hardware Store- vehicle was transferred in the name of the Ashok Kumar on 17.6.2000 subsequent to the date of accident- held, that MACT had fallen in error in holding that Insurance Company was not liable to indemnify the insured.

Title: Ashok Kumar & Anr. vs. Kamla Devi & Ors. Page-1192

Motor Vehicle Act, 1988- Section 166- Appellant contended that amount received by the claimant from the insurer should be deducted from the total compensation awarded to him- held, that the amount received by the claimant from the Insurance Company regarding the damage of his vehicle cannot be deducted from the total amount of compensation.

Title: H.R.T.C. vs. Indus Hospital and another Page-1130

Motor Vehicle Act, 1988- Section 166 – An FIR was lodged against the claimant and challan was presented against him before the Court of competent jurisdiction- Held, that the question of law and fact are involved, therefore, it is open for the claimant to seek appropriate remedy.

Title: Manu Sharma vs. Himachal Roadways Transport Corporation & Others Page-720

Motor Vehicle Act, 1988- Section 166- Claimant had not led any evidence to prove that he was travelling in the offending vehicle as a passenger and that he had met with an accident- therefore, MACT had rightly dismissed his claim.

Title: Karam Chand vs. Kanta Devi & others Page-96

Motor Vehicle Act, 1988- Section 166- Claimant had sustained 30% permanent disability- she was not in a position to perform any domestic work with her left arm and bones of her left arm had also not been properly adjusted and joined- held, that while awarding compensation some guess work has to be done- claimant was a house wife and her income was less than ₹ 3,000/- per month - permanent disability had affected at least 30% of her earning capacity - her age was 31 years and the multiplier of 10 has to be applied, therefore, she is entitled for ₹ 1,12,000/- under the head loss of earning- ₹ 50,000/- under the head “pain and suffering, loss of amenities, inconvenience and mental stress and ₹ 50,000/- under the head “pain and suffering”- ₹ 1,47,934/- under the head “medical expenses" along with interest at the rate of 6% per annum.

Title: Raksha Devi Vs. United India Insurance Company Limited & others Page-1211

Motor Vehicle Act, 1988- Section 166**-** Claimant had wrongly recorded the registration number of offending vehicle- Held that the procedural wrangles & tangles and mystic maybes cannot come in the way of granting compensation to the victims- The claimant was permitted to make correction in the registration number of the vehicle.

Title: United India Insurance Company Ltd. vs. Gurmit Singh & another Page-741

Motor Vehicle Act, 1988- Section 166- Claimant practicing as an Advocate -he was travelling in a vehicle in which sand was being carried for the construction of his house- claimant had not pleaded in the claim petition that he had hired the vehicle for carrying his sand- Insured had also not pleaded that the vehicle was hired by claimant for transporting the sand- held, that the claimant was travelling in the vehicle as a gratuitous passenger- Insurance company is liable to satisfy the award with the right of recovery.

Title: Rajeev Chauhan vs. Hari Chand Bramta & others Page-242

Motor Vehicle Act, 1988-Section 166- Claimant suffered 25% permanent disability- Held, that the claimant had undergone pain and sufferings, his physical frame had been shattered, he is not in a position to do any sport activity- He has lost charm of his life and is deprived of amenities of life -Amount of ₹1,00,000/- was awarded under the head pain and sufferings, ₹50,000/- under the head loss of amenities of life, ₹3,60,000/- under the head loss of income, ₹9,100/- under the head expenditure on medical treatment and ₹2,000/- under the head expenditure on attendant.

Title: Pramod Kumar vs. Himachal Roadways Transport Corporation & another Page-730

Motor Vehicle Act, 1988- Section 166- Claimant sustained permanent disability to the extent of 30% qua his right lower limb- claimant was undergoing training as dental technician- his income taken as ₹ 4,000/- per month- taking the loss of the earning capacity as 30%, the loss of income was taken as ₹ 1,000/- per month- he was aged 23 years at the time of accident- applying the multiplier of 15, compensation of ₹ 1,80,000/- was awarded to the petitioner.

Title: Dinesh Kumar vs. Yashpal and others Page- 282

Motor Vehicle Act, 1988- Section 166- Claimants pleaded that the deceased had hired the vehicle for carrying the vegetables to be sold at Junga and to bring the household goods- vehicle owner had not disputed these facts– The Insurance Company pleaded that the deceased was travelling as a gratuitous passenger- however, no evidence was led to prove this fact- Owner admitted in his evidence that the deceased had hired the vehicle and was travelling as an owner of goods- Held, that the person who had hired the vehicle for transporting the goods cannot be said to be travelling as a gratuitous passenger and Insurance company is bound to satisfy the award.

Title: Naresh Verma vs. The New India Assurance Company Ltd. & others Page – 483

Motor Vehicle Act, 1988- Section 166- Compensation is always higher in case of disablement than in case of death- bodily injury is to be treated as a deprivation, which entitles the victim to claim damages which vary according to the gravity of the injury- some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of disability are involved while determining compensation in an accident case but these have to be considered in an objective manner.

Title: National Insurance Company Ltd. vs. Raman Mittal & anr.
Page-1069

Motor Vehicle Act, 1988- Section 166- Deceased, a bachelor had income of ₹ 4,500/- per month- claim petition filed by his father- held, that the loss of the dependency is to be taken 50% and thus, compensation of ₹ 4,50,000/- along with interest @ 9% per annum awarded.
Title: Sewak Ram vs. Desh Raj and another Page-98

Motor Vehicle Act, 1988- Section 166- Deceased died in the accident- deceased was earning ₹ 16,478/- per month- Tribunal had allowed 30% addition by way of future prospects- he was aged 40 years- Tribunal had applied the multiplier of 14- held, that there is no infirmity in the award passed by Tribunal.
Title: H.R.T.C. vs. Parveen Kumari and others Page-220

Motor Vehicle Act, 1988- Section 166- Deceased died in the motor vehicle accident- no evidence was led to prove that the driver did not have any valid driving license or that the owner had committed any willful breach of terms and conditions of the insurance policy- no evidence was led to prove that the deceased was travelling as a gratuitous passenger- driver did not deny the averments that the deceased was employed as a labourer for loading or unloading luggage- held, that the Insurance Company is liable to indemnify the insured.

Title: Oriental Insurance Company vs. Lekh Raj and Ors. Page-228

Motor Vehicle Act, 1988- Section 166- Deceased was 31 years of age at the time of accident- held, that multiplier of 15 would be applicable and the claimants would be entitled to ₹ 2,600 X 12 X 15 = ₹ 4,68,000/- + 10,000/- under the head of loss of love, affection and cremation charges etc. and ₹ 5,000/- under the head loss of consortium.
Title: Rekha & Ors. Vs. Himachal Pradesh Road Transport Corporation & Anr. Page-1220

Motor Vehicle Act, 1988- Section 166- Deceased was 51 years old- Tribunal had applied multiplier of 10- held, that the multiplier of 11 was to be applied- Tribunal had awarded interest @ 7.5% per annum- respondents were directed to pay interest @ 9% per annum from the date of the filing of the petition till realization.
Title: Manoj Kumar vs. Sudarshana Kumari and others Page-1018

Motor Vehicle Act, 1988- Section 166- Deceased was a Government employee and was getting salary of ₹ 6,078/- per month -MACT determined the loss of dependency as ₹3,300/- per month and applied the multiplier of '16'- held, that the MACT had rightly determined the compensation.

Title: National Insurance Co. Ltd. Vs. Sushma Devi & others Page-1208

Motor Vehicle Act, 1988- Section 166- Deceased was a Manager of Dhauladhar Public Education Society- his salary was ₹17,500/- per month- Claimants are three in number, therefore 1/4th of the amount is to be deducted towards personal expenses of the deceased, and the loss of dependency would be ₹ 13,000 per month- Age of the deceased was 49 years and therefore, the multiplier of 13 would be applicable- the claimants would be entitled for compensation of ₹20,28,000/- towards loss of dependency, ₹ 2,000/- towards funeral expenses, ₹ 5,000/- toward loss of consortium and ₹2,500/- towards loss of estate .

Title: New India Assurance Company Limited vs. Smt. Kiran Sharma & others Page – 600

Motor Vehicle Act, 1988- Section 166- Deceased was drawing ₹18,443/- as salary – Tribunal had taken the income of deceased as ₹10,495/- which was his carry home salary- held, that the Tribunal erred in taking the carry home salary as the income of the deceased- deduction made towards GPF and other subscriptions were part of the income– Taking the salary as ₹18,400/- and after deducting 1/3rd of the salary, loss of dependency is taken as 12,300/-after applying the multiplier 12 the compensation was enhanced to ₹17,71,200/- with interest.

Title:Neelam Nadda and another vs. Narender Singh and others Page- 604

Motor Vehicle Act, 1988- Section166- Insurance Company contended that the accident was a result of contributory negligence- however no such plea was taken by the Insurance Company in its reply- it was stated that accident had taken place due to the negligence of the scooterist – no evidence was led to prove the same-held that the plea of the Insurance Company is not acceptable.

Title: United India Insurance Company Ltd vs. Sh. Sunil Kumar & others Page-1153

Motor Vehicle Act, 1988- Section 166- MACT had awarded compensation and had directed the Insurance Company to pay the same- held, that the award was legal and speaking one and required no interference.

Title: Nanak Chand Vs. Parmod Kumar & Ors. Page-1274

Motor Vehicle Act, 1988- Section 166- MACT had awarded compensation to the extent of ₹41,312/- along with interest at the rate of 9% per annum from the date of filing of the petition till realization- held, that no breach was committed by the insured and the Insurance

Company was rightly held liable to pay the compensation- Appeal dismissed.

Title: United India Insurance Company Ltd. vs. Sh. Tulsi Ram and others Page-1156

Motor Vehicle Act, 1988- Section 166- MACT had dismissed the petition for grant of compensation- Respondents had not denied the allegations regarding the accident specifically and these were deemed to have been admitted- no evidence was led by the respondents to controvert the evidence led by the claimants- held, that the rules of the pleadings are not strictly applicable to the claim petition- claim of the claimants was duly proved and MACT had wrongly dismissed the claim petition.

Title: Kusum Kumari and others Vs. M.D. U.P. Roadways and others Page-1205

Motor Vehicle Act, 1988- Section 166- MACT held that the Insurance Company is liable to satisfy the award- an appeal was preferred by the Insurance company- held, that the Insurance Company had failed to prove on record that there was a breach of terms and conditions of the policy- Insurance policy covered the driver and, therefore, the Insurance Company is liable to pay the amount of compensation.

Title: National Insurance Co. Ltd vs. Hima Devi and others Page-223

Motor Vehicle Act, 1988- Section 166- MACT holding that the owner is liable to satisfy the award to the extent of 70% while insurer was liable to satisfy the award to the extent of 30% on the ground that the registration certificate of the vehicle was transferred in the name of the 'D' and it was not in the name of the owner- held, that the transfer of the vehicle will not absolve the insurance company from its liability- Insurance Company is liable to pay whole of the amount.

Title: Dilbag Singh vs. Rakesh Kumari and others Page-214

Motor Vehicle Act, 1988- Section 166- Mahindra Pick up hit the motorcycle due to which the claimant who was travelling as pillion rider sustained injury- held, that Mahindra Pick up falls within the definition of Light Motor Vehicle as gross unladen weight of the vehicle is below 7500 kilograms - the driver had a valid and effective driving licence to drive the same- no endorsement of PSV was required- it was also not pleaded by Insurer that accident had taken place due to the reason that driver of the vehicle was competent to drive one kind of vehicle and he was driving a different kind of vehicle which caused the accident, therefore, Insurance Company was rightly held liable.

Title: National Insurance Company Limited vs. Parshotam Lal & others

Page- 285

Motor Vehicle Act, 1988- Section 166- Merely because the FIR or the police report was not filed is not sufficient to hold that no accident had taken place-held on facts that father was driving the Scooter and son was sitting as pillion rider, therefore, in these circumstances, it was not

reasonable to expect the son to lodge the FIR against his father.

Title: National Insurance Company Ltd. vs. Raman Mittal & anr.
Page-1069

Motor Vehicle Act, 1988- Section 166- Minor sisters of the deceased are dependent upon him and are entitled for maintenance- Further, held that both the scooterists were rash and negligent and accident was due to their contributory negligence- 50% of the amount was ordered to be deducted on this account.

Title:Samantra Devi & others vs. Sanjeev Kumar & others Page-861

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal awarded compensation to the extent of ₹11, 5000/- with interest @ 7.5% per annum from the date of claim petition till realization- The Tribunal had held that the Driver was liable and the accident was outcome of contributory negligence – held, that the compensation was adequate and cannot be said to be excessive, hence appeal dismissed.

Title: Prakash Chand and Anr. vs. Himachal Pradesh Road Transport Corporation and Ors. Page- 490

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal deducting GPF subscription of ₹4,000/-, HRA of ₹200/-, FTA of ₹75/- and GIS of ₹30/- while assessing the loss of income- Age of the deceased was 51 years and the Motor Accident Claims Tribunal had applied the multiplier of 7- Held that gross salary was taken into consideration and multiplier of 9 was to be applied, therefore, the claimants are entitled to compensation of ₹6000/- X 12 X 9= 6, 48,000/-, ₹2,000/- towards expenses on the obsequies, ₹2,500/- towards loss of estate and ₹5,000/- towards loss of consortium .

Title: Sudesh Kumari & others vs. Ramesh Kumar & others Page – 597

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal had absolved the Insurance Company of its liability on the ground that the insured had committed willful breach of terms and conditions of the policy- Held, that the record showed that the insured had in fact committed breach of terms and conditions of the policy and insurance company was rightly absolved of its liability.

Title: Bhagwan Datt vs. Narender Kumar and another Page-830

Motor Vehicle Act, 1988 –Section 166- Owner-cum-Driver had passed away on the date of accident- Held that, the widow of the deceased had the remedy under the Workmen Compensation Act- No period of limitation has been prescribed for filing the claim petition, therefore, liberty granted to the claimant to withdraw the claim petition with a liberty to seek appropriate remedy- It was further ordered that the time period spent in prosecuting the claim petition and the appeal shall not come in the way of the claimant for seeking appropriate remedy.

Title: Seema Devi d/o Sh. Bhagwan Dass vs.Som Raj and others.
Page-708

Motor Vehicle Act, 1988 – Section 166- The driver had a valid driving licence to drive the light motor vehicle with TPT endorsement-held, that the driver had a valid and effective licence and the Insurance Company is liable to indemnify the insured.

Title: Oriental Insurance Company vs. Smt. Anita Sharma & others Page-701

Motor Vehicle Act, 1988- Section 166- Tribunal assessing the income of the deceased who was a bachelor as ₹ 2,400/- per month and thereafter assessing the loss of the dependency as ₹ 800/- per month- held, that the assessment is contrary to the decision of the Hon'ble Supreme Court of India in ***Sarla Verma vs. Delhi Road Transport Corporation AIR 2009 SC 3104***- high court assessed the income of the deceased as ₹ 3,000/- per month and loss of the dependency as 50% i.e. ₹ 1,500/- per month and awarded compensation of ₹2,70,000/-.

Title: Narbada Devi vs. Kamla Devi and another Page-97

Motor Vehicle Act, 1988- Section 166- The Driver had not produced the driving license, but had only produced the certificate from Drivers Training Institute, Murthal, regarding undergoing training- RW1 deposed that Drivers Training Institute, Murthal, had no authority to issue the driving licence and no Licence was issued by the Institute- Held that in the absence of driving licence, the insurer is not liable to pay the amount- However, insurer is to satisfy the claim with the right of recovery from the owner .

Title: National Insurance Company Ltd. vs. Kanta Devi & others Page-841

Motor Vehicle Act, 1988- Section 166- Tribunal had awarded the compensation of ₹1,69,000/-, along with interest at the rate of 7.5% per annum from the date of filing of the claim petition - held, that the claimants had established that the driver had driven the vehicle in a rash and negligent manner and had hit the scooter on which the claimant was travelling as a pillion rider- amount awarded in favour of the claimant was inadequate but he had not questioned the award- hence award was upheld reluctantly.

Title: Pr.Chief Conservator of Forests and Anr. Vs. Banita Kumari and another Page-1138

Motor Vehicle Act, 1988- Section 166- Tribunal holding that the claimant was earning ₹ 6,000/- per month, it applied the multiplier of 12 and awarded a sum of ₹8,64,000/- under the head "loss of income" and ₹1,23,324.70 under the head "medical expenses', but the Tribunal had not awarded any compensation under the heads of "pain and suffering" and "loss of amenities of life"- held, that the Tribunal is bound to award the compensation under the heads of "pain and suffering" and "loss of amenities of life"- hence, ₹ 1 lakh awarded under the heads of "pain and suffering" and ₹1,00,000/- awarded under the head of ' loss of amenities of life'.

Title: Hamid Mohd. Vs. Rishi Pal & others Page-93

Motor Vehicle Act, 1988- Section 166- Tribunal holding that claimants had failed to prove that the vehicle was being driven in a rash and negligent manner- held, that there was sufficient evidence on record to prove that vehicle was being driven in a rash and negligent manner – further held that evidence is not to be appreciated as in a criminal case- acquittal in criminal case cannot have any effect on the proceedings before the MACT – when the respondents had admitted that the deceased fell down while boarding Trala- the principle of the *res-ipsa loquitur* would be applicable and the burden would shift upon the respondents to prove that there was no rashness or negligence.

Title: Biasan Devi and others vs. Kartar Chand & Ors. Page-87

Motor Vehicle Act, 1988- Section 168- Tribunal had held that the claimant was entitled to compensation of ₹ 6,63,600/- but awarded compensation to the extent of ₹ 5,00,000/- as compensation, which was the amount claimed in the petition- held, that there is no restriction in granting compensation in excess of the compensation sought by the claimant.

Title: United India Insurance Company Limited vs. Smt. Samitra Devi & others Page-1144

Motor Vehicle Act, 1988- Section 168- Tribunal had not given the details as to how the compensation of ₹ 3,65,000/- was awarded by it- findings recorded by the Tribunal are not based upon the correct appreciation of facts- however, the parties settled the matter at ₹ 2,50,000/- along with interest at the rate of 7% per annum from the date of filing of the claim petition till deposit.

Title: National Insurance Company Ltd. vs. Neelam and others Page-1132

Motor Vehicle Act, 1988- Section 171 - The Tribunal had awarded interest @ 9% per annum from the date of the award- held, that in terms of Section 171,the interest is to be awarded from the date of claim petition and not from the date of award.

Title: Neelam Kaushal & others vs. Ashok Kumar & others Page-723

Motor Vehicle Act, 1988- Section 171- The Tribunal had not awarded the interest on compensation amount- held, that as per the mandate of Section 171, claimants are entitled to the interest on the compensation amount from the date of claim petition- hence, interest awarded at the rate of 9% per annum from the date of filing of the petition till realization.

Title: Kumari Diksha (minor) and others Vs. Himachal Pradesh Road Transport Corporation Page-1190

Motor Vehicle Act, 1988- Section 170- Claim petition was filed by the son against his father who was driving the scooter- held, that merely because petition was filed by the son cannot lead to an inference that the petition was collusive, when the Insurance Company had itself paid own damage to the owner thereby admitting that accident had taken place.

Title: National Insurance Company Ltd. vs. Raman Mittal & anr. Page-1069

Motor Vehicle Act, 1988- Section 173- the insurer cannot question the award on the ground of adequacy of compensation- however, on facts it was held that the awarded compensation was just an adequate - Appeal dismissed.

Title: United India Insurance Company Ltd. vs. Jai Krishan and others Page-1141

Motor Vehicle Act, 1988- Sections 147 and 149- there is no requirement of getting the PSV endorsement in case of LMV, and the insurance company is liable to indemnify the insured- Appeal dismissed.

Title: Trishal Devi & others vs. Jai Kumar & others Page-101

Motor Vehicle Act, 1988- Sections 149 and 166- Insurance Company pleading that Tempo Trax was not a passenger vehicle but it was a private vehicle and it did not cover the risk to the passengers- the claimants pleaded that they were travelling in the vehicle as passengers - route permit showed that the vehicle was not a passenger vehicle and it had no permission to carry the passengers- Insurance policy also discloses that vehicle was meant for private use and not for carrying the passengers-held, that the insured had committed breach of terms and conditions of the policy and the insurance company is not liable to pay the amount.

Title: Oriental Insurance Company vs. Veena Devi & Ors. Page-231

'N'

N.D.P.S. Act, 1985- Link evidence- there was discrepancy in the weight of the sample as found at the spot and weight of the same as analyzed in the laboratory- held, that when the seal impressions were tallied and were not found broken, minor discrepancies in the weight of the sample are not sufficient to make the prosecution case suspect.

Title: State of H.P. Vs.Gulsher Mohd. Page-190

N.D.P.S. Act, 1985- Section 20- Accused stated to be found in possession of 1 kg. 200 grams of charas- MHC stated that three sealed parcels were deposited with him, whereas, he had entered two samples in Malkhana register- there are contradictions in the testimonies of the prosecution witnesses regarding the manner in which ruqqa was taken to the police station and the case file was brought to the spot- CFSL had returned the contraband on the ground that NCB form was not in prescribed proforma- prosecution filled a new proforma and sent it to CFSL, Chandigarh- however, new proforma was not placed on record- held, that in view of the contradictions and the failure to establish the link evidence, accused is entitled to acquittal.

Title:State of Himachal Pradesh vs. Nanak Chand Page-48

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 500 grams of charas- however, he was acquitted by Trial Court on the ground that independent witnesses were not examined and one witness had turned hostile- held, that the testimonies of the police officials

corroborated each other and there were no contradictions in their testimonies and in these circumstances, non-examination of independent witness was not material- when the hostile witness had admitted his signature on the seizure memo, his testimony could not be used for doubting the prosecution version- hence, the acquittal by Trial Court was unjustified- accused convicted.
Title: State of H.P. Vs.Gulsher Mohd. Page-190

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.8 k.g of charas at 4:30 P.M near Kali Mata Mandir- one independent witness associated by police did not support the prosecution case- police officials admitted that the place, where accused was apprehended was a busy place- still no other independent witness was associated- held, that the statement given by the police officials can be relied upon but when one independent witness had not supported prosecution case and other was not associated, the search and seizure become doubtful and the reliance cannot be placed upon the prosecution version.
Title: Hari Singh vs. State of H.P. Page-10

NDPS Act, 1985- Section 20- Accused was found in possession of 2.350 Kgs. of charas- case of the prosecution is that the police party was present at the spot in connection with investigation of a theft case, when the accused was apprehended at 8 A.M.- PW-1 deposed that the accused in theft case was apprehended at 4:00A.M and was sent to police Station before 7:00 A.M- held, that when the accused in a theft case was apprehended at 4:00 A.M and was sent to police station at 7:00 A.M- there was no justification for the police to remain at the spot and this casts a doubt in the genesis of the prosecution version- further, there are contradictions in the testimonies of the police officials- police had only associated the victim in the theft case- other independent witnesses were available but were not associated- the date was over-written- these circumstances, make the prosecution case doubtful.
Title: State of Himachal Pradesh vs. Mehboob Khan Page- 264

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.500 grams of charas- there were contradictions in the testimonies of eye-witnesses regarding the place of search- no independent witness was associated, although, there were many houses around the place of incident- there were contradictions regarding the of weight and scales- held, that in these circumstances, prosecution case was not reliable and acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Ramesh Chand Page-1311

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 12.5 kgs of charas- prosecution not examining the driver of the vehicle who took the police party to the spot and one other witness – the testimonies of the police officials are contradicting each other- no independent witness was associated- non-examination of the independent witness and the other prosecution witness would be fatal to the prosecution.
Title: State vs. Babu Ram Page-72

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 4 kgs of charas- there were contradictions in the testimonies of the prosecution witnesses regarding the manner of arrival at the spot- independent witness had turned hostile- other police officials who accompanied the police party were not examined- there were contradictions regarding the manner of arrival- the version of the police party that motorcycle was seen from the distance was contradicted by the site plan- held, that in these circumstances, accused were entitled to acquittal.

Title: Joban Dass vs. State of Himachal Pradesh Page- 387

NDPS Act, 1985 - Section 20 –Accused was found in possession of bag wrapped with his waist under his garments containing 1.250 Kgs. of Charas- Held, that the police had not complied with the mandatory provisions of Section 50 of the Narcotic Drug and Psychotropic Substances Act, 1985, therefore, the accused is entitled to be acquitted.

Title: State of Himachal Pradesh vs. Brijesh Tiwari Page-755

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 ₹ 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-933

NDPS Act, 1985- Section 20- Accused were found riding a motorcycle- On search of motorcycle one bag containing 3 Kgs. and other bag containing 2 Kgs. of Charas were recovered- Held, that the Investigating Officer had failed to collect the documents revealing the ownership of motorcycle, which shows that the accused had never acquired the possession of motorcycle- Investigation was tainted and the accused were falsely implicated – Further, as per the prosecution case the police party was checking the vehicles, however no vehicle was associated with the recovery-Accused acquitted.

Title: State of H.P. vs. Lal Chand & Anr. Page- 632

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 or discrepancy in the testimony of the official witnesses does 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-937

NDPS Act, 1985- Section 20- As per prosecution case, the accused was found in possession of 4.5 kgs. of poppy husk- PW-1, an independent witness, had not supported the prosecution version- another independent witness was not examined- The recovery memo could be

proved only by the testimonies of marginal witnesses- Recovery memo was not proved in accordance with law- Further, the recovery was effected from Dhaba where third person had access, as such conscious and exclusive possession of the accused was not proved- Original seal was not produced in the Court for comparison- held, in these circumstances the prosecution case is not proved beyond reasonable doubt- Accused acquitted.

Title: State of Himachal Pradesh vs. Kurban Khan Son of Shri Lal Khan Page-892

N.D.P.S. Act, 1985- Section 20 - Link evidence- Parcels were found in torn condition which can lead to the only inference that these were tempered with- further, column Nos. 9 to 12 of NCB form were left blank- therefore, link evidence had not been proved and the accused is entitled to acquittal.

Title: State of H.P. vs. Paras Ram Page-52

N.D.P.S. Act, 1985- Section 20- Link evidence- PW-5 stating that four sample seals of seal impression T were prepared, whereas, PW-1 and PW-3 stating that only one such sample was prepared- when the case property was opened in the Court, it was sealed with two impressions of seal 'K' and three impressions of seal T - report of CTL did not record that seal was received or it was tallied- in these circumstances, link evidence has not been proved and the acquittal of the accused is justified.

Title: State vs. Babu Ram Page-72

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 a distance of 500 meters from 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-948

N.D.P.S. Act, 1985- Section 20- Search of vehicle being driven by the accused led to recovery of one bag containing 10 Kg. Charas and other bag containing 9 Kgs. Charas- One person ran away from the vehicle prior to its search- Held, that the police had not made any efforts to associate independent witness - Testimonies of the police officials regarding topography of the area was falsified by the photographs - Testimonies of the police officials that they tried to locate the independent witnesses but could not succeed was not acceptable- therefore, the accused acquitted.

Title: Shyam Singh vs. State of H.P. Page-650

N.D.P.S. Act, 1985- Section 20- Trial Court had awarded sentence of rigorous imprisonment of four years and fine of ₹ 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 ₹ 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 ₹ 1 lac.

Title: State of H.P. vs. Ganesh Kumar Page-998

N.D.P.S. Act, 1985- Section 20 (C) - Accused saw the police party and tried to run away – accused was apprehended and was found in possession of 3 kgs of charas- testimonies of the police officials corroborating each other- there was no independent witness at the spot- therefore, prosecution case cannot be doubted due to non-examination of the independent witness- testimonies of the police official cannot be doubted on the basis that they are police officials-conviction upheld.

Title: Govind Singh vs. State of H.P. Page-205

N.D.P.S. Act, 1985 - Section 29- As per prosecution, accused 'M' was found with 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 L was justified.

Title: Mukesh Kumar vs. State of H.P. Page-933

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 seat adjacent to accused 'S'- held, that there was no evidence to connect accused 'R' with 'S'- hence, acquittal of 'R' was justified.

Title: Satpal vs. State of H.P. Page-937

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

NDPS Act, 1985- Section 50- the contraband was recovered from the bag and not from the person of the accused- held that in such case Section 50 was not applicable.

Title: State of Himachal Pradesh vs. Mehboob Khan Page- 264

N.D.P.S. Act, 1985- Section 57- PW-10 stated that the case property was handed over to PW-9- he further admitted that it had come in investigation that case property was produced before PW-6 who denied the same- case property was not re-sealed prior to its deposit with MHC- there is contradiction regarding the date of the deposit of the case property in the laboratory- held, that in these circumstances, the possibility of tampering with the case property could not be ruled out.

Title: Joban Dass vs. State of Himachal Pradesh Page- 387

N.D.P.S. Act, 1985- Sections 18 and 52(3) - Accused was found to be in possession of 2 kgs. 500 grams of opium- held, that the accused and the case property were not immediately taken to the Officer in charge of the nearest police station which is violation of the mandatory provision of Section 52 and the accused is entitled to be acquitted.
Title: State of H.P. vs. Paras Ram Page-52

NDPS Act, 1985- Sections 20 and 22**-** Accused was driving the vehicle- On checking the vehicle, 9 strips of Nitrosun and 800 Gms. of charas were recovered- Held, that the NCB form regarding tablet was not filled at the spot which shows that the prosecution version regarding completion of investigation at the spot was doubtful- The seal impression "I" used for sealing the parcel; as well as the parcel containing bulk quantity was previously used by the Investigating Officer which shows S.H.O. had not re-sealed the sample and bulk parcel- Further, the entire proceedings relating to search were carried out at the place of occurrence but the personal search memo was witnessed by two independent witnesses who were not the members of raiding party- This shows that the memo of personal search was not prepared on the spot, but was prepared somewhere else- therefore, in these circumstances, the prosecution version becomes doubtful-consequently, the accused acquitted.
Title: State of H.P. vs. Vikram Kuthiala Page- 637

N.D.P.S. Act, 1985-Sections 42 and 50- Accused were travelling in the Maruti van, which was found to be containing 3.5 k.g of charas- accused were acquitted by trial Court due to non-compliance of Sections 42 and 50 of N.D.P.S. Act- held, that the charas was recovered from the vehicle in a chance recovery and not by conducting personal search of the accused, therefore, provision of Sections 42 and 50 are not applicable.
Title: State of H.P. vs. Puran Chand & another Page-1039

'P'

Precedent- *per incuriam-* the judgment of Karnataka High Court in ***Ravi vs. The Karnataka University, (2006) 6 Kar.L.J. 192*** - holding that judgment of Hon'ble Supreme Court of India in ***Dalpat Abasaheb Solunke and others vs. Dr. B.S. Mahajan and others (1990) 1 SCC 305*** is per incuriam is not correct- the binding effect of the decision of the Supreme Court does not depend upon whether the particular argument was considered or not but upon the fact whether the point under reference was actually in issue or not- it is not permissible to say that full facts had not been presented before the Supreme Court of India to dilute the authority of precedent.
Title: Mahalakshmi Oxyplants Pvt. Ltd. Vs. State of H.P. & Anr.
Page-1260

Procedure- Non-mentioning of a provision of law does not invalidate an order.
Title: Kesari Devi vs. Karam Singh Chandel Page-256

Protection of Women from Domestic Violence Act, 2005- Respondent starting beating his wife after the death of his mother- he was working in a Atal Savasthay Seva – respondent had no source of income- the income of the petitioner is about ₹ 20,000- 25,000/- per month- held that the respondent husband is bound to maintain his wife- in these circumstance, granting of ₹ 3,000/- per month as maintenance from the date of the filing of the petition cannot be said to be excessive.
Title: Hitesh Tandon vs. Manmohini Page-38

Protection of Women from Domestic Violence Act, 2005- Section 12- Husband has a legal duty to maintain his wife and the children- he cannot shun from this duty-maintenance has to be awarded from the date of the application and it can be awarded from the date of the order only in exceptional cases where there is fault of the applicant.
Title: Kesari Devi vs. Karam Singh Chandel Page- 256

Protection of Women from Domestic Violence Act, 2005- Section 12- The marriage between the parties was solemnized on 28.05.2006- the child was born on 4.6.2007- the husband casted aspersions on the character of the wife-he administered beating to her and maltreated her for not bringing dowry- Held, that the husband was working as tailor, he was also an agriculturist- His income could not be held to be less than ₹ 5,000/- per month- The wife had to leave her matrimonial home due to maltreatment by her husband- The matter was also reported to the Police and she had to go to the Court for custody of her son, therefore, under these circumstances the maintenance of ₹1500/- per month and compensation of ₹ 5,000/- cannot be said to be excessive.
Title: Balmohan vs. Kunta Devi Page- 271

Protection of Women from Domestic Violence Act, 2005- Sections 2(s), 17, 18, 19 and 20 - Applicant filed an application under Protection of Women from Domestic Violence Act with the allegations that she and her minor child were staying in the matrimonial home which was in her possession prior to the death of her husband- family members of the deceased/husband started harassing the applicant after the death of her husband- Learned Sessions Judge allowed the appeal and held that the applicant is entitled to a shared accommodation consisting of one room, one kitchen and one bath room- held, that a woman cannot lay claim to every household where she lives or has lived at any stage in a domestic relationship and she is entitled to claim a right of residence in a house belonging to or taken on rent by the husband or the house, which belongs to the joint family of which the husband is a member- in case house is self-acquired property of her father-in-law then it cannot be called as shared household where she has a right of residence- however, family members of her deceased husband are liable to maintain the applicant.
Title: Gaji Ram & ors. vs. Smt. Badalu Page- 1109

'S'

Service Law- Appointment in the public institutions can be made by way of advertisement of vacancy as per Employment Exchange (Compulsory

Notification of Vacancies) Act, 1959 by way of appointment by recruitment committee and as per recruitment and promotion rule- since there was no evidence that the appointment of the petitioner was made in accordance with any of the above procedures- therefore, petitioners are not entitled for regularization.

Title: Jai Singh vs.H.P. State and others Page-41

Service Law- Appointment in the public institutions can be made by way of advertisement of vacancy as per Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 by way of appointment by recruitment committee and as per recruitment and promotion rule- since there was no evidence that the appointment of the petitioner was made in accordance with any of the above procedures- therefore, petitioners are not entitled for regularization.

Title: Jeet Ram Sharma vs. H.P. State and others Page-45

Service Law- Selection- Institute had issued an advertisement for the appointment of the posts of the teacher, but no posts were filled up- subsequently, teachers were appointed from the person who had applied earlier- held, that the life-span of an advertisement had come to an end and the posts could not be filled up without a proper fresh advertisement- appointments made by the Institute were back door appointments.

Title: Ramanujam Royal College of Education vs. National Council for Teacher Education and others Page- 343

Specific Relief Act, 1963- Section 34- Plaintiff claimed to be the daughter of one B -the property of B was mutated in favour of defendants on the ground that their predecessor-in-interest was real brother of B- held, that the version of the plaintiff that she is the daughter of B has been duly corroborated by Voter Identity Card which carried with it a presumption of correctness- hence, she was entitled to inherit the estate of her father- mutation attested in favour of the defendants is wrong.

Title: Thelu vs. Lakhanu & ors. Page-1105

Specific Relief Act, 1963- Section 34-Plaintiff filed a Civil Suit for declaration that defendant No. 1 was not the daughter of P- mutation was wrong and illegal- held, that name of the defendant No.1 was recorded as the daughter in the Parivar register – no evidence was led to show that the false entry was made in the Parivar register- therefore, the version of the plaintiff that defendant No. 1 is not the daughter of one P was not proved.

Title: Mahajan vs. Basanti and others Page-1065

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that defendant had instituted a suit for foreclosure, which was compromised- plaintiff had orally relinquished the title and possession of some land in favour of the defendants and the defendants had relinquished the title of the suit land in favour of the plaintiff- plaintiff was in possession of the suit land- one of the plaintiffs filed an

application for confirmation of the possession, which was allowed -the defendants resiled from the relinquishment and threatened to dispossess the plaintiffs- defendants denied the claim of the plaintiffs- held, that the plaintiffs had failed to prove that any demarcation was conducted on the spot- relinquishment deed was also not proved and the tatima was prepared without any demarcation, therefore, the version of the plaintiff could not be relied upon- Appeal dismissed.

Title: Thakur Dass & ors. vs. Roshan Lal & ors. Page-1013

Specific Relief Act, 1963- Section 34- Plaintiff sought a declaration that her mother 'L' was the owner of the property - plaintiff and her sister being legal heirs are entitled to succeed to the property- defendants asked the plaintiff to vacate the property on the basis of revenue record- defendants contended that mother of the plaintiff had transferred the property in favour of the defendants by executing a Tamliqnama and affidavit dated 31st January, 1966-mutation was also attested in favour of the defendants on 16.3.1971- Trial Court had held that documents had been duly proved that they were more than 30 years of age and a presumption could be drawn regarding their due execution- held, that plaintiff had failed to prove that documents had not been properly executed- appeal dismissed.

Title: Giano Devi Vs. Bihari Lal & others Page-1199

Specific Relief Act, 1963- Section 34- Plaintiff was allotted nautor land – he deposited ₹ 16,350/- as Nazarana- plaintiff broke up the land and made it cultivable- however, the allotment was cancelled by Financial Commissioner- Trial Court found that the allotment was made during the ban period- suit was dismissed but state was directed to refund the Nazarana- Appellate Court dismissed the appeal but set aside the order refunding Nazrana- held, that the payment of Nazarana was a consideration for the grant and when the grant was cancelled, the plaintiff is entitled for the refund of the amount- therefore, appeal partly accepted and defendant directed to refund the Nazarana along with interest.

Title: Prem Singh & Anr. vs. State of H.P. Page-183

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-961

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit for seeking permanent prohibitory injunction restraining the defendants from raising construction over the suit land with the allegations that there was a path on the same and defendants had no right to stop the path or to raise construction thereon – Held that the suit land was recorded as Abadi Deh in the Revenue record, therefore, all the villagers had a right over the suit land- Defendants had a right so possess the suit land as an Abadi Deh- The raising of construction by the defendants was not proved to be over and above the area in excess of their share in the Abadi Deh- The plaintiff had failed to prove the exact location where the actual or threatened invasion of their right was committed- Thus, the plaintiff had failed to prove his case.

Title: Mohd. Rashid vs. Gulsher & Others Page- 479

'T'

Transfer of Property Act, 1882- Sections 3 and 41- Suit land was earlier owned by defendants No. 1 & 2 and others- defendant No. 2 and others sold the suit land to predecessor in interest of the plaintiffs vide sale deed dated 20.3.1967- mutation No. 644 was attested- however, on the death of the predecessor-in-interest of the plaintiff mutation of inheritance was not sanctioned and the suit land was recorded in the ownership and possession of the defendant No. 1 and defendant No. 2 filed a Civil Suit against the defendant No. 1 in which the suit land was sold in the execution to defendant No. 3- held that when defendant No.1 and others had sold the land belonging to them to the predecessor-in-interest of the plaintiff by way of registered sale deed, defendant No. 3 cannot claim to be one of the purchasers for consideration as he would have a notice of the sale deed.

Title: Mohar Singh and othersvs.Krishan Chand and Ors. Page-127

'W'

Workmen Compensation Act, 1923 - Section 22- Insurance Company is liable to pay the amount as per the schedule appended to the Act with interest- Remaining amount including funeral charges is to be paid by the owner.

Title: Oriental Insurance Company Ltd. vs. Smt. Biasa Devi and others Page-709

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State of Haryana and others vs. Kashmir Singh and another (2010) 13 SCC 306

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'W'

Woodland Society, Andretta vs. Smt.Pinki Devi and others, Latest HLJ 2010 (HP) 1404

'Y'

Yogesh Kumar & ors Vs. Government of NCT Delhi & ors, AIR 2003 SC 1241

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

Bhisham Bahadur. ...Appellant.

Vs.

State of Himachal Pradesh. ...Respondent.

Criminal Appeal No. 400/2010
Reserved on : 27.8.2014
Decided on: 1.9. 2014

Indian Penal Code, 1860- Section 302- Accused having an argument with the deceased over accompanying him- sister of the deceased went to the Ram Mandir and when she returned, she saw the accused running towards Ram Mandir- when she went to the house, her sister was found dead- a Darat smeared with blood was also lying on the spot- held, that case is based upon the circumstantial evidence- motive that the accused asked his wife to accompany him but she refused, is a weak motive to provoke a person to commit murder –there is contradiction regarding the time at which the sister of the deceased told another witness about the incident- prosecution witness had admitted that the police had applied blood on the T-shirt of the accused- witness of the recovery had not supported the prosecution case- therefore, in these circumstances, accused could not be held liable for the commission of murder.

(Para- 17 to 21)

For the Appellant: Mr. Naveen K. Bhardwaj, Advocate
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 12.7.2010 rendered by the Additional Sessions Judge, Fast Track Court, Kullu in Sessions Trial No. 3 of 2010 whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under sections 302 of the Indian Penal Code, has been convicted and sentenced to undergo life imprisonment and to pay a fine of Rs. 20,000/- and in default of payment of fine, he was further directed to undergo simple imprisonment for a period of one year for the commission of offence under section 302 of the Indian Penal Code.

2. Case of the prosecution, in a nutshell, is that PW-1 Sita Thakur was residing in the house of her parents at Manikaran. Geeta Had come to the house of her parents one day prior to Rakshabandhan in the year 2009. Accused came to Manikaran on 12.8.2009 and stayed with his wife in the house of her parents. Mahinder Kaur had gone to

Punjab about 3-4 days prior to the incident. Sita, her father PW-3 Suresh Kumar, deceased Gita and accused were present at the house on the date of the incident. Accused asked his wife to accompany him on 13.8.2009 to Anni. She declined and asked the accused to wait for her mother. Accused got infuriated and started abusing his wife. Sita went to Ram Mandir at about 2-2:30 p.m. for answering the call of nature. When she came back after 3-4 minutes, she saw accused running towards Ram Mandir. Thereafter, accused ran towards Gurdwara. Sita came to her house and found that the door was closed. However, it was not bolted. She went inside and found that Gita was dead and was lying in a pool of blood. One darat Ext. P-1 was lying on the spot. It was stained with blood. The spectacles of the deceased Ext. P-2 were also lying on the spot. There was an injury on the neck of the accused. PW-1 Sita went to the house of her sister, PW-5 Deepa. She narrated the incident to her. PW-5 Deepa came on the spot. Sita went to call her father from Brahm Ganga. The matter was reported to the Police. Statement of PW-1 Sita was recorded Ext. PW-1/A by PW-11 Dulo Ram. It was sent to Police Station for registration of the FIR on the basis of which FIR Ext. PW-10/A was registered. The police invested the case and after investigation of the case, Challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as sixteen witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Naveen K. Bhardwaj has vehemently argued that the prosecution has miserably failed to prove its case against the accused.

5. Mr. Ramesh Thakur, learned Assistant Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Sita Devi has deposed that her sister Gita had come from Anni on 5.8.2009 to celebrate Raksha Bandhan. She was residing with them. Accused came on 13.8.2009. He also stayed in the house of her parents. Her mother had gone to Punjab to the house of her sister. Incident took place on 13.8.2009. She, accused and her sister Gita were present in the house of her parents. Her brother and sisters had gone to play. Her father had gone to Brahm Ganga. Deepa was in her house. Accused asked her sister Gita to accompany him to Anni at 2:30 p.m. She replied that she would leave the home on the arrival of her mother. She went to toilet. It was at some distance. She returned after 3-4 minutes. She found that dead body of her sister was lying on mattresses. The accused was running towards Gurdwara. His clothes were stained with blood. Her sister was bleeding. Blood had spilled over the floor. Blood stained darat was lying on the spot. Spectacles of her sister were also lying on the spot. She tried to wake up her sister, but she was dead.

Her body was cold and she was not moving. She noticed injury on her neck. According to her, injury was caused with darat. She went to the house of Deepa. She told her that brother-in-law has killed her sister. Thereafter, she went to Brahm Ganga to call her father. Her sister brought the Police to the spot. When the accused and deceased were quarrelling, she left to answer the call of nature. Nobody was present on the spot nor any other person came on the spot. In her cross-examination, she has deposed that her sister Deepa was residing in a separate house at a distance of 5-10 mtrs. from the house of her parents. The toilet where she had gone was located at a distance of 10 meters from the house of her parents. She had not talked to any person while going to toilet and coming back from the toilet. She came back within 2-3 minutes. Police post is near to her house. She has also admitted that many people visit Manikaran for going to Ram Mandir and Gurdwara. Brahm Ganga was located at a distance of 5-10 minutes walk from her house. She returned to her house along with her father after about five minutes. Her sister had already left prior to their arrival. When they returned, the Police had already arrived at the spot. There were 3-4 police officials. According to her, when Ext. P-1 to Ext. P-3 were recovered by the Police, accused was not present on the spot. Dead body of her sister was brought from the room to the kitchen by her father. Volunteered that he was thinking that she was alive and he wanted to take her to the doctor. She had admitted in her cross-examination that the Police had applied the blood on the T-shirt of the accused with the help of brush.

8. PW-2 Tara Chand has deposed that dead body of the wife of accused and daughter of Suresh Kumar was lying in the house. There was a mark of injury on the neck. The house comprised of a kitchen and one room. The police took photographs. The police recovered Darat, mattresses and spectacles from the spot. He carried dead body towards other side of the river. Sketch of darat was also prepared.

9. PW-3 Suresh Kumar is the father of the deceased Gita. His daughter Sita came to him at about 2 p.m. and told that accused had murdered his wife. When he reached the house, his daughter was lying on the mattresses in a pool of blood. There was cut mark on her neck. He tried to pick up her and take her to doctor. However, her neck was severed partially and she was dead. He kept the dead body in the kitchen. Blood spilled over the television and temple. Police arrived on the spot and took the photographs. In his cross-examination, he has deposed that he dragged the body out of the room. The mattress was lying inside the room and it was not brought to the kitchen. PW-4 Hukum Ram has deposed that the blood stained T-shirt of the accused was taken into possession on 13.8.2009 at about 11:15 p.m vide seizure memo Ext. PW2/G.

10. PW-5 Deepa is the sister of the deceased. She was sitting in her room on 13.8.2009 at about 3 p.m. Her younger sister Sita came to her and told that accused has killed Gita with darat. She went to Brahm Ganga to narrate this incident to her father. She went to the house of her

parents and found that the dead body of her sister stained with blood was lying on the mattress. One blood stained darat was lying near the dead body. Police seized darat, spectacles and mattresses.

11. Statements of PW-6 Paine Ram, PW-7 Ram Krishan, PW-8 Uttam Singh, PW-9 Ved Ram, PW-10 Prem Dass, PW-11 Dulo Ram and PW-12 Sanjeev Chauhan are formal in nature.

12. PW-13 Dr. Palzore has conducted the post mortem. He issued post mortem report Ext. PW13/A. He noticed following injures on the dead body.

> "A large incised wound involving neck muscles, vessels, trachea esophagus and also cervical vertebrae;
>
> The wound was anti-mortem in nature;
>
> The rigor mortis was present on all the limbs.
>
> A large incised wound was piercing beyond cervical vertebrae about 8 cm in size in front of neck. A overlapping another incised wound of about 7 cm in size around the neck.
>
> A linear incised wound of about 5-6 cm. incise just above the left ear."

According to him, the deceased died of severe injury in front of neck involving major vessels leading to excessive bleeding, shock and death. According to him, the injuries noticed by them on the dead body could have been caused with the help of darat, Ext. P-1.

13. PW-14 Santosh Kumar has deposed that accused was engaged as a servant in his orchard. His wife was residing with him. He was paying them a sum of Rs. 4000/- per month. Gita had left her house on 4.8.2009 to celebrate Rakhi. The accused left his house on 11.8.2009.

14. Statement of PW-15 Narpat is formal in nature.

15. PW-16 Pawan Kumar has deposed that he reached the spot on 13.8.2009. He conducted the spot inspection. He prepared site plan Ext. PW16/A and sketch Ext. PW2/B. Recoveries of T-shirt etc. were effected. In his cross-examination he has admitted that he has not taken the call details of the accused and deceased in possession.

16. DW-1 Dr. Ramesh Chander has deposed that he conducted post mortem of deceased Gita on 14.8.2009. The probable duration between death and post mortem examination was more than 6 hours and less than 24 hours, in his opinion. The death was instantaneous. The body could become cold within 2-3 hours after the death.

17. According to PW-1 Sita Devi, accused had asked her sister to accompany him to Anni at 2.30 P.M. She replied that she would leave the home on the arrival of mother. Thereafter a quarrel started. She went to toilet. She came back after 3-4 minutes. She found that dead body of her sister was lying on the mattress and the accused was running towards Gurdwara. A 'darat' was lying on the spot smeared with blood. Thereafter, she went to the house of PW-5 Deepa. She told that

her brother-in-law has killed her sister. She went to Braham Ganga to call her father. PW-3 Suresh Kumar, father of deceased has deposed that his daughter Sita came to him at about 2.00 P.M. and told that accused has murdered his wife. PW-5 Deepa has deposed that she was sitting in her room on 13.8.2009 at about 3.00 P.M. PW-1 Sita came to her and told that accused has killed Gita with darat. She went to Braham Ganga to narrate the incident to her father. Thus, according to PW-1 Sita, the incident has taken place at 2.30 P.M. However, PW-2 Suresh Kumar has deposed that he was informed about the incident at 2.00 P.M. PW-5 Deepa has deposed that PW-1 Sita had come to her at about 3.00 P.M. The timing is significant in this case since according to PW-1 Sita, accused asked deceased to accompany him to Anni at 2.30 P.M. She went to toilet and came back after 3-4 minutes. The toilet was at a distance of 10 meters and the house of PW-5 Deepa was at a distance of 5-10 meters from the house of her parents. If the incident has taken place at 2.30 P.M., there was no occasion for PW-1 Sita Devi to go to Braham Ganta to narrate the incident to PW-3 Suresh Kumar at 2.00 P.M. According to PW-1 Sita, Braham Ganga is located at a distance of 5-10 minutes walk from their house. According to PW-5 Deepa, Sita came to her at 3.00 P.M.

18. The dead body was lying in the room. The house comprised of one room and one kitchen. PW-3 Suresh Kumar, in his cross-examination, has testified that dead body was dragged out of the room. Why he has dragged the body from room to kitchen has not been explained satisfactorily. The only explanation PW-1 Sita has given that PW-3 Suresh Kumar was thinking that she might be alive and he wanted to take her to the doctor. In her examination-in-chief, PW-1 Sita has deposed that she tried to wake up her sister, but she was dead. Her body was cold and she was not moving.

19. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that T-Shirt was recovered and the blood was found on the same. PW-1 Sita has testified that the police has applied the blood on the T-shirt of the accused with the help of brush from the floor. It renders the recovery of blood stained 'T' shirt highly doubtful. Rather the manner in which the blood has been planted on the T-shirt of the accused render the entire case of the prosecution untruthful.

20. The case is based on circumstantial evidence. There is no eye witness in this case. The motive attributed to the accused is that he asked his wife to accompany him, but she refused. Trivial issue that wife has refused to accompany the accused could not lead to murder, that too, in the afternoon when the sister was also present at the house with the deceased. The house of PW-5 Deepa is only at a distance of 5-10 meters. There were other houses near the police station and the police station was also not very far from the spot of incident. Rather PW-2 Tara Chand, in his cross-examination, has admitted that many houses surrounded their houses and the house of Deepa and the house of her father were located in the same colony and these were adjacent to each other.

21. Recovery of darat is also doubtful in view of the fact that PW-2 Tara Chand was declared hostile and was cross-examined by the learned Public Prosecutor. He has denied that the police seized darat, spectacles, mattresses and the cloth having blood in his presence and these were taken into possession vide separate memos. He has denied portions A to A, B to B, C to C and D to D of his previous statement mark 'A' made before the police. He has also denied that the police has seized T-shirt worn by the accused, which was stained with blood. Rather, according to PW-2 Tara Chand, Gita Devi was not at home on 8.8.2009. He did not know where she had gone. Then stated that she had gone with her mother towards Punjab.

22. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove its case beyond reasonable doubt that the accused has committed murder of Gita. The circumstances noticed by us hereinabove creates reasonable doubt in the version of prosecution.

23. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 12.7.2010 passed in Sessions Trial No. 3 of 2010 by learned Additional Sessions Judge, Fast Track Court, Kullu is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already, deposited be returned to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Union of India & Ors. …Petitioners.

Vs.

Gian Singh Verma & Anr. …Respondents.

CWP No. 6160 of 2014

Decided on: 1st September, 2014.

Constitution of India, 1950- Article 227- Respondent was appointed as a Stenographer Grade-III in Army Training Command and was promoted as a Stenographer Grade-I- Hon'ble Supreme Court directing in ***M. Nagraj vs. Union of India etc. 2007 (4) SCT 664*** to extend the benefit of 77th and 85th amendment of the Constitution and to re-frame the rule if necessary- no such exercise undertaken by Union of India- respondent made a representation for the implementation of the judgment but it was rejected on the ground that the judgment was only applicable to the State of U.P. and no notification was issued by DOPT- held, that the

judgment of the Hon'ble Supreme Court of India was binding upon the Union of India and it was bound to implement the same.

Case referred:
M.Nagraj Vs. Union of India etc. 2007(4) SCT 664

For the Petitioners: Mr.Janesh Mahajan, Central Government Counsel.
For Respondents: Nemo.

The following judgment of the Court was delivered:

Justice Sureshwar Thakur, Judge (Oral)

The brief facts, sequelling the institution of the writ petition, at the instance of the petitioners, are of the respondent having joined service with the petitioner-Department as Stenographer Grade-III with the Army Training Command on 17.6.1995. Subsequently, he, in March 2006, was promoted as Stenographer Grade-I. The respondent, through his representation of 2.8.2012, drew the attention of the petitioner-Department to the judgment, rendered by the Hon'ble Apex Court, which was forwarded by the ARTRAC to the competent authority at Delhi, under Annexure A-4. However, the competent authority, in its communication, comprised in Annexure A-5 with OA, rejected the representation of the respondent on the ground that the judgment, rendered by the Hon'ble Apex Court, is applicable to the State of U.P. only. Besides, it was further conveyed to the respondent, under communication of 28.9.2012, that in case of Central Government Employees, a notification for implementation of judgments, passed by the Hon'ble Supreme Court, is notified by the Nodal Agency i.e. DOP&T and since no notification has been issued in the present case for implementing the orders in Central Government offices, no action is required to be taken in the present case on the basis of judgment passed by the Hon'ble Apex Court.

2. The respondent was dissatisfied and aggrieved with the rejection of his case for promotion to the post of the Private Secretary, hence, approached Central Administrative Tribunal by way of O.A. No.371/HP/2013. The O.A. was allowed by the Central Administrative Tribunal. A direction was rendered to the petitioner-Department to consider the case of the respondent for the post of private secretary by treating the relevant point as unreserved, if found fit.

3. The petitioner-Department is aggrieved by the judgment in O.A. No.371/HP/2013 rendered by the Central Administrative Tribunal and, hence, has assailed it by way of the instant writ petition.

4. The judgment of the Central Administrative Tribunal, under challenge before this Court, would warrant interference only in case it is manifest on its plain reading that the view, taken by it, is un-reasonable as well as perverse. A circumspect perusal of and analysis of

the judgment of Central Administrative Tribunal, under challenge before this Court, brings forth the fact that its findings while ultimately rendering relief to the respondent, inasmuch, as, the petitioner-department being directed to consider the case of the respondent for promotion to the post of private secretary by treating the relevant point as un-reserved, hence, denying the benefit of reservation in promotion with consequential seniority to respondent No.5, are anvilled upon a proper appraisal of the factual matrix, as well as, an appropriate application of the apposite case law to it, inasmuch, as, (a) it having, on an analysis on the principles laid down in **M.Nagraj vs. Union of India etc. 2007(4) SCT 664,** wherein it has been mandated that it would be mandatory on the part of the State Government to undertake proper exercise in case any rule was required to be framed by it to extend the benefit of enabling provision in the Constitution by way of 77th and 85th amendment i.e. for reservation in promotion with consequential seniority; (b) in the face of, hence, a mandatory obligation having been cast upon the respective department of the Government before extending the benefit of reservation and promotion with consequential benefit to undertake the proper exercise and it being manifested from the available material on record that uncontrovertedly no such contemplated exercise was undertaken by the petitioner-department within the parameters of the mandate comprised in the judgment of the Hon'ble Apex Court, aforesaid, as such, in absence thereof, the view, as adopted by the Central Administrative Tribunal while rendering a direction to the petitioner-department for considering the case of the respondent for promotion to the post of private secretary by treating the relevant point as un-reserved, was both a tenable, warranted as well as a sustainable view. Obviously, it is not permeated with the vice of perversity or absurdity nor is an unreasonable view. Consequently, it necessitates reverence.

5. In view of the above, the petition is dismissed and the judgment, passed by the Central Administrative Tribunal, is affirmed. All the pending CMPs, if any, are also dismissed. No costs.

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

Har Bhajan Singh. ...Petitioner.

Vs.

Krishan Das Verma (died) through LRs. ...Respondents.

CMPMO No.4061 of 2013
Reserved on : 19.8.2014
Decided on: 3.9. 2014

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit for declaration that he had become owner by way of adverse

possession- defendant asserted that he had become the owner by way of registered sale deed- held, that adverse possession is to be used as a sword and not as a shield- it cannot furnish a cause of action- defendant had spent huge amount towards construction- therefore, in these circumstances, plaintiff is not entitled for the relief of injunction. (Para-9)

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the Respondents: Mr. Y.P. Sood and Mr. Sanjay Parashar, Advocates for respondents No. 1 (i) to 1 (iii).

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the order dated 28.2.2013 rendered by the learned District Judge, Shimla in Civil Misc. Appeal No. 48-S/14 of 2012.

2. "Key facts" necessary for the adjudication of this petition are that Krishan Das Verma, predecessor-in-interest of the respondents-plaintiffs (hereinafter referred to as the "plaintiffs" for convenience sake), has filed a suit for declaration that he was in physical possession of the land entered as Khasra No. 226 measuring 00-21.18 hectares situated in Mauja Kufri Junga and that by way of adverse possession he has acquired ownership over the suit land. He has also assailed validity of sale deed No. 1873 dated 17.12.2007 in favour of petitioner-defendant (hereinafter referred to as the "defendant" for convenience sake). He has further claimed that subsequent mutation No.73 dated 13.2.2008 and entries in the revenue record with respect to the suit land in favour of the defendant were illegal and wrong. He has also claimed a decree for permanent prohibitory injunction.

3. Defendant has filed written statement to the plaint. According to the defendant, he has purchased land in question from Virender Kumar by way of registered sale deed dated 17.12.2007 and pursuant to the sale deed, mutation was attested on 13.7.2008.

4. Plaintiff has filed an application under order 39 rules 1 and 2 read with section 151 of the Code of Civil Procedure restraining the defendant from interfering in the ownership and possession of the suit land and changing the nature, alienating and encumbering the same. The application was resisted by the defendant. Civil Judge (Junior Division), Court No.VII, Shimla dismissed the application on 4.6.2012. Plaintiff preferred an appeal against the order dated 4.6.2012 before the learned District Judge, Shimla bearing Civil Misc. Appeal No. 48-S.14 of 2012. The District Judge partly allowed the appeal and order of trial court qua Khasra No. 193 old 26 new was set aside. Order of trial court qua Khasra No.194 old 207 new was affirmed. It is in these circumstances, present petition has been filed.

5. Mr. G.D. Verma, learned Senior Advocate has vehemently argued that the District Judge has not taken into consideration three tests necessary for granting interim relief, i.e. prima facie case, balance of convenience and irreparable loss and injury. He has also contended that the District Judge has wrongly relied upon the judgment passed by the Additional District Judge (Fast Track Court), Shimla in Civil Appeal No.17-S/13 of 2004/02.

6. Mr. Y.P. Sood has supported the order dated 28.2.2013 passed by the District Judge.

7. I have heard the learned counsel for the parties and have gone through the pleadings carefully.

8. What emerges from the pleadings of the parties is that defendant has purchased the suit land by way of sale deed No. 1873 dated 17.12.2007. Mutation No.73 was also attested in favour of the defendant on 13.2.2008. As per jamabandis for the years 1996-97 and 2001-2002, Virender Kumar was the owner of the suit land. Plaintiff has filed suit claiming his title by way of adverse possession. In the earlier judgment dated 31.12.2004 rendered by the Additional District Judge (Fast Track Court), Shimla in Civil Appeal No. 17-S/13 of 2004/02, the *lis* was between the different parties.

9. Now, as far as claim of adverse possession by the plaintiff is concerned, he has to prove this by leading evidence. Plaintiff has failed to prove his possession prima facie on the suit land. Civil Judge (Junior Division) has passed a well reasoned order and has also taken into consideration that adverse possession is to be used as shield and not as weapon. The District Judge has erred in partly allowing the appeal on 28.2.2013 by ordering the parties to maintain status quo qua Khasra No. 193 old 206 new without taking into consideration the basic principles for grant of ad-interim injunction. Defendant has purchased the suit land and has also spent amount towards construction. Plea of adverse possession is not a cause of action. However, the defence can be legitimately raised in a suit for possession by the other party.

10. Accordingly, the petition is allowed. Order dated 28.2.2013 passed by the learned District Judge, Shimla in Civil Miscellaneous Appeal No.48-S/14 of 2012 is set aside. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Hari Singh .....Appellant.

Vs.

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

Cr. Appeal No. 391 of 2011.
Reserved on: September 02, 2014.
Decided on: September 03, 2014.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.8 k.g of charas at 4:30 P.M near Kali Mata Mandir- one independent witness associated by police did not support the prosecution case- police officials admitted that the place, where accused was apprehended was a busy place- still no other independent witness was associated- held, that the statement given by the police officials can be relied upon but when one independent witness had not supported prosecution case and other was not associated, the search and seizure become doubtful and the reliance cannot be placed upon the prosecution version. (Para-18)

For the appellant**:** Mr. Pardeep K. Sharma, Advocate vice Mr. Anup Chitkara, Advocate.

For the respondent**:** Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 14.9.2011 and consequent order dated 15.9.2011, rendered by the learned Special Judge, Chamba, in Sessions Trial No. 15 of 2011, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. One lac and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year. The period already undergone by the accused in custody during the trial was ordered to be set off as per Section 428 Cr.P.C.

2. The case of the prosecution, in a nut shell, is that on 5.3.2011, at about 4:15 PM the accused carrying a Naswari colour (dharidar) bag on his right shoulder came from Sarol side. On seeing the police he turned back and started running. On being suspected that he was having narcotic substance in his bag, he was overpowered by ASI Kuldeep Singh, with the help of other police officials. In the meantime, Hanif Mohammad son of Sher Mohammad arrived at the spot and was associated in the investigation as an independent witness. In his presence as well as in the presence of the police officials, ASI Kuldeep Singh apprised the accused of his legal right to be searched before the Magistrate or the Gazetted Officer. He gave his option to be searched by the police. The bag was searched, from which a white coloured plastic envelope, containing charas was recovered. The charas was weighed. It weighed 1 kg and 800 gms. He put the recovered charas in the same envelope. The envelope was put in the bag and bag was parceled and sealed with ten seals of seal 'K'. Specimen of seal 'K' was also taken on the cloth and facimal of seal on NCB forms. Seal 'K' was handed over to HC Raghubir Singh and parcel containing charas was taken into possession by ASI Kuldeep Singh. '*Ruka*' was prepared and sent to the

Police Station, Chamba through H.H.C. Karam Chand. The F.I.R. was registered against the accused. Special report was also sent to the Superintendent of Police, Chamba. He also prepared the site plan and recorded the statement of witnesses on the spot. On reaching the Police Station, ASI Kuldeep Singh produced the case property before S.I. Piar Chand i.e. PW-8 for resealing. Resealing was done and deposited with the MHC. The same was sent to F.S.L. Junga, through Constable Krishan Kumar. The F.S.L. report was got prepared. The investigation was completed and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 12 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. Mr. Pardeep K.Sharma, Advocate, appearing vice Mr. Anup Chitkara, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment of the learned Special Judge, Chamba, H.P. dated 14.9.2011 and consequent order dated 15.9.2011.

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

6. PW-1, Haneef Mohammad deposed that he was doing the business of selling fried fish. He had no knowledge about the case. He was declared hostile. He denied that on 5.3.2011, the police officials met him at Parel bridge at 4:30 near the rain shelter. He denied that the police people apprehended one person alongwith a bag at a distance of about 40-50 meters from the rain shelter. He denied that the person disclosed his name as Hari Singh son of Sh. Chain Lal, resident of Sallain PO Sillagharat Pargana Gudial Tehsil and Distt. Chamba. He also denied that in the presence of H.C. Raghubir Singh, he was associated by the I.O. in the investigation of the case. He denied that the accused was apprised of his legal right to be searched before the Magistrate or Gazetted Officer in his presence. He also denied that the accused consented to be searched by the police present at the spot. He also denied that on checking of the bag, being carried by the accused, 1 kg 800 gms. charas was recovered. He also denied that the recovered charas was put in the same bag and the bag was parceled and sealed with ten seals of seal 'K' in his presence. He also denied that the specimen of seal was affixed on the NCB form in his presence and specimen of seal was taken separately on piece of cloth. He denied portion A to A of memo mark 'A'. However, he has admitted that memo mark 'B' bears his signatures. He denied that memo mark B was prepared by the police after giving personal search by the police to the accused. He also admitted his signatures on mark 'C'. He denied that the police had searched the bag in the possession of the accused in his presence and on search 1 kg 800 gms. Charas was recovered from it. He

also denied that the recovered charas was taken into possession vide mark 'C'. He denied portion A to A of memo mark 'C'. He admitted his signatures on parcel Ext. P-1. He also admitted that the specimen of seal 'K' Ext. PW-1/B bears his signatures in red circle 'A'. He denied that his statement was recorded by the police. He admitted his signatures on arrest memo mark 'D'. He denied that in his presence vide mark 'D', the police informed the accused that charas has been recovered from him as such communicated the grounds of arrest. He was selling fried fish on road side at Ballu and police people used to come and due to this they have made him a witness. In his cross-examination by the learned Advocate, he admitted that he has signed the aforesaid papers in the Police Station. He also admitted that no proceedings were drawn by the police pertaining to this case. He also admitted that he had seen the accused in the Court for the first time.

7. PW-2, H.C. Raghubir Singh testified that on 5.3.2011, he along with H.C. Karam Singh, Constable Kishan Singh and A.S.I. Kuldeep Singh, were on patrol duty at Parel bridge near rain shelter in official vehicle being driven by Constable Suresh. Rapat Ext. PW-2/A was recorded to this effect. At about 4:15 PM, from Sarol side, one person was found coming with a bag on his right shoulder. On seeing the police party, he got perplexed, turned back and tried to run. In the meantime, Hanif Mohammad son of Sher Mohammad, resident of Ballu, reached at the spot in his presence. The accused was overpowered at a distance of 40-50 meters from the rain shelter. The accused disclosed his name Hari Singh son of Chain Singh, resident of Sallain, Distt. Chamba. The accused was told about his right to be searched before the Magistrate or the Gazetted Officer. He consented to be searched by the police. The I.O. prepared the consent memo which is Ext. PW-2/B. Thereafter, ASI gave his personal search as well as the search of his I.O. kit and memo to this effect Ext. PW-2/C was prepared. The bag carried by the accused was searched by the I.O. and on search of the bag, one plastic envelope was recovered containing black colored hard substance. On checking, it was found to be charas. Thereafter, I.O. weighed the charas alongwith the envelope. It was found to be 1 kg 800 gms. The charas was put in the same bag and the bag was parceled in a piece of cloth and sealed with ten seals of seal 'K'. Sample of seal 'K' was taken separately on cloth piece which is Ext. PW-1/B. NCB forms in triplicate were filled in. Seal 'K' was also affixed on the NCB forms. The seal after use was handed over to him. The parcel containing recovered charas was taken into possession vide memo Ext. PW-2/D. The I.O. prepared the '*ruka*'. He also prepared the site plan. In his cross-examination, he deposed that first of all, the accused was seen by the I.O. There was no prior information and at that time, they were checking the vehicles. He did not remember, which kind of vehicle was being checked by them at that time. The locality is far away from the spot. The entire proceedings of the spot were conducted in his presence. The rain shelter is at a distance of ten meters from the place where they were standing. In his cross-examination, he admitted that Chamba Pathankot road is a busy road. He admitted that many people used to wait for bus in the rain

shelter. He also admitted that one path leads to Navodiya School. He also admitted that after school hours, the staff of the school used to come to the rain shelter and wait for the buses. As per the spot map, the accused has been shown to be apprehended near Kali Mata temple. Kali Mata temple is opposite to Chamba Pathankot road. He also admitted that from Kali Mata temple, the road touches Chamba-Kiyani road at Sarol. He admitted that the polytechnic is far away from Kali Mata temple. He admitted that the polytechnic and 4-5 shops fall in between Sarol and the place where the accused was apprehended. Many people were there but they were busy in drawing the proceedings.

8. PW-3, HHC Karam Singh also deposed the manner in which accused was apprehended and search was carried out. He also deposed the manner in which sealing process was completed. In his cross examination, he admitted that at the time of giving option, the accused, witness Hanif and 5 police officials were present at the spot. He admitted that from Mandir, there is passage leading to Navodaya School. He also admitted that the staff of Navodaya School used to come to Parel bridge for boarding the bus. At that time, it was 4.15 p.m., so they have not seen anybody there. He also admitted that the people used to remain standing at the rain shelter to get bus.

9. PW-4, HHC Madan Singh deposed that on 5.3.2011 at about 9.05 PM A.S.I. Kuldeep Singh produced one sealed parcel sealed with 10 seals of seal 'K' containing 1 kg 800 gms charas alongwith NCB forms (triplicate) for resealing to S.I/S.H.O. Piar Chand. He resealed the parcel with three seals of seal 'S'. He also took specimen of seal 'S' on a piece of cloth which is exhibit PW-4/A. Reseal memo Ext. PW-4/B was prepared. Seal 'S' was affixed on NCB form and the seal after use was handed over to him. Thereafter, S.I Piar Chand deposited the case property with the MHC at 9.50 p.m.

10. PW-5, HC Joginder Singh deposed that Additional S.H.O. Piar Chand handed over to him one sealed parcel containing 1 kg 800 gms charas. The parcel was having 10 seals of seal 'K' and three seals of seal 'S'. He also deposited with recovery memo, sample seal and NCB form in triplicate. He entered the same in the Malkhana register.

11. PW-6, Ramesh Chand deposed that on 6.3.2011, he was officiating as M.H.C. in Police Station Chamba. He sent one sealed parcel sealed with seals 'K' and 'S' alongwith sample seals, recovery memo, copy of FIR and NCB forms (triplicate) vide RC No. 33/2011 through constable Krishan Kumar to FSL Junga. The copy of R.C is Ext. PW-6/A.

12. PW-7, Subhash Chand has deposed about the special report sent to the Superintendent of Police, Chamba.

13. PW-8, S.I. Piar Chand deposed that A.S.I. Kuldeep Singh produced one sealed parcel sealed with 10 seals of seal 'K' alongwith sample seals, NCB forms (Triplicate) in the police station for resealing at 9.05 PM. He resealed the said parcel with three seals of seal 'S' in the

presence of H.H.C. Madan and specimen of seal 'S' was taken on the reverse of seal 'K'. NCB form was filled in and specimen of seal 'S' was taken. The specimen of seal 'S' is Ext. PW-4/A. He prepared reseal memo Ext. PW-4/B. NCB form is Ext. PW-8/A, column Nos. 9, 10, 11 of the same were filled in by him.

14. PW-9, Gian Singh is a formal witness.

15. PW-10, Kishan Kumar deposed that on 6.3.2011, one sealed parcel sealed with ten seals of seal 'K' alongwith sample seal, NCB forms in triplicate, were handed over to him by M.H.C. Ramesh Chand vide R.C No. 33/11 for being delivered at F.S.L., Junga. He deposited the case property on 7.3.2011 at F.S.L., Junga with the concerned official.

16. PW-11, H.C. Devi Chand deposed that on 7.3.2011, M.H.C. Pawan Kumar handed over to him the special report of the case for being delivered at S.P. Office, Chamba. He delivered the same in the office.

17. PW-12, A.S.I. Kuldeep Singh, deposed the manner in which the accused was apprehended at about 4:15 PM. The search and sealing process was completed. He prepared the *'ruka'* Ext. PW-12/A. He sent the same to Police Station through H.H.C. Karam Chand. Copy of '*ruka*' was also sent to S.P. Chamba for information. On the basis of *'ruka'*, FIR Ext. PW-5/A was registered in the Police Station. He prepared the site plan and recorded the statement of witnesses. He returned to the Police Station at 9:05 PM and produced the accused and case property alongwith sample seal and NCB forms before the S.I. Piar Chand for resealing. He resealed the same and deposited with the M.H.C. In his cross-examination, he admitted that there was rain shelter on Chamba Pathankot road. He also admitted that Kali Mata Mandir is opposite to Chamba Pathankot road and in between the both, there is a bridge. He also admitted that they were checking the vehicles at Chamba Pathankot road. He also admitted that at one time, the vehicles can be checked at one place. He admitted that the path leads from Kali Mata temple to Navodiya school. He also admitted that from Kali Mata temple, a road leads to Sarol and touches Chamba Kiyani road. He denied that the Sarol Village is 200-250 meters from Kali Mata temple. Volunteered that, it is 500 meters from Kali Mata temple.

18. What emerges from the statements is that the accused was apprehended at 4:30 PM near Kali Mata Mandir. Haneef Mohammad is an independent witness. However, Haneef Mohammad has not supported the case of the prosecution in entirety. He was declared hostile. PW-2, H.C. Raghubir Singh has admitted in his cross-examination that Chamba Pathankot road is a busy road. He also admitted that lot of people used to wait for the bus in the rain shelter. He also admitted that one path leads to Navodiya School. The entire staff of the School used to go to the rain shelter and wait for buses. He also admitted that as per the spot map, the accused has been shown to be apprehended near the Kali Mata temple. The Kali Mata temple is opposite to Chamba Pathankot road. He also admitted that from Kali Mata temple, the road touches Chamba-Kiyani road at Sarol. PW-3,

H.H.C. Karam Singh also deposed that there was a Kali Mata Mandir. He also admitted that from the Mandir, there is a passage leading to the Navodiya school. The staff of Navodiya school used to come to Parel bridge for boarding the bus. He also admitted that people remain standing at rain shelter waiting for the buses. PW-12, A.S.I. Kuldeep Singh has also admitted in his cross-examination that when he saw the accused, he was checking the vehicles on Chamba Pathankot road. He admitted that there was a rain shelter on Chamba Pathankot road. He also admitted that kali Mata Mandir is opposite to Chamba Pathankot road and in between the both, there is a bridge. He also admitted that they were checking the vehicles on Chamba Pathankot road. He admitted that a path leads from Kali Mata temple to Navodiya school. He admitted that from Kali Mata temple, a road leads to Sarol and touches Chamba Kiyani road. He denied that Sarol village is 200-250 meters from Kali Mata temple. Volunteered that, it is 500 meters from Kali Mata temple. In his cross-examination, he deposed that approximately, 15-20 vehicles were checked by him. No driver or occupants of the vehicles were associated in the investigation as they were not ready to become a witness. It is evident from the statements of PW-2 H.C. Raghubir Singh, PW-3 H.H.C. Karam Singh and PW-12 A.S.I. Kuldeep Singh that the police was checking the vehicles on a busy Chamba Pathankot road. The Kali Mata temple was also nearby. There was also a rain shelter near the spot when the accused was apprehended. The Navodiya School closed at 4:00 PM and the accused was apprehended at about 4:15 PM. It is not one of those cases where the accused has been apprehended at an isolated place. The police ought to have associated the independent witnesses at the time of apprehending the accused as also carrying out the search and sealing process. As per the statement of PW2, H.C. Raghubir Singh, after school hours, the entire staff of the school used to go to the rain shelter to take buses. PW-12 A.S.I. Kuldeep Singh has deposed that village Sarol was at a distance of 500 meters. Kali Mata Temple is opposite to Chamba Pathankot road and in between there is a bridge. He should have sent police officials to search for independent witnesses from nearby village. PW-12 A.S.I. Kuldeep Singh could easily associate any of the drivers or the occupants of the vehicles being checked by him on a Chamba Pathankot road. His explanation that the drivers or the occupants of the vehicles could not be associated cannot be believed. He should have issued notice to the persons, if they have refused to join the investigation. It is a settled law that the statements made by the official witnesses can be relied upon if they inspire confidence and are natural and consistent. However, in the instant case, the independent witness Haneef Mohammad has not supported the case of the prosecution. The police has not associated any independent witnesses, though readily available at the time when the accused was arrested from a busy place at 4.15 P.M.

19. We have also gone through the site plan Ext. PW-12/B. It is clear from this map that the place where the accused was apprehended was a busy place. The police could have easily associated the independent witnesses. Since the independent witnesses though

available have not been joined by the prosecution during the course of investigation, arrest and search of the accused becomes doubtful.

20. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 14.9.2011 and consequent order dated 15.9.2011, rendered by the learned Special Judge, Chamba, in Sessions trial No. 15 of 2011, is set aside. The accused is acquitted of the charge framed under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

CWP No. 4489/2012 a/w
CWP No.750/2014
Reserved on : 20.8.2014
Decided on: 5.9. 2014

1. CWP No. 4489 of 2012
Praveen Kumar. ...Petitioner.
Vs.
State of Himachal Pradesh and others. ...Respondents.

2. CWP No. 750 of 2014
Ajeet Verma. ...Petitioner.
Vs.
State of Himachal Pradesh and others. ...Respondents.

Constitution of India, 1950- Article 226- Petitioner applied for the post of Head Masters (School Cadre) Class-II (Non-Gazetted)- but he was not called for interview as he had passed M.Ed.- Advertisement provided that the candidate must have 2nd Class Master's Degree in Arts/Science or its equivalent from a recognized University- held, that M.Ed. is a professional qualification- the duration of B. Ed is one year, whereas, the duration for M.Ed. is two years- therefore, M.Ed. cannot be considered to be equivalent to M.A. (Para-13)

Cases referred:
Dr. Prit Singh Vs. S.K. Mangal and others, 1993 Supp (1) SCC 714 (rel. on)

Dr. Ram Sevak Singh Vs. Dr. U.P. Singh and others, (1992) 2 SCC 189 (dist.)

(In both the petitions).

For the Petitioner: Mr. Sanjeev Bhushan, Advocate for petitioner in CWP No. 4489/2012 and for respondent No.5 in CWP No. 750/2014.
Mr. Dilip Sharma, Sr. Advocate with Ms. Shristi Chauhan, Advocate for the petitioner in CWP No.750/2014 and for respondent No.4 in CWP No. 4489/2012

For the Respondents: Mr. Anup Rattan and Mr. M.A. Khan, Addl. A.Gs for the respondent-State.
Mr. D.K. Khanna, Advocate for respondent No.3 in both the petitions.
Mr. J.L. Bhardwaj, Advocate for respondent-University.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both the petitions, the same were taken up together and are being disposed of by a common judgment.

CWP No. 4489/2012

2. Respondent-State has issued an advertisement on 23.9.2011 whereby applications were invited for filling up 212 posts of Head Masters (School Cadre) Class-II (Non-Gazetted). Petitioner also submitted an application for considering his candidature. Written test was held on 7.2.2012. Petitioner was called for interview for 17.4.2012. However, fact of the matter is that petitioner was not interviewed on the ground that he did not fulfill minimum educational qualification. He approached the Court by way of present petition. According to the petitioner, he was fully eligible and qualified since he possesses M.Ed. qualification. Petitioner was permitted to be interviewed provisionally for the post of Head Master on 12.6.2012. On 27.7.2012, H.P. Public Service Commission was directed to declare the result of all the candidates, including petitioner. Since petitioner was declared successful, H.P. Public Service Commission was directed to recommend the name of the petitioner for appointment, subject to the outcome of writ petition. However, before issuing actual orders of appointment, respondent Nos. 1 and 2 were directed to seek permission of the Court. On 19.9.2012, the Court clarified previous order dated 27.7.2012 to the effect that it would be open to the Government to make appointments, making it subject to the result of the writ petition. In view of interim orders passed by the Court, petitioner was issued appointment letter on 19.10.2013 (Annexure R-I).

3. Respondent No.4 also moved an application for impleadment bearing CMP No.2086/2013. It was allowed by the Court on 26.6.2013 and he was also arrayed as respondent No.4.

CWP No. 750/2014

4. Petitioner also submitted an application for considering his candidature for the post in question. He qualified the written test. He was interviewed on 9.4.2012. Petitioner has secured 56 marks and respondent No. 5 Praveen Kumar has secured 60 marks as per the result declared by the H.P. Public Service Commission.

5. Mr. Sanjeev Bhushan, learned counsel appearing on behalf of petitioner in CWP No. 4489/2012, has vehemently argued that his client was fully eligible and qualified to be considered for the post of Head Master (School Cadre) as per Advertisement No.VIII/2011 dated 23.9.2011.

6. Mr. Dilip Sharma, learned Senior Advocate, appearing on behalf of petitioner in CWP No. 750/2014 has vehemently argued that client of Mr. Sanjeev Bhushan was not eligible and qualified to be considered for appointment to the post of Head Master (School Cadre).

7. The short legal question involved in these petitions is: whether petitioner Praveen Kumar fulfilled the essential qualification as per Advertisement No.VIII/2011 dated 23.9.2011 or not.

8. Advertisement No. VIII/2011 was issued by the H.P. Public Service Commission on 23.9.2011. Essential qualification for the post of Head Master (School Cadre) as per advertisement reads as under:

i. "At least 2nd Class Master's Degree in Arts/Science or its equivalent from a recognized University.

ii. 5 years teaching experience as Trained Graduate Teacher in Senior Secondary Schools/High Schools/Middle Schools of H.P. Government or any Educational Institutions affiliated to H.P. Board of School Education/C.B.S.E./I.C.S.E."

9. It would be apt at this stage to refer to column No. 5 of Appendix-II of the advertisement. According to column No.5, the candidate was required to write his/her qualifications codes in the boxes provided for the purpose in figures and to dark the respective circles below the boxes. The list of qualification codes was as under:

Qualification	**Code**
BA/B.Sc/B.Com/BBA/BCA	01
B.Sc (Agriculture) B.Sc.(Horticulture) B. Sc (Forestry)	02
B.Tech/B.E. (Engg)	03
MBBS/BDS/B.V.Sc. & A.H. /BAMS/GAMS	04

(with internship) B. Pharmacy	
BJMC/Public Relations	05
LLB	06
MA/M.Sc./M.Com/MBA/MCA/LLM/MJMC	07
M.Sc. (Agriculture) M.Sc. (Horticulture) M.Sc. (Forestry) M.Pharmacy	08
M.Tech/ME (Engg)	09
MS/MD/MDS	10
Ph.D/D/M.Phil/NET/SLET	11

The qualification of M.A./M.Sc./M.Com./MBA/ MCA/LLM/MJMC was mentioned against Code No.07.

10. The H.P. Public Service Commission has sought clarification from the Education Department whether the candidate having M.Ed. qualification would be considered equivalent to the Master Decree prescribed in Rule 7 (i) in the Recruitment and Promotion Rules or it is to be treated as training qualification higher to the B.Ed. only. The Education Department sent information to the H.P. Public Service Commission on 19.6.2012, which reads as under:

"M.Ed. qualification is a professional qualification and the M.Ed. Degree is obtained after obtaining B.Ed Degree. B.Ed degree is professional degree in Education and M.Ed is Master Degree in Education, whereas Rule (i) of Rule 7 of the R&P Rules notified on 5.2.1998 for making direct recruitment of H.M's says that there should be a 2nd class Master Decree in Arts/Science or its equivalent from a recognized University. Master Degree in Arts/Science are the Academic Degrees which can't be equated with professional Degree of M.Ed."

11. Joint Director, Higher Education has sent communication to the Assistant Registrar (Academic) Himachal Pradesh University on 28.9.2013 seeking clarification whether the M.Ed. post-graduation degree in discipline of education is equivalent to M.A. Arts/Science or its equivalent from University. Respondent-University vide letter dated 10.10.2013 has informed that M.A./M.Sc. are two years post-graduate academic degrees after B.A. or B.Sc. Similarly, M.Ed. is a professional two years post-graduate degree in education. A candidate who wants to pursue M.Ed. has to do one year B.Ed. after B.A./B.Sc. and only then he/she can pursue M.Ed. As the duration of these post-graduate courses are equal, i.e. two years, they are equivalent degrees.

12. According to the reply filed by respondent Nos. 1 and 2 in CWP No.750/2014, as per Recruitment and Promotion Rules of Headmaster, essential qualification for direct appointment as Headmaster is at least 2nd Class Master's degree in Arts/Science or its

equivalent from recognized University and Master Degree in Arts/Science are the academic degrees which cannot be equated with professional degree of M.Ed.

13. We have gone through the First Ordinances of Himachal Pradesh University 1973 as amended from time to time. According to clause 11.1 of Chapter-XI of the First Ordinances, the duration of Bachelor or Education course is one academic year for regular students and two years for the distance education mode. According to clause 11.12, the duration of Master of Education course shall be one academic year, spread over two semesters. Thus, duration of Bachelor of Education is one year and that of Master of Education is also one year. The respondent-University has erred by clubbing B.Ed. and M.Ed. degrees. The courses are only of one year duration. Thus, it cannot be said that M.Ed. degree is equivalent to Master degree in Arts or Science or its equivalent. It is on the basis of the clarification received by the Director of Education that the petitioner Praveen Kumar has been given appointment on 19.10.2013. He did not fulfill the basic essential qualification as prescribed under sub-rule (i) of rule 7 of the Recruitment and Promotion Rules notified on 5.2.1998 read in conjunction with Advertisement No.VIII/2011 dated 23.9.2011. The advertisement itself has clarified in column No.5 of Appendix-II what would be the post-graduate master degree, i.e. M.A./M.Sc./M.Com/MBA/ MCA/LLM/MJMC. M.Ed. is not provided therein. The duration of all the post-graduations mentioned in column No.5 is two years and duration of B.Ed. degree is one year and M.Ed. is also one year.

14. Their Lordships of the Hon'ble Supreme Court in **Dr. Prit Singh Vs. S.K. Mangal and others, 1993 Supp (1) SCC 714** have held that the degree of Master of Arts is an academic qualification, whereas degree of Master of Education is a professional qualification. Their Lordships have further held that when the qualifications required "a consistently good academic record with first or high second class (55% marks/grade B in the seven point scale) Master's degree in any subject", it shall mean an academic qualification like Master of Arts. Their Lordships have held as under:

> "11. It need not be pointed out that the Degree of Master of Arts is an academic qualification, whereas Degree of Master of Education is a professional qualification. According to us, when the qualifications required "a consistently good academic record with first or high second class (55% marks/grade B in the seven point scale) Master's Degree in any subject"; (emphasis added) it shall mean an academic qualification like Master of Arts. The said requirement was prescribed with "a consistently good academic record". That Master's Degree shall mean Degree of Master of Arts in any subject, is apparent also from the fact that apart from that degree the candidate was required to possess also "Degree in Education" which will mean B.Ed. or M.Ed. Normally if the expression "Master's Degree" was to include even the

> Master's Degree in Education (M.Ed.) there was no necessity of prescribing the third requirement of a "Degree in Education".
>
> 12. If the claim of the appellant that "Master's Degree" shall include a Degree of Master of Education, is accepted, it will lead to an anomalous position. A person having secured third division in M.A. who cannot be considered by any University even for the post of Lecturer, will become qualified for being appointed as a Principal of any College, if later he secures a high second class marks in M.Ed. Examination by com- pleting a course of one year. It need not be pointed out that the sole ob- ject of prescribing qualification that the candidate must have a con- sistently good academic record with first or high second class Master's Degree for appointment to the post of a Principal, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration. In the present case there is no dispute that in the Master of Arts Examination, the appellant secured only 47.1% marks which is not even a second division. We were informed that in the concerned University, second division is 50% and above. The appellant had not secured even second class marks in his Master of Arts Examination whereas the requirement was first or high second class (55%). The irresistible conclusion is that on the relevant date the appel- lant did not possess the requisite qualifications."

15. Mr. Sanjeev Bhushan, learned counsel appearing on behalf of petitioner in CWP No. 4489/2012 has placed strong reliance on **Dr. Ram Sevak Singh Vs. Dr. U.P. Singh and others, (1992) 2 SCC 189**. In Dr. Ram Sevak Singh case, the Master's Decree or an equivalent degree of a foreign university in one of the subjects taught in the college in a subject allied or interconnected therewith was the minimum essential qualification. However, in the case in hand, the minimum essential qualification prescribed is at least 2nd Class Master's Degree in Arts/Science or its equivalent from a recognized University. M.Ed. cannot be treated as Master's degree in Arts/Science.

16. Accordingly, in view of the analysis and discussion made hereinabove, CWP No.4489/2012 is dismissed. CWP No. 750/2014 is allowed. Appointment of respondent No.5 in CWP No. 750/2014 vide order dated 19.10.2013 is quashed and set aside. H.P. Public Service Commission is directed to recommend the case of the petitioner in CWP No.750/2014 strictly as per the merit list drawn for appointment to the State Government within a period of two weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Jiwan Lal Sharma …Petitioner.
Vs.
Kashmir Singh Thakur …Respondent.

CMPMO No. 75 of 2014
Reserved on: 28.7.2014
Decided on: 6.9.2014

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filing a suit seeking injunction to restrain the defendant from forcibly occupying and raising construction over the best portion of three storied building – the Court appointing a Mediator for resolving the dispute before whom the party arrived at a settlement- defendant filed objection to the settlement in the Court- held, that there is no scope of filing of objections to the report of the Mediator- the Court is required to take steps by giving notice and hearing the parties to effect the compromise. (Para-5)

Case referred:
Salem Advocate Bar Association, T.N. Vs. Union of India, reported in (2005) 6 SCC 344

For the petitioner: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondent: Mr. N.K.Thakur, Sr. Advocate, with Ms. Ishita Bhandari, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This petition is instituted against the order dated 28.12.2013, rendered by the learned Civil Judge (Sr. Divn.) Shimla, H.P., in Civil Suit No. 218-1 of 2010.

2. Key facts, necessary for the adjudication of the petition are that the petitioner (hereinafter referred to as the plaintiff) has filed a suit against the respondent-defendant (hereinafter referred to as the defendant) for permanent prohibitory injunction restraining the defendant from forcibly occupying and raising construction work over the best portion of three storey building as detailed in the plaint. The defendant filed the written statement and contested the claim of the plaintiff. The plaintiff also moved an application for grant of ad-interim injunction. The trial Court vide order dated 5.5.2011, directed the parties to maintain status quo. The defendant challenged the order dated 5.5.2011 before the learned District Judge, Shimla. The appeal was dismissed by the learned District Judge on 18.8.2012. The trial Court during the pendency of the Civil Suit, under Section 89 of the Code of Civil Procedure and the Rules framed by this Court, with the consent of

the parties, referred the matter to the Mediator for resolving the dispute between the parties. Sh. Pawan Thakur, Advocate, was appointed as Mediator vide order dated 4.1.2011. The Deed of Settlement was prepared on 11.1.2011. The parties signed the Deed of Settlement (Annexure P-4). The Mediator submitted the report dated 12.1.2011 to the learned trial Court. The defendant filed objections to the settlement vide Annexure P-6 dated 21.2.2011. The plaintiff filed reply to the objections vide Annexure P-7 dated 3.5.2011. The trial Court passed the order dated 28.12.2013. The learned Civil Judge (Sr. Divn.), Shimla, came to the conclusion that the compromise arrived at between the parties through mediation was not binding upon the parties and the objections were also not maintainable. The learned Civil Judge (Sr. Divn.), Shimla, listed the matter for framing of issues on 4.3.2014. In these circumstances, the plaintiff has filed the present petition challenging the order dated 28.12.2013.

3. I have heard the learned Senior Advocates for the parties and gone through the pleadings and impugned order carefully.

4. The trial Court has erred by holding that the time limit for completion of the mediation in the instant case has expired. The learned trial Court has quoted Section 6 of the Civil Procedure Mediation Rules, 2005 (hereinafter referred to as the Rules), while coming to this conclusion. Infact, it is Rule 18 of the Rules, which prescribes that on the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated unless the Court which referred the matter enter suo motu or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful, but such extension shall not be beyond a further period of thirty days. The order was passed by the learned trial Court referring the matter to the Mediator on 4.1.2011. The Deed of Settlement was prepared on 11.1.2011. The Mediator submitted the report dated 12.1.2011 to the trial Court.

5. According to Rule 17 of the Rules, the parties must understand that the Mediator only facilitates in arriving at a decision to resolve disputes and that he would not and cannot impose any settlement nor does the Mediator give any warranty that the mediation will result in a settlement. The Mediator cannot impose any decision upon the parties. In the instant case, the parties have arrived at a settlement on 4.1.2011. They have signed the statements. The report, as noticed hereinabove, was furnished to the trial Court by the Mediator on 12.1.2011. According to Rule 24, where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same is to be reduced in writing and signed by the parties or their power of attorney and if any counsel have represented the parties, they are required to attest the signature of their respective clients. The agreement of the parties duly signed and attested is to be submitted to the Mediator who shall, with a covering letter signed by him, forward the same to the Court where the suit is pending. The trial Court, as per sub

rule (1) of Rule 25, within 7 days of the receipt of any settlement, is required to issue notice to the parties fixing a date for recording the settlement and such date should not be beyond a further period of 14 days from the receipt of the settlement. Thereafter, as per sub rule (2) of Rule 25, the Court is required to pass a decree in accordance with the settlement so recorded if the settlement disposes of all the issues in the suit. The trial Court has not followed Rule 25 of the Rules. There is no provision for filing the objections against the settlement which is arrived at between the parties duly signed by them. The only requirement after the receipt of the settlement is that the Court, which is seized of the matter, shall issue notice to the parties fixing date for recording the settlement. The defendant has not raised any objection at the time of settlement dated 11.1.2011. The trial Court immediately after the completion of the formalities required under Rule 24, was to take necessary steps as provided under Rule 25, by giving notice and hearing the parties to effect compromise and pass a decree in accordance with the terms of settlement accepted by the parties.

6. Their lordships' of the Hon'ble Supreme Court in the case of ***Salem Advocate Bar Association, T.N. Vs. Union of India,*** reported in ***(2005) 6 SCC 344,*** have held that Section 89(2)(d) only means that when mediation succeeds and parties agree to the terms of settlement, the Mediator will report to the Court and the Court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Their lordships' have further held that when the parties come to a settlement upon a reference made by the Court for mediation and the parties want the same, there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court must first record the settlement and pass a decree in terms thereof and, if necessary, proceed to execute it in accordance with law. If the parties do not want the Court to record a settlement and pass a decree, there will be no public record of the settlement. Their lordships' have held as follows:

> "57 A doubt has been expressed in relation to clause (d) of Section 89(2) of the Code on the question as to finaliasation of the terms of the compromise. The question is whether the terms of compromise are to be finalized by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through the Lok Adalat and mediation are meant to be the action of persons or institutions outside the court and not before the court. Order 10 Rule 1-C speaks of the "Conciliation Forum" referring back the dispute to the court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the Court and the Court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement

accepted by the parties. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement, and on that ground he cannot be treated to be disqualified to try the suit afterwards, if no settlement is arrived at between the parties.

62. When the parties come to a settlement upon a reference made by the court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such eventuality, nothing prevents them in informing the court that the suit may be dismissed as a dispute has been settled between the parties outside the court."

7. Accordingly, order dated 28.12.2013 is set aside. The trial Court is ordered to proceed with the matter strictly as per Rule 25 of the Civil Procedure Mediation Rules, 2005, by issuing notice to the parties and after hearing the parties effect the compromise and pass a decree in accordance with the terms of the settlement arrived at between the parties.

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

Paras Ram ...Petitioner..

Vs.

Ramesh Chand & Ors. ...Respondents.

CMPMO No. 253 of 2014.
Reserved on: 28.8.2014.
Decided on: 08.09. 2014.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filing a civil suit claiming himself to be the owner in possession of half of the land and in possession of remaining half of the land as Gair Marussi Tenant- defendants claiming that their predecessor had filed an

application for resumption of land which was allowed- held, that when the plaintiff had not challenged the resumption order and the possession was being delivered on the basis of such order, the plaintiff has no prima facie case to seek any injunction- application dismissed. (Para- 7)

For the petitioner: Mr. Vikas Bhardwaj, Advocate.

For the respondent: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 28.6.2013, rendered by the learned Addl. District Judge (I), Kangra at Dharamshala, in Civil Miscellaneous Appeal No. 11-D/XIV/2012.

2. Key facts, necessary for the adjudication of the petition are that the petitioner (hereinafter referred to as the plaintiff) has filed a suit against the respondents-defendants (hereinafter referred to as the defendants) for permanent prohibitory injunction before the Civil Judge (Sr. Divn.), Kangra, H.P. The suit was contested by the defendants.

3. The plaintiff has also moved an application under Order 39, Rules 1 & 2 CPC for restraining the defendants from interfering in the possession of the plaintiff over the suit land, dispossessing him therefrom and threatening to get the revenue entries changed in their favour as "*khud kasht*" in connivance with the revenue staff. The application was also contested by the defendants.

4. According to the plaintiff, the land comprised in *khata* No. 135, *Khatauni No.* 211, *Khasra No.* 593, measuring 0-28-63 hectares situated in Mohal Tang, Mauza Narwana, Tehsil Dharamshala, Distt. Kangra, H.P. as per Jamabandi for the year 2008-09 is recorded in the ownership of the parties to the extent of half share each. The plaintiff is owner in possession of half share in the suit land and with respect to the remaining half share of the defendants, he is in possession as "*Gair Marussi Tenant*". The defendants being head strong persons on 20.5.2012, illegally and forcibly started interfering in the suit land in a bid to dispossess the plaintiff therefrom. The defendants further are threatening to get the revenue entries changed in their favour as "*khud Kasht*" in connivance with the revenue staff. According to the defendants, their predecessor-in-interest, namely, Sh. Hari Ram, infact had filed L.R.-V application for resumption of land and the said application was allowed by the Land Records Officer, Dharamshala on 11.2.1991 and in pursuance thereof, the defendants had moved an application to the Land Records Officer, Dharamshala for implementation of the resumption order. The revenue officials in compliance thereof visited the spot on 30.5.2012 in order to measure, demarcate and prepare tatima of the land. However, the plaintiff alongwith some ladies came to the spot and started quarreling, fighting and abusing the defendants and revenue

officials. The plaintiff has refused to part with the possession of the suit land. In view of this, the resumption order could not be implemented.

5. The plaintiff filed rejoinder to the reply filed by the defendants to the application for ad-interim injunction. According to the plaintiff, the resumption order dated 11.2.1991 already stood implemented. The learned Civil Judge (Sr. Divn.) Kangra, dismissed the application on 18.8.2012. The plaintiff preferred an appeal before the learned Addl. District Judge, Kangra. The same was dismissed on 28.6.2013. In these circumstances, the plaintiff has filed the present petition challenging the order dated 28.6.2013.

6. I have heard Mr. Vikas Bhardwaj, Advocate, learned counsel for the plaintiff and gone through the pleadings and impugned order carefully.

7. What emerges from the material placed on record is that the resumption order was passed by the Land Records Officer, Dharamshala in Case No. 171/D titled as Hari Ram vrs. Kalu on 11.2.1991. The resumption order was qua the suit land. The resumption is qua the land comprised in Kh. No. 593 measuring 0-28-63 hectares. The defendants are legally entitled for resumption of the suit land, as per order dated 11.2.1991. The plaintiff, admittedly, has not assailed the order dated 11.2.1991. It has attained finality. The plaintiff has not placed on record order dated 13.2.2005, alleged to have been passed by the Assistant Collector (Ist Grade), Dharamshala. Once the order has been passed by the competent Authority, i.e. the Land Records Officer, the possession was to be handed over to the defendants. The presence of the revenue officials was necessary in order to measure, demarcate and prepare *tatima* of the suit land. There is nothing on record to suggest even remotely that the defendants have forcibly tried to dispossess the plaintiff from the suit land. There is neither prima-facie case nor balance of convenience in favour of the plaintiff. The plaintiff has also failed to prove that he would suffer irreparable loss or injury if the ad-interim injunction is not granted in his favour rather the learned Civil Judge (Sr. Divn.), Kangra at Dharamshala, has allowed the application preferred by the defendants by restraining the plaintiff from interfering, in any manner, in the implementation of the resumption order dated 11.2.1991. There is no illegality or infirmity in the order passed by both the Courts' below. The orders are in conformity with the principles governing the grant of ad-interim injunction.

8. Accordingly, there is no merit in the present petition, the same is dismissed, so also the pending application(s), if any.

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

Paras Ram son of Khazana Ram (patient of chronic schizophrenia) through his wife Smt Urmila .....Petitioner.

Vs.

State of H.P. through its Principal Secretary (Revenue) and another. .....Respondents.

CWP No. 10583 of 2011
Reserved On: 8.8.2014
Date of Decision: 8.9.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as a Peon- he is suffering from chronic schizophrenia- his wife applied for compassionate appointment- held, that wife of the petitioner was receiving more than Rs.1 lakh as income- hence, she is not entitled for compassionate appointment as per rule- Further, the order compulsorily retiring the petitioner has been set aside and therefore, she cannot claim compassionate appointment in such circumstance. (Para-6 and 7)

For the petitioner:	Mr. J.L.Bhardwaj, Advocate.
For Respondents.	Mr. Pushpinder Singh Jaswal, Dy. 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 filed under Article 226 of the Constitution of India. Brief facts of the case as pleaded are that petitioner Paras Ram was appointed as Peon in the office of respondent No.2 Deputy Commissioner Shimla District Shimla HP. It is further pleaded that petitioner is suffering from chronic schizophrenia. It is further pleaded that thereafter wife of petitioner Smt Urmila Devi applied for employment on compassionate ground. It is further pleaded that Civil Writ Petition No. 850/2010 titled Paras Ram Vs. State of HP and others was filed which was decided on 19.10.2010. It is further pleaded that respondents did not comply the direction of Hon'ble High Court of HP issued in Civil Writ Petition No. 850/2010 titled Paras Ram Vs. State of HP and another decided on 19.10.2010. It is further pleaded that at present vide order dated 16.6.2010 learned Deputy Commissioner Shimla passed office order of retirement of petitioner Paras Ram Peon from government service w.e.f. 16.6.2010 (A.N) under rule 38 of Central Civil Services (Pension) Rules 1972. It is further pleaded that the order of learned Deputy Commission Shimla dated 16.6.2010 is contrary to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (hereinafter referred to as the 'Act'). It is further pleaded that learned Deputy Commissioner

also rejected the claim of Smt. Urmila Devi wife of Sh Paras Ram and her son Deepak Kumar for employment on compassionate ground on dated 28.9.2011. It is further pleaded that order dated 16.6.2010 and order dated 28.9.2011 passed by learned Deputy Commissioner Shimla be set aside. It is further pleaded that son of Sh Paras Ram namely Deepak Kumar be appointed on compassionate ground or consequential salary benefit be given to petitioner Paras Ram.

2. Per contra reply filed on behalf of respondents pleaded therein that present petition is not maintainable. It is pleaded that as per medical report Sh Paras Ram is not fit to be retained in service due to his ailment health i.e. chronic schizophrenia. It is further pleaded that Smt Urmila Devi wife of Sh Paras Ram has received an amount of Rs. 1,32,797/- (One lac thirty two thousand seven hundred ninety seven) as retirement dues and is also receiving pension to the tune of Rs.5285/- (Five thousand two hundred eighty five) per month and also receiving income from house property to the tune of Rs. 35,000/- (Thirty five thousand) per annum. It is further pleaded that total income of the family of Sh Paras Ram is exceeding Rs.1,00,000/- (One lac) per annum. It is further pleaded that as per policy of employment on compassionate ground the benefit could be given to those dependents only whose maximum family income does not exceed Rs.1,00,000/-. (One lac). Prayer for dismissal of writ petition sought.

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

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

1. Whether petitioner is legally entitled for benefit of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 as alleged?.
2. Whether wife of petitioner namely Urmila Devi or son of petitioner namely Deepak Kumar are entitled for employment on compassionate ground as alleged?

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is legally entitled for benefit of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 is accepted for the reason hereinafter mentioned. It is proved on record that petitioner Paras Ram is suffering from chronic schizophrenia as per medical certificate placed on record issued by Dr. Gurpartap Singh and Dr. Savinder Singh posted as Medical Officer in Mental Hospital Amritsar. It is also proved on record that Sh Paras Ram has sustained chronic schizophrenia when he was in service. It is proved on record that Sh Paras Ram has not attained the age of superannuation as of today as per service rules. Court is of the opinion that the Persons with disabilities Act 1995 came into effect w.e.f.

07.02.1996 in order to protect the disabled person as defined under Section 2(i) of the Persons with disabilities Act 1995. Section 47 of the 'Act' is quoted: "(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. Provided that, if an employee, after acquiring disability is not suitable for the post he was holding could be shifted to some other post with the same pay scale and service benefits. Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or until he attains the age of superannuation whichever is earlier."

6. In view of the above stated facts it is held that the case of the petitioner is covered under Section 47 of the Persons with disabilities Act 1995. As per Section 2(i) of the Persons with disabilities Act 1995 persons suffering from mental retardation and Mental illness falls under the Persons with disabilities Act 1995. It is held that petitioner is legally entitled to all the protection mentioned under Section 47 of the 'Act'. See 2008 (1) SCC 579 titled Bhagwan Dass and another Vs. Punjab State Electricity Board. Point No.1 is decided in favour of the petitioner.

Finding upon Point No.2.

7. Submission of learned Advocate appearing on behalf of the petitioner that the wife of petitioner namely Urmila Devi and son of the petitioner namely Deepak Kumar are also legally entitled for employment on the basis of compassionate ground is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that as per affidavit filed by learned Deputy Commissioner Shimla attested by Executive Magistrate Shimla that an amount of Rs. 1,32,797-/- (One lac thirty two thousand seven hundred ninety seven) has been paid to Smt Urmila Devi wife of petitioner Paras Ram as retirement dues. It is proved on record that wife of petitioner namely Urmila Devi is receiving an amount of Rs.5,285/- (five thousand two hundred eighty five) per month as pension. It is proved on record that the wife of petitioner is also earning income of Rs.35,000/- (Thirty five thousand) per annum from house property. It is proved on record that as per compassionate policy the dependent whose maximum family income exceeding Rs.1,00,000/- (One lac) are not entitled for employment on the basis of compassionate ground. Court is of the opinion that two benefits cannot be given to the petitioner i.e. benefit of Section 47 of the 'Act' as well as benefit of employment on compassionate ground simultaneously. As of today Sh Paras Ram is alive and suffering from chronic schizophrenia. Hence it is held that petitioner Paras Ram is legally entitled for one benefit only i.e. benefit of Section 47 of the 'Act'.

8. In view of the above stated facts it is held (1) That petitioner Paras Ram will be entitled for all the benefit under Section 47 of the Persons with disabilities Act 1995. It is held that petitioner will be kept on supernumerary post until a suitable post is available or until petitioner Paras Ram attains the age of superannuation whichever is earlier. The office order of learned Deputy Commissioner dated 16.6.2010

Annexure P8 qua retirement of Sh Paras Ram Peon is set aside. It is held that Sh Paras Ram will be legally entitled for all the consequential benefit of supernumerary post as mentioned under Section 47 of the Persons with disabilities Act 1995 subject to adjustment of all dues paid to Sh Paras Ram through his wife. (ii) Prayer of the petitioner that the wife of Sh Paras Ram namely Urmila Devi or son of the petitioner namely Deepak Kumar be appointed on the basis of compassionate ground declined. Office order of learned Deputy Commission dated 28.9.2011 Annexure P-10 declining employment on compassionate ground to the wife of petitioner Smt Urimila Devi or son of petitioner namely Deepak Kumar is affirmed. It is held that two benefits i.e. benefit of Section 47 of the Persons with disabilities Act 1995 and the benefit of appointment on compassionate ground cannot be granted simultaneously to the petitioner. (iii) Other relief(s) claimed by petitioner declined and it is held that all other relief(s) merged in point No.1 and 2 determined by the Court. 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 RAJIV SHARMA, J.

Rajinder Singh Mehta .....Appellant

Vs.

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

Cr. Appeal No. 205 of 2013.
Reserved on: 04.09. 2014.
Decided on: 08.09.2014.

Indian Penal Code, 1860- Sections 279, 337, 338 and 304-A- Accused was found to be driving the vehicle in a rash and negligent manner- ethyl alcohol was found in his blood to the extent of 135.41 mg% and in the urine to the extent of 167.90 mg%- held, that Section 185 of Motor Vehicle Act clearly provides that a person driving a motor vehicle having alcohol exceeding 30 mg per 100 ml is liable to punishment- accused had endangered the personal safety of others by driving the vehicle in a rash and negligent manner with alcohol in his blood- he was rightly convicted.

(Para- 21 & 22)

For the appellant: Mr. B.S.Chauhan, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 17.4.2013 of the learned Addl. Sessions Judge, Kinnaur Sessions

Division at Rampur Bushahar, H.P., rendered in Case No. 3-AR/7 of 2009/2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences under Sections 279, 337, 338 and 304-AA IPC, was convicted and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo further simple imprisonment for a period of one year under Section 304-AA of the IPC. He was further sentenced to undergo simple imprisonment for two months and to pay a fine of Rs. 500/- and in default to undergo simple imprisonment for a period of one month under Section 279 of IPC. He was also sentenced to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 250/- and in default to undergo further simple imprisonment for a period of 15 days under Section 337 IPC. All the sentences were ordered to run concurrently. The period of detention undergone by the accused was ordered to be set off under Section 428 Cr.P.C.

2. The case of the prosecution, in a nut shell, is that on 16.4.2009, after the classes were over, Priyanka Thakur alongwith her friends were waiting for bus at Dakolar near Shangrila Hotel by the side of National Highway No. 22. She was a resident of Village and Post Office Nirmand and taking coaching classes in Sigma Institute for PMT and AIEEE. At about 3:40 PM one white coloured Sumo Jeep came from Rampur side at very high speed and hit the students standing by the side of the road. She alongwith Sapna, Usha, Monika, Satish, Anu and Manjula received injuries and Nidhi received serious injuries. The Sumo Jeep after hitting the students hit the hill side on other side of the road. It was driven by the accused. All the injured including Priyanka Thakur, were taken to the hospital. Nidhi succumbed to the injuries on the spot. The police reached the spot at about 3:45 PM. The police recorded the statement of Priyanka Thakur under Section 154 Cr.P.C. She narrated to the police the manner in which the accident has taken place due to the rash and negligent driving of the accused. The FIR was registered. The post mortem of deceased Nidhi was conducted. The other injured were also medically examined at MGMSC Khaneri. The post mortem report was issued by the Medical Officer. The Tata Sumo jeep was taken into possession. The accused was arrested. His blood and urine samples were preserved and sent to FSL, Junga. The vehicle was mechanically inspected. The investigation was completed and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 15 witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has denied the case of the prosecution in toto. According to him, he was innocent and falsely implicated in the present case. He has also examined one Raj Kumar as DW-1. The learned Trial Court convicted and sentenced the accused, as stated hereinabove.

4. Mr. B.S.Chauhan, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General, has supported

the judgment of the learned Addl. Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., dated 17.4.2013.

5. I have heard learned counsel for both the sides and gone through the material available on record very carefully.

6. PW-1, Priyanka Thakur deposed that she was taking coaching for PMT examination in Sigma Institute at Dakolar. On 16.4.2009, she alongwith her friends was waiting for bus at Dakolar. At about 3:30 or 3:45 PM, one Sumo vehicle came from Rampur side in a high speed and ran over them causing injuries to her, Anu, Monika, Satish, Sapna, Usha and Manjula. The vehicle hit against the hill side of the road. Nidhi suffered serious injuries. All the injured including herself were taken to MGMSC, Khenari for treatment. Nidhi succumbed to the injuries. At the time of the accident, they were standing on the side of the road. The accident had taken place due to the rash and negligent driving on the part of the driver of the Sumo Jeep. The accused was driving the vehicle. In her cross-examination, she denied the suggestion that the stones were lying on the left side and when the driver avoided the stones, they got perplexed. She also reiterated that the vehicle had hit them and thereafter they were dragged and as a result of this, they fell down on the road. The Principal of the Institute had accompanied them from the spot to the hospital.

7. PW-2, Monika also deposed that on 16.4.2009 at about 3:30 or 3:45 PM, after their classes were over, they were waiting for the vehicle by standing on the side of the road. In the meanwhile, one white colour jeep came from Rampur side in a high speed and in an uncontrolled manner hit against them. In this accident 8 or 9 students suffered injury. She also suffered injury. Nidhi had suffered serious injuries and she died on the spot. The accident has taken place on account of rash and negligent driving on the part of the driver of the vehicle.

8. PW-3, Satish Kumar deposed that he was taking coaching in Sigma Institute at Dakolar. On 16.4.2009, at about 3:30 or 3:45 PM, he alongwith other students were waiting for the bus and standing on the side of the road at Dakolar. In the meanwhile, one white colour Sumo came from Rampur side in a high speed and ran over them. In the accident 8-9 students suffered injuries. He also suffered injury. Nidhi suffered grievous injuries and died on the spot. The accident has taken place on account of rash and negligent driving on the part of the driver of the vehicle. The name of the driver of the vehicle was Rajinder Mehta.

9. PW-4, Sapna also deposed the manner in which the accident had taken place at about 3:40 PM on 16.4.2009. According to her, she alongwith other students was waiting for the vehicle and standing on the side of the road at Dakolar. In the meanwhile, one Sumo jeep came from Rampur side in a fast speed and hit against them causing injuries to 9 or 10 students. After the accident they were moved to Khenari hospital for treatment. Nidhi suffered grievous injuries and

died on the spot. The accident has taken place on account of rash and negligent driving on the part of the accused.

10. PW-5, Dr. Hemant Kumar deposed that on 16.4.2009, he was going from Rampur to Bithal in his vehicle. On the way, he stopped at Dakolar near Bansal Tent House and parked his car on the side of the road. After talking to the owner of the Tent House, he came back and boarded his car. As soon as he got into his car the same was hit from behind by some vehicle and his car was dragged for about 10 feet. He came out and found that his car was hit by a Sumo Jeep coming from Rampur towards Dakolar.

11. PW-6, Satya Prakash, is a formal witness.

12. PW-7, Anu Raman deposed that on 16.4.2009 at about 3:45 PM, one white Sumo came from Rampur side in a high speed and came towards their side and hit against Nidhi and others including herself. She also suffered injuries and became unconscious and regained consciousness at hospital Khaneri. She came to know that Nidhi had died as a result of the accident. She denied the suggestion, in her cross examination, that heap of stones was lying on the left side of the road and to avoid that heap, the driver turned his vehicle towards the right side.

13. PW-8, Jia Lal deposed that he was running a scrap shop at Dakolar for the last 6-7 years. About one and a half years back in the afternoon, children of the Coaching Centre were standing on the road to take lift. One Tata Sumo vehicle came from Rampur side and hit against the students and 6-7 students suffered injuries. He alongwith other people present there arranged to send the injured to the hospital.

14. PW-9, Dr. Rajan Uppal, has examined Ms. Sapna and issued MLC Ext. PW-9/B. He also examined Anu Raman and issued MLC Ext. PW-9/C. He examined Ms. Usha and issued MLC Ext. PW-9/D. He also examined Monika and issued MLC Ext. PW-9/E. He examined Priyanka and issued MLC Ext. PW-9/F. He also examined Manchala Gill and issued MLC Ext. PW-9/G. He also examined Satish Thakur and issued MLC Ext. PW-9/H. He also examined the accused at 6:05 PM. According to his observation, there was smell of alcohol. Blood and urine sample were taken and handed over to the police for chemical examination. The opinion was reserved until the receipt of the report of the Chemical Examiner. He recorded his final opinion that the accused had consumed ethyl alcohol. He had examined him and found that he had taken alcohol but was not under the influence of the alcohol. He issued MLC Ext. PW-9/K. In his cross-examination, he deposed that he did not find accused under the influence of the alcohol. He denied the suggestion that there was some pilferage in taking the sample and thereafter sending the same to the Chemical Examiner.

15. PW-10, Atul Tandon deposed that on 16.4.2009 at about 3:30 or 3:40 PM, he was standing outside his institute at Dhakolar and the students of his institute were standing on the right side of the road going towards Nogli side and were waiting for the Cab. In the meanwhile,

one Sumo vehicle of white colour came from Rampur side in a high speed and hit against the hill side on the left side. In the accident, 7-8 students of his institute suffered multiple injuries and out of this, Miss. Nidhi suffered fatal injury and died. The accident took place on account of rash and negligent driving on the part of the driver of the Sumo vehicle.

16. PW-11, HC Sanjeev Kumar has undertaken mechanical examination of the vehicle. He issued report Ext. PW-11/A. According to the report, there was no mechanical defect in the vehicle.

17. PW-12, A.S.I. Lalit Negi, deposed that he received a telephonic call in Police Station Rampur at about 3:45 PM and after receiving the same, he visited MGMSC Khaneri. He recorded the statement of Priyanka Thakur Ext. PW-1/A under Section 154 Cr.P.C. He prepared the inquest papers. He also moved an application for conducting the post mortem examination on the body of deceased Nidhi. He also moved an application for the medical examination of the other injured students. He took into possession the accidental vehicle. He also recorded the statement of witnesses under Section 161 Cr.P.C.

18. PW-13, Dr. Avinash Sharma conducted the post mortem examination on the dead body of Nidhi. According to him, the cause of death was head injury leading to cardio respiratory arrest. The probable time that elapsed between injury and death was immediate and between death and post mortem was 12 to 36 hours. He issued postmortem report Ext. PW-13/A.

19. Statements of PW-14, S.I. Hari Bhagat and PW-15, Inspector Des Raj are formal in nature.

20. It is duly established by the prosecution on the basis of the statements of PW-1 Priyanka Thakur, PW-2 Monika, PW-3 Satish Kumar, PW-4 Sapna, PW-7 Anu Raman and PW-10 Atul Tandon, that the accident was caused on 16.4.2009, by the accused while driving Tata Sumo in a rash and negligent manner. The students suffered injuries. They were medically examined and PW-9 Dr. Rajan Uppal has issued MLCs. One of the students, namely, Nidhi died in the accident. Her post mortem examination was conducted by PW-13, Dr. Avinash Sharma. According to him, the cause of death was head injury leading to cardio respiratory arrest. The probable time that elapsed between injury and death was immediate and between death and post mortem was 12 to 36 hours. These witnesses have also deposed that the vehicle was driven at a very high speed. The vehicle driven by the accused has also struck against the car of Dr. Hemant Kumar (PW-5) and then struck the other side of the hill. The defence taken by the accused that there was heap of stones lying on the side of the road and when he was trying to overt them, the accident has taken place, has rightly been rejected by the learned trial Court.

21. The accused was medically examined by PW-9 Dr. Rajan Uppal. He has issued M.L.C. Ext. PW-9/K. He has taken the blood and urine samples of the accused. These were sent to FSL, Junga for

chemical analysis. According to the FSL report Ext. PW-15/A, ethyl alcohol was detected in the contents of parcels P-1 and P-2, which contained blood and urine of the accused. The content of ethyl alcohol in blood was 135.41 mg% and in urine was 167.90 mg%. According to PW-9 Dr. Rajan Uppal, the accused was smelling alcohol but on chemical examination, he did not find accused under the influence of the alcohol. The accident has taken place at 3:45 PM and the blood samples were taken at 6:05 PM. The quantity of ethyl alcohol found in the blood and urine sample was on very high side. Though the doctor has stated that the accused was not under the influence of the alcohol but his opinion is contrary to the FSL report Ext. PW-15/A. Even, according to Section 185 of the Motor Vehicles Act, 1988, whosoever while driving, or attempting to drive, a motor vehicle, has, in his blood, alcohol exceeding 30 mg per 100 ml of blood detected in a test by a breath analyser, would come under the category of drunken person. It can safely be concluded that the accused was driving a public service vehicle in a state of intoxication. The accused has caused hurt while endangering life and personal safety of others by his rash and negligent driving on 16.4.2009. He was driving the vehicle in a rash and negligent manner and thereby endangered the human life. The accident caused by the accused has resulted in death of a very young student aged about 18 years. Other students as well, have suffered serious injuries.

22. Mr. B.S.Chauhan, Advocate, appearing for the accused has vehemently argued that HHC Radhey Shyam, who has taken blood and urine samples to the FSL, Junga has not been examined by the prosecution. No suggestion has been put to the I.O. by the learned counsel for the accused on this aspect. The accident has taken place on 16.4.2009 and the samples were sent to FSL, Junga on 19.4.2009. Mr. B.S.Chauhan, Advocate, has further argued that the prosecution has not explained as to where the samples remained for five days. No suggestion has been put to the I.O. on this aspect also. But, the fact of the matter is that the samples reached the FSL, Junga intact and were chemically examined by FSL, Junga. The ethyl alcohol was detected in the blood and urine test of the accused, as noticed hereinabove. PW-9, Dr. Rajan Uppal has denied the suggestion that the sample was tampered with. There is no merit in the contention of Mr. B.S.Chauhan, Advocate, that sufficient quantity of blood sample was not taken. Since the FSL has analysed the blood and has given its opinion and in case there was lesser quantity of blood, the same could not be analysed. Thus, the quantity of blood sample was sufficient for examination.

23. Accordingly, there is no merit in this appeal, the same is dismissed. The prosecution has proved the case against the accused under Sections 279, 304-AA and 337 IPC. However, taking into consideration that the accused is a young man, being the first offender and the only bread earner of the family, a lenient view can be taken by reducing the sentence from 7 years to 5 years under Section 304-AA of the IPC. The sentences under Section 279 and 337 IPC are not interfered.

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

Hitesh Tandon. …Petitioner.
Vs.
Manmohini. …Respondent.

Criminal Revision No. : 4183/2013
Reserved on 3.9.2014
Decided on: 9.9.2014

Protection of Women from Domestic Violence Act, 2005- Respondent starting beating his wife after the death of his mother- he was working in a Atal Savasthay Seva – respondent had no source of income- the income of the petitioner is about Rs. 20,000- 25,000/- per month- held that the respondent husband is bound to maintain his wife- in these circumstance, granting of Rs. 3,000/- per month as maintenance from the date of the filing of the petition cannot be said to be excessive.
(Para- 13)

For the Petitioner: Mr. Ramesh Sharma, Advocate.
For the Respondent: Mr. Parveen Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This revision petition is directed against the judgment dated 24.5.2013 rendered by the learned Additional Sessions Judge, Chamba in Criminal Appeal No. 16/12.

2. "Key facts" necessary for the adjudication of this petition are that respondent filed an application under sections 12 read with sections 17, 18, 19 and 20 of the Protection of Women from Domestic Violence Act, 2005 in the court of Chief Judicial Magistrate, Chamba bearing case No. 347-1/10. According to the averments contained in the application, she was legally wedded wife of petitioner Hitesh Tandon. The marriage between the parties was solemnized according to the Hindu rites and customs prevailing in the area. Petitioner kept her nicely for about few days after the marriage. He started maltreating the respondent. He also used to give beatings to her. She tolerated inhuman beahaviour of the petitioner in the hope that he would mend his ways with the passage of time. He also levelled allegations of unchastity against her. He used to make sarcastic remarks against her. She was deprived of basic necessities. She was turned out from matrimonial house after administering beatings on 4.8.2010. Petitioner was also proclaiming that he has solemnized second marriage at Dharamshala. Petitioner is hail and hearty. Monthly income of the petitioner is Rs.30,000/-. She has no source of income. She has no house to live.

3. Petitioner filed reply to the application. He has denied the allegations made in the application. Learned Chief Judicial Magistrate allowed the application on 23.6.2012. Petitioner was prohibited from committing any act of domestic violence against the respondent. He was ordered to provide at least one room, kitchen and bathroom in the shared house. He and his relatives were restrained from entering in the shared house in which she was residing. He was also restrained from alienating or disposing of room allotted in the shared house to the respondent. She was awarded maintenance of Rs.3,000/- per month from the date of filing the application, i.e. 20.10.2010. Petitioner filed Criminal Appeal No.16/12 against the order dated 23.6.2012 before the Additional Sessions Judge, Chamba. Learned Additional Sessions Judge, Chamba dismissed the appeal on 24.5.2013. Hence, the present petition.

4. Mr. Ramesh Sharma has vehemently argued that both the courts below have not correctly appreciated the evidence. According to him, respondent herself has started quarreling with the petitioner and has left the matrimonial house. She has taken Rs.four lakhs from the petitioner and has spent the same during election. Petitioner has never given beatings to the respondent. Income of his client was Rs.6,500/- per month. His services were terminated on 16.12.2012. He had opened a clinic in the name of "Himalayan Health Care Clinic" of Electro Homoeopathy at village Sankha, P.O. Kilod, Tehsil and District Chamba. He was unable to earn sufficient money. He was living in rented house and was spending Rs.1,000/- per month.

5. Mr. Parveen Chauhan has supported the order and judgment rendered by both the courts below.

6. I have heard the learned counsel for the parties and have perused the record carefully.

7. Respondent has appeared as AW-1. According to her, the marriage was solemnized on 6.8.2009. She was kept properly when her mother-in-law was alive. Petitioner used to give her beatings. Her husband was working in "Atal Savasthay Seva" and was earning between Rs. 15,000/- to 20,000/- per month. He has also opened a clinic at place Panela. Bank balance of the petitioner was Rs.15 to 20 lakhs. She required a room, kitchen and bath room and Rs.4,000/- to 5,000/- per month as maintenance.

8. Respondent's father Pardeep Kumar has appeared as AW-2. According to him, marriage between the parties was solemnized in the month of August, 2009. Respondent was treated properly till her mother-in-law was alive. Thereafter, his son-in-law and his relatives started torturing her. Petitioner was earlier running a medical store at place Panela and thereafter he started working in "Atal Savasthay Seva" and was earning Rs.20,000/- to 25,000/- per month. His mother was retired as a C.D.P.O. Petitioner has received a sum of Rs.20 to 25 lakhs from his mother on retirement. He was the only son of his parents.

9. Petitioner has appeared as RW-1. He was having cordial relations with the respondent. He had opened a shop at place Panela. Thereafter, he closed his shop. Respondent used to quarrel with him. His father paid Rs.1.5 lakhs for B.Ed training to the respondent. His father had given him Rs.4 lakhs for business. However, the same was spent by respondent during election. She also purchased jewelry. Thereafter, she left the matrimonial house. She was residing with her parents. Income of his father-in-law was Rs.30,000/- to 35,000/-. His father was having four rooms house at Jullakari. His father was Naib Tehsildar. His mother has received a sum of Rs.13,32,816/-.

10. RW-2 Behmi Ram is the father of the petitioner. According to him, respondent asked him to pay her Rs.1.5 lakhs since she wanted to do B.Ed. training. She left the house of his son. He paid Rs. 4 lakhs to his son to start his own business. His son told that it was taken by the respondent. Income of respondent's father was Rs. 35,000/- to 40,000/- . Income of his son was Rs.6,500/- per month.

11. RW-3 Dhano Devi has deposed that she did not know anything about the case. She has never threatened the respondent.

12. RW-4 Pushpa has deposed that respondent was kept nicely. She has never seen the parties quarreling. Respondent was residing with her parents. Respondent has left the company without any reason.

13. What emerges from the evidence discussed hereinabove is that marriage between the parties was solemnized in the month of August, 2009 according to Hindu rites and customs prevailing in the area. Respondent was treated properly and nicely till her mother-in-law was alive. Thereafter, petitioner has started giving beatings to her. She was given severe beatings on 4.8.2010. She was turned out of her house. She was forced to live with her parents. Income of the petitioner was Rs.20,000/- to 25,000/- per month as per the statements of AW-1 Manmohini and AW-2 Pardeep Kumar. He was working in "Atal Savasthay Seva". House of petitioner's father comprises of 4-5 rooms. There is nothing on record to prove that respondent has sufficient source of income. It is the duty of the petitioner to maintain his wife and not to commit any domestic violence against her. There is nothing on record to prove that petitioner has given a sum of Rs.4 lakhs to the respondent and she has spent the same during election. Petitioner has not led any evidence that his father has given money to the respondent to do B.Ed. training. Petitioner cannot be absolved of his duty to look after and maintain his wife merely on the ground that her father's income is between Rs.25,000/- to 30,000/- per month. Petitioner's father was working as Naib Tehsildar and his mother has also retired as C.D.P.O. Respondent has not left her matrimonial house voluntarily, but she has been forced to leave the house. Both the courts below have correctly appreciated the evidence led by the parties and the order and judgment passed by the courts below do not warrant any interference by this Court.

14. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Jai Singh S/o Sh Daya Ram ....Petitioner.
Vs.
H.P. State and others. ....Respondents.

CWP No. 8728 of 2012
Reserved on: 5.9.2014
Date of Decision: 10.09.2014

Constitution of India, 1950- Article 226- High Court had issued a direction in Jeet Ram Sharma vs. State of H.P. CWP no. 791 of 1995 decided on 14.11.1995 directing the Secretary (Health) to issue direction to CMO and BDO to maintain a seniority list of DDT Beldars, to publish the same in the notice board and the office of the CMO and start making appointments according to the seniority- petitioner filing a petition that the directions were not complied with- held, that there is no positive evidence that the seniority lists were prepared and were published in the notice board- hence, the state directed to comply with the directions.
(Para-5)

Service Law- Appointment in the public institutions can be made by way of advertisement of vacancy as per Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 by way of appointment by recruitment committee and as per recruitment and promotion rule- since there was no evidence that the appointment of the petitioner was made in accordance with any of the above procedures- therefore, petitioners are not entitled for regularization.

For the petitioners: Mr. G.R.Palsra, 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 filed under Article 226 of the Constitution of India. Brief facts of the case as pleaded are that petitioner was engaged as DDT Beldars in the year 1987-88 by respondent

department. It is further pleaded that name of the petitioner was sponsored through concerned employment exchange along with other DDT Beldars. It is further pleaded that petitioner worked with the respondentdepartment till 30.9.1994 when his services were disengaged. It is further pleaded that petitioner filed CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others before Hon'ble High Court of HP which was disposed on dated 14.11.1995. It is further pleaded that Hon'ble High Court of HP in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others issued following directions to the respondents. (1) That Secretary (Health) to the Government of Himachal Pradesh shall issue instructions to all concerned more particularly Chief Medical Officers of the Districts and Block Development Officers to maintain a seniority list of DDT Beldars. (2) That said seniority list shall be duly published in the notice board of the Block Development Officer and also at the office of Chief Medical Officer of the District and appropriate publicity shall also be given in the neighbouring places where such Beldars are working. (3) That whenever the season starts appointments shall be offered according to the seniority. It is further pleaded that respondents did not comply the directions issued by Hon'ble High Court of HP in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others. It is further pleaded that respondent department may be directed to issue appointment of DDT Beldars or any post of Class-IV employee as per direction of Hon'ble High Court of HP dated 14.11.1995. It is further pleaded that respondent department may be directed to circulate the seniority list of DDT Beldars to the petitioner prepared as per direction of Hon'ble High Court of HP dated 14.11.1995. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that petitioner was initially engaged as DDT Beldars on seasonal basis from time to time. It is further pleaded that the work of DDT spray is seasonal work and it is carried out from the month of April to September every year. It is further pleaded that thereafter services of all the DDT Beldars used to be disengaged. It is further pleaded that as per direction of Hon'ble High Court of HP the seniority list of all the DDT Beldar was got prepared and maintained and thereafter all engagements of DDT Beldars on seasonal basis were made strictly as per seniority and in accordance with the sanction of government regarding number of persons to be engaged on year to year basis. It is further pleaded that one of the DDT Beldar was selected as Class-IV because he fulfills the requisite essential criteria in accordance with Recruitment and Promotion Rules. It is further pleaded that no cause of action accrued in favour of the petitioner. Prayer for dismissal of writ petition sought.

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

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

(1) Whether respondents have complied with the direction of Hon'ble High Court of HP issued in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others?

(2) Whether petitioner is entitled by way of writ of mandamus for appointment as DDT Beldar or upon any post of Class-IV employee as per direction dated 14.11.1995 issued by Hon'ble High Court of HP?

Finding upon Point No.1.

5. Hon'ble High Court of HP in CWP No. 719 of 1995 decided on 14.11.1995 titled Jeet Ram and another Vs. State of HP and others issued following directions to respondents.

(1) That Secretary (Health) to the government of Himachal Pradesh shall issue instructions to all concerned more particularly Chief Medical Officers of the Districts and Block Development Officers to maintain a seniority list of DDT Beldars.

(2) That said seniority list shall be duly published in the notice board of the Block Development Officer and also at the office of the Chief Medical Officer of the District and appropriate publicity shall also be given in the neighbouring places where such Beldars are working.

(3) That whenever the season starts appointments shall be offered according to the seniority. Although the respondents have pleaded that they have complied the directions issued by Hon'ble High Court of HP in CWP No. 719 of 1995 but respondents did not place on record the register of seniority list of DDT Beldars prepared by Chief Medical Officer of the Districts and Block Development Officer. There is no positive, cogent and reliable evidence on record that seniority list was duly published in the notice board of the Block Development Officer and in the office of Chief Medical Officer of the District. The submission of learned Advocate appearing on behalf of the respondents that they have complied the direction of Hon'ble High Court of HP issued in CWP No. 719 of 1995 is defeated on the concept of ipse dixit (Assertion made without proof). Only list of selected DDT Beldars for the year 1994 issued by Chief Medical Officer Mandi District Mandi placed on record. Respondents did not place on record any list of seniority of DDT Beldar prepared after November 14,1995 when civil writ petition was disposed of. Respondents did not assign any cogent reason for non-placing on record the seniority list published in the notice board of Block Development Officer and Chief Medical Officer. There is no evidence on record that after November 14, 1995 Chief Medical Officer of the District and Block Development Officer have maintained the seniority list of DDT Beldars.

Finding on Point No.2.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is entitled for appointment of DDT Beldar or upon any post of Class-IV employee as per direction dated 14.11.1995 issued by Hon'ble High Court of HP is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that respondents is a public institution and it is well settled law that appointment on the public institution is always conducted in the following manner. (1) By way of advertisement of vacancy as per Employment Exchanges (Compulsory Notification of Vacancies) Act 1959. (2) By way of appointment by recruitment committee. (3) As per Recruitment and Promotion Rules. Even the Hon'ble High Court in CWP No. 719 of 1995 did not mention that petitioners would be directly appointed in Class-IV post without following the Recruitment and Promotion Rules. Hon'ble High Court of HP has directed in CWP No. 719 of 1995 that DDT Beldar would be appointed against Class-IV post as per rules only. Hence it is held that appointment of petitioner shall be strictly made as per Recruitment and Promotion Rules.

7. In view of the above stated facts it is held (1) That Secretary (Health) to the Government of Himachal Pradesh shall issue instruction to the Chief Medical Officer of the Districts and Block Development Officer to maintain seniority list of DDT Beldars within fortnight. Compliance report by way of affidavit shall be filed in the Registry of Hon'ble High Court of HP by Chief Medical Officers and Block Development Officers within fortnight after receipt of certified copy of the order. (2) It is further held that seniority list of DDT Beldars maintained by Chief Medical Officer of the Districts and Block Development Officer shall be duly published in the notice board of the Block Development Officer and shall also be published in the notice board of the office of Chief Medical Officer of the District. It is further held that appropriate publicity shall also be given in the neighbouring places where the Beldars are working. Compliance report by way of affidavit will be filed within fortnight after receipt of copy of order. (3) It is held that Chief Medical Officer and Block Development Officer shall appoint DDT Beldar in spray season w.e.f April to September every year according to seniority list prepared by Chief Medical Officer and Block Development Officer. (4) The prayer of the petitioner that petitioner be appointed as DDT Beldar or upon any post of Class-IV employee on regular basis is declined in view of the fact that all appointments upon the public post is governed by Recruitment and Promotions Rules. (5) Other relief(s) claimed by petitioner declined and it is held that all other relief(s) merged in point No.1 and 2 determined by the Court. Writ petition is accordingly disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

****

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

Jeet Ram S/o Sh Mani Ram and another. ....Petitioner.

Vs.

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

CWP No. 3006 of 2012
Reserved on: 5.9.2014
Date of Decision: 10.09.2014

Constitution of India, 1950- Article 226- High Court had issued a direction in Jeet Ram Sharma vs. State of H.P. CWP no. 791 of 1995 decided on 14.11.1995 directing the Secretary (Health) to issue direction to CMO and BDO to maintain a seniority list of DDT Beldars, to publish the same in the notice board and the office of the CMO and start making appointments according to the seniority- petitioner filing a petition that the directions were not complied with- held, that there is no positive evidence that the seniority lists were prepared and were published in the notice board- hence, the state directed to comply with the directions. (Para-5)

Service Law- Appointment in the public institutions can be made by way of advertisement of vacancy as per Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 by way of appointment by recruitment committee and as per recruitment and promotion rule- since there was no evidence that the appointment of the petitioner was made in accordance with any of the above procedures- therefore, petitioners are not entitled for regularization.

For the petitioners:	Mr. G.R.Palsra, 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 filed under Article 226 of the Constitution of India. Brief facts of the case as pleaded are that petitioners were engaged as DDT Beldars in the year 1987-88 by respondent department. It is further pleaded that names of the petitioners were sponsored through concerned employment exchange along with other DDT Beldars. It is further pleaded that petitioners worked with the respondent department till 30.9.1994 when their services were disengaged. It is further pleaded that petitioners filed CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others before Hon'ble High Court of HP which was disposed on dated 14.11.1995. It is further pleaded that Hon'ble High Court of HP in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others

issued following directions to the respondents. (1) That Secretary (Health) to the Government of Himachal Pradesh shall issue instructions to all concerned more particularly Chief Medical Officers of the Districts and Block Development Officers to maintain a seniority list of DDT Beldars. (2) That said seniority list shall be duly published in the notice board of the Block Development Officer and also at the office of Chief Medical Officer of the District and appropriate publicity shall also be given in the neighbouring places where such Beldars are working. (3) That whenever the season starts appointments shall be offered according to the seniority. It is further pleaded that respondents did not comply the directions issued by Hon'ble High Court of HP in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others. It is further pleaded that respondent department may be directed to issue appointment of DDT Beldars or any post of Class-IV employee as per direction of Hon'ble High Court of HP dated 14.11.1995. It is further pleaded that respondent department may be directed to circulate the seniority list of DDT Beldars to the petitioners prepared as per direction of Hon'ble High Court of HP dated 14.11.1995. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that petitioners were initially engaged as DDT Beldars on seasonal basis from time to time. It is further pleaded that the work of DDT spray is seasonal work and it is carried out from the month of April to September every year. It is further pleaded that thereafter services of all the DDT Beldars used to be disengaged. It is further pleaded that as per direction of Hon'ble High Court of HP the seniority list of all the DDT Beldar was got prepared and maintained and thereafter all engagements of DDT Beldars on seasonal basis were made strictly as per seniority and in accordance with the sanction of government regarding number of persons to be engaged on year to year basis. It is further pleaded that one of the DDT Beldar was selected as Class-IV because he fulfills the requisite essential criteria in accordance with Recruitment and Promotion Rules. It is further pleaded that no cause of action accrued in favour of the petitioners. Prayer for dismissal of 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 and also perused entire records carefully.

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

(1) Whether respondents have complied with the direction of Hon'ble High Court of HP issued in CWP No. 719 of 1995 titled Jeet Ram and others Vs. State of HP and others?

(2) Whether petitioners are entitled by way of writ of mandamus for appointment as DDT Beldar or upon any post of Class-IV employee as per direction dated 14.11.1995 issued by Hon'ble High Court of HP?

Finding upon Point No.1.

5. Hon'ble High Court of HP in CWP No. 719 of 1995 decided on 14.11.1995 titled Jeet Ram and another Vs. State of HP and others issued following directions to respondents.

(1) That Secretary (Health) to the government of Himachal Pradesh shall issue instructions to all concerned more particularly Chief Medical Officers of the Districts and Block Development Officers to maintain a seniority list of DDT Beldars.

(2) That said seniority list shall be duly published in the notice board of the Block Development Officer and also at the office of the Chief Medical Officer of the District and appropriate publicity shall also be given in the neighbouring places where such Beldars are working.

(3) That whenever the season starts appointments shall be offered according to the seniority. Although the respondents have pleaded that they have complied the directions issued by Hon'ble High Court of HP in CWP No. 719 of 1995 but respondents did not place on record the register of seniority list of DDT Beldars prepared by Chief Medical Officer of the Districts and Block Development Officer. There is no positive, cogent and reliable evidence on record that seniority list was duly published in the notice board of the Block Development Officer and in the office of Chief Medical Officer of the District. The submission of learned Advocate appearing on behalf of the respondents that they have complied the direction of Hon'ble High Court of HP issued in CWP No. 719 of 1995 is defeated on the concept of ipse dixit (Assertion made without proof). Only list of selected DDT Beldars for the year 1994 issued by Chief Medical Officer Mandi District Mandi placed on record. Respondents did not place on record any list of seniority of DDT Beldar prepared after November 14,1995 when civil writ petition was disposed of. Respondents did not assign any cogent reason for non-placing on record the seniority list published in the notice board of Block Development Officer and Chief Medical Officer. There is no evidence on record that after November 14, 1995 Chief Medical Officer of the District and Block Development Officer have maintained the seniority list of DDT Beldars.

Finding on Point No.2.

6. Submission of learned Advocate appearing on behalf of the petitioners that petitioners are entitled for appointments of DDT Beldars or upon any post of Class-IV employee as per direction dated 14.11.1995 issued by Hon'ble High Court of HP is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that respondents is a public institution and it is well settled law that appointment on the public institution is always conducted in the

following manner. (1) By way of advertisement of vacancy as per Employment Exchanges (Compulsory Notification of Vacancies) Act 1959. (2) By way of appointment by recruitment committee. (3) As per Recruitment and Promotion Rules. Even the Hon'ble High Court in CWP No. 719 of 1995 did not mention that petitioners would be directly appointed in Class-IV post without following the Recruitment and Promotion Rules. Hon'ble High Court of HP has directed in CWP No. 719 of 1995 that DDT Beldar would be appointed against Class-IV post as per rules only. Hence it is held that appointment of petitioners shall be strictly made as per Recruitment and Promotion Rules.

7. In view of the above stated facts it is held (1) That Secretary (Health) to the Government of Himachal Pradesh shall issue instruction to the Chief Medical Officer of the Districts and Block Development Officer to maintain seniority list of DDT Beldars within fortnight. Compliance report by way of affidavit shall be filed in the Registry of Hon'ble High Court of HP by Chief Medical Officers and Block Development Officers within fortnight after receipt of certified copy of the order. (2) It is further held that seniority list of DDT Beldars maintained by Chief Medical Officer of the Districts and Block Development Officer shall be duly published in the notice board of the Block Development Officer and shall also be published in the notice board of the office of Chief Medical Officer of the District. It is further held that appropriate publicity shall also be given in the neighbouring places where the Beldars are working. Compliance report by way of affidavit will be filed within fortnight after receipt of copy of order. (3) It is held that Chief Medical Officer and Block Development Officer shall appoint DDT Beldar in spray season w.e.f. April to September every year according to seniority list prepared by Chief Medical Officer and Block Development Officer. (4) The prayer of the petitioners that petitioners be appointed as DDT Beldars or upon any post of Class-IV employee on regular basis is declined in view of the fact that all appointments upon the public post is governed by Recruitment and Promotions Rules. (5) Other relief(s) claimed by petitioners declined and it is held that all other relief(s) merged in point No.1 and 2 determined by the Court. 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 RAJIV SHARMA, J. & HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh. …Appellant.

Vs.

Nanak Chand. …Respondent.

Criminal Appeal No. 326/2008
Reserved on : 5.9.2014
Decided on: 10.9. 2014

N.D.P.S. Act, 1985- Section 20- Accused stated to be found in possession of 1 kg. 200 grams of charas- MHC stated that three sealed parcels were deposited with him, whereas, he had entered two samples in Malkhana register- there are contradictions in the testimonies of the prosecution witnesses regarding the manner in which ruqua was taken to the police station and the case file was brought to the spot- CFSL had returned the contraband on the ground that NCB form was not in prescribed proforma- prosecution filled a new proforma and sent it to CFSL, Chandigarh- however, new proforma was not placed on record- held, that in view of the contradictions and the failure to establish the link evidence, accused is entitled to acquittal. (Para-14 & 16)

For the Appellant: Mr. Ashok Chaudhary, Addl. A.G.
For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 11.1.2008 rendered by the Special Judge-II, Mandi in Sessions Trial No. 21 of 2007 whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 12.11.2006 police party was on patrol and Nakka duty on Karsog-Kelodhar-Chatri road. At 4.30 when the police party was at Ultidhar, accused came on foot. He saw the police. He threw his bag Ex.P-4. He tried to run away. He was over-powered. The bag was searched. It contained Charas. It was weighed and found to be 1 kg 200 grams. SI Surti Ram drew two samples of charas of 25 grams each out of the recovered stuff. He packed and sealed the sample charas in separate parcels with seal having impression 'S'. The remaining charas was packed and sealed in separate parcel with seal having impression 'S'. He also filled in NCB form. He took specimen seal impression on pieces of cloth. He took into possession the case property and seizure memos were prepared. SI Surti Ram also sent rukka through Constable Durga Singh to Police Station, Karsog. Accused was arrested on the spot. The contraband was sent to C.F.S.L, Chandigarh. The Chemical Examiner sent his report. According to the report, the same was charas. 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 denied the case of the prosecution in entirety. Learned trial Court acquitted the accused. Hence, the present appeal.

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

5. Mr. G.R. Palsra, learned counsel for the accused, has supported the judgment rendered by the trial court.

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

7. PW-1 Head Constable Dhiraj Singh has deposed that on 12.11.2006, he alongwith SI/SHO Surti Ram, ASI Shriram, Constable Ami Chand and Constable Durga Singh were in official vehicle No.HP-33-8179 on patrol duty. They had laid Nakka at Ultidhar. At 4.30 A.M., one person came from shortcut. When he saw the police party, he got perplexed. He threw away his bag and tried to run away. He was over powered by SI Surti Ram. The bag was searched. It contained charas. It weighed 1 kg 200 grams. SI Surti Ram drew two samples of charas out of the recovered charas of 25 grams each. Two samples of 25 grams each were put in two separate packets and the packets were made into two separate parcels. These were sealed with six seal impressions each having seal impression 'S', whereas the remaining stuff was put in the same bag. It was sealed with same seal impression 'S'. 12 seal impressions were embossed on the same. NCB form in triplicate was also filled in on the spot. The seal after use was handed over by the Investigating Officer to him. He has produced the seal. SI Surti Ram sent rukka through Constable Durga Singh to Police Station, Karsog for registration of case. The sample parcel was sent to C.F.S.L. Chandigarh. It was received back with an objection that columns of NCB form were not filled in properly and fresh NCB form was to be filled in. Thereafter, on 21.11.2006, SHO Surti Ram asked him to handover the seal to him. He handed over the seal having impression 'S' to SHO Surti Ram. Fresh NCB form was filled in vide mark 'A'. SHO Surti Ram after embossing seal impression 'S' on mark 'A' again handed over the ring, which was used for sealing the case property.

8. PW-2 Durga Singh has deposed the manner in which accused was arrested and proceedings were completed on the spot. He took the rukka to the Police Station. He came back with rukka from Ultidhar till 6.00 A.M. He came on foot upto Kelodhar from Ultidhar with rukka and after Kelodhar he came in a vehicle upto Karsog. He came in a truck from Kelodhar at about 6.20 A.M. He did not know how far is Kelodhar from Ultidhar.

9. PW-3 Mahant Ram has deposed the manner in which accused was arrested and the seizure and sampling process was completed on the spot. According to him, on 12.11.2006, Constable Durga Singh brought one rukka mark 'B'. It was sent by SI Surti Ram on the basis of which FIR Ex.PW-3/A was recorded. Thereafter, he sent the file through Constable Durga Singh to the spot. On 12.11.2006, SI/SHO Surti Ram deposited with him three sealed parcels. He entered the case property in the Malkhana register. The parcel containing samples were

marks A-1 and A-2. NCB form was also deposited. He has brought original register Malkhana vide Ex.PW-3/C. He sent one parcel containing sample charas, NCB form with dockets, copy of FIR, copy of recovery memo and specimen seal impression through constable Ami Chand vide RC No. 84/2006 to C.F.S.L. Chandigarh. He produced RC vide Ex.PW-3/D. On 17.11.2006, constable Ami Chand brought back the parcel containing documents with objection of the C.F.S.L. Chandigarh that NCB form be sent on the new prescribed proforma. Thereafter, SHO Surti Ram again filled in the prescribed NCB form. He asked Head Constable Dhiraj Singh to produce the seal. SHO, again prepared the prescribed NCB form and embossed seal impression 'S' on the same. The seal was again handed over to Dhiraj Singh. Thereafter, on 22.11.2006, he again sent the sealed parcel containing sample alongwith articles, NCB form, specimen seal impression, copy of FIR and recovery memo through constable Ami Chand to C.F.S.L. Chandigarh vide RC No. 84/2006. He filled in column Nos. 1, 2 of the NCB form.

10. Statement of PW-4 constable Tarsem Singh is formal in nature.

11. PW-5 Constable Amin Chand has deposed that on 15.11.2006, MHC Mahant Ram of Police Station, Karsog handed over to him, one parcel containing sample charas sealed with seal impression 'S' six in number alongwith specimen seal impression, NCB form, copy of FIR, recovery memo vide RC No. 84/2006 for depositing the same with C.F.S.L. Chandigarh.

12. Statements of PW-6 Sanjeev Kumar, PW-7 Chander Shekhar, PW-8 Jai Singh and PW-9 Parma Nand are formal in nature.

13. PW-10 Surti Ram has deposed the manner in which the accused was apprehended, charas was recovered, it was weighed and sampling procedure was completed. He filled in NCB form. Rukka was sent through Constable Durga Singh to the Police Station, Karsog. He prepared spot map Ex.PW-10/B. The parcel was returned back by C.F.S.L. Chandigarh with an objection that latest NCB form having 12 columns be sent. He prepared fresh NCB form. He took back the seal from Dhiraj Singh and seal impression was embossed on the NCB form. On 21.11.2006, the parcel containing sample alongwith NCB form old as well as new, copy of recovery memo and copy of FIR were again sent through Constable Amin Chand by the MHC. Docket was prepared. He recorded the statements of witnesses. He sent rukka at 6.00 A.M. through Constable Durga Singh. He went on foot. He returned from the Police Station on foot at the spot 8.30 or 8.45 or 9.00 A.M. He did not see Constable Durga Singh alighting from the bus at the place of occurrence on his return from Police Station. He also did not come on motorcycle.

14. According to PW-3 Head Constable Mahant Ram, SI Surti Ram has deposited with him three sealed parcels and he has entered the same in the Malkhana register. However, it is evident from Ex.PW-3/A that only two samples have been deposited in the Malkahana. Mark A-1

has not been deposited in the Malkhana on 12.11.2006. The prosecution has not explained where mark A-1 was kept with effect from 12.11.2006 to 15.11.2006.

15. There are also contradictions the manner in which PW-2 Durga Singh has taken the rukka to Police Station and came back. There are variations in the statements of PW-2 Durga Singh and PW-10 Surti Ram to this effect.

16. The C.F.S.L. Chandigarh has returned the contraband on the ground that NCB form was not in prescribed proforma. According to PW-10 Surti Ram, he has filled in all the columns on the prescribed proforma and the contraband was thereafter sent for chemical examination to C.F.S.L. Chandigarh. The prosecution has placed on record the copy of old NCB form Ex.PW-3/E and the latest NCB form has not been placed on record. The new proforma was filled in on 21.11.2006. Moreover, Ex.PW-1/A specimen seal impression was placed on record only at the time of recording statement of PW-1 Dhiraj Singh. The documents have been placed on record with the challan. There are inherent contradictions in the statements of the witnesses, which render the case of prosecution doubtful. There is no explanation where mark A-1 remained with effect from 12.11.2006 to 15.11.2006 and why the new NCB form was not exhibited. The trial court has correctly appreciated the evidence led by the prosecution and there is no need to interfere with the well reasoned judgment passed by the trial court.

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

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

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

Vs.

Paras Ram @ Suraj .....Respondent.

Cr. Appeal No. 340 of 2008
Reserved on: 4.9.2014
Date of Decision: 10.9.2014

N.D.P.S. Act, 1985- Sections 18 and 52(3) - Accused was found to be in possession of 2 kgs. 500 grams of opium- held, that the accused and the case property were not immediately taken to the Officer in charge of the nearest police station which is violation of the mandatory provision of Section 52 and the accused is entitled to be acquitted. (Para-23 & 24)

N.D.P.S. Act, 1985- Section 20 - Link evidence- Parcels were found in torn condition which can lead to the only inference that these were tempered with- further, column Nos. 9 to 12 of NCB form were left blank-

therefore, link evidence had not been proved and the accused is entitled to acquittal. (Para- 26 and 27)

For the Appellant: Mr. P.M.Negi, Deputy Advocate General.

For the respondent: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

The instant appeal is directed against the judgement of acquittal, rendered on 29.12.2007, by the learned Special Judge, Mandi, H.P., in Sessions trial No.33 of 2004, whereby the respondent has been acquitted for his having committed offence punishable under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act').

2. The prosecution story, in brief, is that on 7.12.2003, at about 2.15 p.m., a telephonic call was received from some unkown person by ASI Baldev, incharge Police Post, Darang, that scooter, bearing No. HP-33-7358, coming from Narla towards Mandi and some contraband was being carried illegally in the said scooter. Thereafter, the report, under Section 42(2) of the Act, was sent through Constable Brij Lal to Dy. S.P. Ms. Subhra Tiwari. ASI Baldev Singh, along with Constable Ghanshayam, reached at National Highway, near Police Post, Darang, and joined Dr.Ravinder Kaundal, as an independent witness. Scooter, being driven by accused, was stopped and the respondent-accused was apprised that he was being suspected of carrying Charas as he has a right to get himself searched either before a Gazetted Officer or a Magistrate. The accused agreed for his search being carried out from the police party and gave his consent comprised in memo Ext.PB. ASI Baldev gave his personal search to the accused vide memo Ext.PC. Thereafter, he conducted the search of dickey of the scooter, from which two poly bags were recovered containing charas or opium. The recovered charas was weighed and found to be 2 Kgs and 500 grams. The Investigating Officer separated 2 samples of 25 grams each and put them in two sealed packets and sealed with seal H at 6 places. The remaining bulk was put in a single poly bag and sealed with seal H at 9 places. The seal, after use, was handed over to Dr.Ravinder Kaundal. The I.O. filled up the columns of NCB form Ext.PP and put seal impression H on the said form. The case property was taken into possession vide recovery memo Ex.PE duly signed by the witnesses. The accused was arrested vide memo Ext.PH and given memo of information of commission of offence comprised in memo Ext.PF. ASI Baldev sent Ruka Ext.PN through HHC Balbir for registration of the case and he handed over the same to K.D.Sharma, Inspector Police Station Sadar, who recorded the F.I.R. Ext.PO.

3. After receipt of the report of Chemical Examiner Ext.PP/1, it was revealed that the contraband, recovered from the accused, was opium, as such, challan under Section 173 of the Cr.P.C. was prepared and filed in the Court.

4. Accused was charged for his having committed offence punishable under Section 18 of the NDPS Act, by the learned trial Court, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 15 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused was given an opportunity to adduce evidence, in, defence, and he chose not to adduce any evidence in defence.

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

7. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross-mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

10. The first witness, who, stepped into the witness box to prove the prosecution case, is, PW-1 Constable Ghanshyam, who deposes that on 7.12.2003, at about 2.15 p.m., ASI Baldev received a telephonic call in the Police Post, Drang that a scooter, bearing No. HP-33-7358, is coming from Narla to Mandi and the driver of the scooter is deposed to be carrying some contraband article in the said scooter. Thereafter, he, along with ASI Baldev, stood on the road and Dr.Ravinder Kaundal, running a private clinic, was also called. He further deposes that the scooter was parked by the side of the road and the accused was apprised that he has a legal right to get himself searched either from a Magistrate or a gazetted officer, to which, the accused offered to be searched by the police. He continues to depose that during search, two polythene bags were recovered from the dickey of the scooter, which was

weighed and found to be 2.500 kgs. He further deposes that I.O. separated two samples of opium from both the bags of 25 grams each and put them in a parcel and sealed with seal H. The remaining opium was also put in separate parcel and sealed with seal H. The copy of the recovery memo was also supplied to the accused. The I.O. also filled up NCB form in triplicate and impression of seal H was also taken on the NCB form. The I.O. sent ruka through constable Balbir Singh for registration of the case to P.S.Sadar.

11. PW-2 Ravinder Kaundal, PW-3 Nirmala Devi, and PW-12 Hem Singh have not supported the prosecution case since during their examination-in-chief they have not supported the prosecution case, hence, they were declared hostile and was requested by the learned public prosecutor to be cross-examined. On his request, having come to be acceded to, they were cross-examined by the learned public prosecutor but no incriminating material against the accused could be elicited from their cross-examination.

12. PW-4 Kashmir Singh deposes that on 7.12.2003, a police official came to his shop and asked him to handover scale and weights. Accordingly, he handed over scale along with weights of 2 kgs, 1 kg, 500, 100, 50 grams. Later-on, he took the said scale along with weights, and left the same at his shop.

13. PW-5 H.C. Ramesh Chand deposes that on 8.12.2003, report under Section 42(2) Ext.PA was handed over to him by Dy. S.P. Shubhra Tiwari, which was received by her on 7.12.2003. He further deposes that on the same day, special report under Section 57 was handed over to him at 3.50 p.m. by the Dy.S.P, and the same is Ext.PL.

14. PW-6 HHC Baldev deposes that on 7.12.2003, SHO K.D.Sharma deposited with him three parcels. He further deposes that SHO also deposited with him NCB form, sample seals H and N and recovery memo etc. and the same were entered in the Malkhana Register. In cross-examination, he deposes that bulk parcel Ext.P-3 is partly damaged and further deposes that when it was deposited with him the parcel was in proper shape.

15. PW-7 HHC Mohan Lal deposes that on 10.12.2003, HHC Baldev Singh handed over him one sample parcel, sample seals H and N, NCB form and other documents vide RC No. 008440, which he deposited on the same day in CTL, Kandaghat. He further deposes that nobody tampered with the case property so long it remained with him.

16. PW-8 Constable Brij Jal deposes that on 7.12.2003, at about 12.25 p.m., Constable Liak Chand handed over to him report under Section 42(2), copy of which is Ext.PA and he handed over the same to Dy.S.P. at her residence and she also appended endorsement on the same.

17. PW-9 Constable Liak Chand deposes that on 7.12.2003, at about 2.15 p.m., a telephonic call was received that a scooter bearing

No.HP-33-7358 was coming from Narla side and opium was being carried in it and he reduced the same in daily diary register vide D.D.No. 12 vide Ext.PA.

18. PW-10 Constable Balbir Singh deposes that on 7.12.2003, at about 5.30 p.m., ASI Baldev handed over to him the ruka, three parcels of opium, bearing seal impression H along with the sample seal N, NCB form, etc. to deposit the same at P.S.Sadar, which he deposited at 6.25 p.m. with SHO K.D.Sharma. He further deposes that he handed over the ruka to MHC Gulab Singh, who, on its basis, registered the F.I.R. and handed over the case file back to him.

19. PW-11 Inspector K.D.Sharma, deposes that on 7.12.2003, he received a ruka Ext.PN through constable Balbir Singh, on the basis of which, he recorded the F.I.R. He further deposes that Constable Balbir Singh handed over to him bulk parcel Ext.P4. He continues to depose that he re-sealed the case property with his own seal having seal impression N. He further deposes that he deposited the case property with Incharge Malkhana, Baldev Singh, along with NCB form, specimen seals, H and N. In cross-examination, he deposes that Ext.P-3 was not torn at the time of resealing and feigns ignorance when the cloth of the parcel was torn. He further deposes that he has not filled in the column No.9 of the NCB form.

20. PW-13 Dy. S.P. Ms. Shubhra Tiwari, deposes that on 7.12.2003, she received information report under Section 42(2) through Constable Brij Lal and she made endorsement on the said report. She continues to depose that on the next day, she received the special report under Section 57 of the Act through Constable Baldev Singh on which she made endorsement.

21. PW-14 ASI Baldev Singh deposes that he received the telephonic information about the carrying of contraband in a scooter bearing No.HP-33-7358. He further deposes that he alongwith constable Ghanshyam went towards NH-20 near PP Drang and associated Dr. Ravinder Kaundal, as a witness and stopped the accused. He further deposes that accused agreed for his search to be carried out by the police party and conducted the search of the dickey of the scooter and during such search, two poly bags were recovered, which were containing opium. He continues to depose that he filled in the NCB form in triplicate and put the impression of seal H on the same. He proceeds to depose that the accused was arrested vide memo PH and was duly informed regarding grounds of arrest. He continues to depose that the case property was sent through HHC Balbir Singh to Police Station alongwith seal H and NCB form and deposes that special report under Section 57 was sent through HHC Balbir Singh. In cross-examination he admits the suggestion that column No. 9 to 12 of the NCB form are blank and also admits that Ext.P-3 Ext.P-4 are torn out from the middle.

22. PW-15 Dy.S.P.N.K.Sharma deposes that on 8.6.2004 ASI Baldev Singh, Incharge P.P. Drang, after completion of the investigation,

handed over the case file to him and after receiving the report of Chemical Examiner Ext.PP/1, he prepared the challan and presented the same in Court.

23 The rummaging of the evidence on record by this Court has been thorough and circumspect. The prosecution case, per-se, is hit by pervasive infirmities. The said pervasive infirmities rid as well as ingrain the prosecution case with the vice of prevarication, hence, rendering the genesis of the prosecution case to be both uninspiring as well as untrustworthy. The prime infirmity, which grips the prosecution case, is, of the mandate of Section 52(3) of the NDPS Act, contemplating and enjoining a statutory mandatory duty upon the Investigating Officer who arrests a person and seizes articles under sub section (2) of Section 41, Section 42 and Section 43 or Section 44 to transmit or forward without unnecessary delay both the person arrested and the article seized, to the Officer Incharge of the nearest Police Station or to the Officer In-charge empowered under Section 53, having been infringed. Now for fathoming whether the casting of the statutory mandatory duty upon the Investigating Officer had come to be infracted, an advertence to the testimony of PW-14 is necessary, wherein he deposes that he had taken the accused to the police post, Darang at 6.00 p.m. Obviously, it is palpable that hence he had not taken the accused alongwith the case property to the Police Station, manned by Station House Officer before whom the accused was to be mandatorily produced. Consequently, when there was a mandatory statutory obligation cast upon the Investigating Officer to take the accused arrested by him for his having committed the offence alleged, to the Officer In-charge of the nearest Police Station, who did not man the police post rather manned the Police Station, marks a departure from or transgression on his part of the mandatory statutory obligation cast upon him. The said deposition of I.O. appearing as PW-14 is corroborated by the deposition of PW-15, inasmuch, as, he voices in his deposition the fact that the accused was not either produced by him before the Station House Officer or any other Police Officer, after completion of the codal formalities at the site of occurrence, which deposition with aplomb constrains this Court to conclude that a shady, camouflaged and impartisan investigation has been carried out by the Investigating Officer. Obviously, it cannot gain credence with this Court.

24. The inference formed by this Court that the obligation cast under Section 52(3) of the Act upon the Investigating Officer after arresting the accused produce him before the Officer Incharge of the Police Station or the Officer empowered under Section 52(3) being mandatory, attains sanctity in the face of it being omitted to be canvassed by the learned Deputy Advocate General by citing apposite authorities rendered by the Hon'ble Apex Court pronouncing upon the fact that the said obligation envisaged and contemplated in Section 52(3) of the NDPS Act of the arresting officer or the investigating officer on arresting the accused produce him without unnecessary delay before the officer incharge of police station or the officer empowered is not a mandatory obligation, rather is directory, a firm conclusion hence, can

be formed that the obligation aforesaid cast upon the Investigating Officer under Section 52(3) of the NDPS Act is a mandatory obligation and its non compliance vitiates the prosecution case or it renders suspect the genesis of the prosecution version.

25. Moreover, the parcels in the instant case were found in a tattered or torn condition, which fact has come to be conceded by PW-14. The tattered condition of the parcel inspires a conclusion that they did not remain intact or gained such a condition as the Investigating Officer or any official of the Police Station concerned had taken to tamper with them. With the forming of such a conclusion the prosecution case is also rendered suspect besides does not gain credence.

26. For reiteration, in other words, it has to be concluded that the parcels, as attributable to the accused or portrayed to be purportedly linking the accused in the commission of the offence alleged are not the parcels as may have been allegedly recovered from the purported conscious and exclusive possession of the accused rather it has to be with aplomb concluded that replaced parcels are attributed to the accused. As a corollary, then on substituted, replaced or tampered parcels, this Court cannot record findings of conviction against the accused.

27. Preponderantly and pre-eminently Column No. 9 to 12 of the NCB form are blank. The said columns were enjoined to be filled in by the SHO of the Police Station concerned. In case they were omitted to be filled in by the SHO, renders open a conclusion that the Investigating Officer did not produce even the case property for its resealing by the SHO of the concerned Police Station. If the above inference is drawable, then entwined with the inference aforesaid formed on the basis of production of tattered parcels, of replaced or substituted material being projected by the prosecution to be allegedly connecting the accused in the offence alleged, it magnifyingly ensuingly fillips a conclusion that the Investigating Officer has conducted the entire investigation in a slanted and mechanical manner. More so when the abstract of Malkhana Register has not been produced in Court which fact entwined with the fact that Column No. 10 of the NCB form relating to the deposit of the case property in the Police Malkhana has, too, remained unfilled, communicates the fact of the aforesaid omission having been occasioned by the Investigating Officer smothering the truth qua the genesis of the prosecution case. Therefore, this Court cannot place any reliance upon slanted, tainted or vitiated investigation.

28. The learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

State of H.P. …Appellant.
Vs.
Thakur Dass …Respondent.

Cr.Appeal No.341 of 2008.
Reserved on: 04.09.2014
Decided on: 10.09.2014.

Indian Penal Code, 1860- Sections 376, 452 and 506- Accused raped the prosecutrix in her home- she reported the matter to the police after three days on the arrival of her son- prosecutrix failed to disclose the incident to her daughter who arrived prior to her son- hence, the delay assumes significance- no injuries were found on her person or the person of the accused- neighbours deposing that they had not heard any cries from the house of the prosecutrix- these circumstances show that the prosecutrix was a consenting party and the acquittal of the accused was justified.

(Para-30 and 33)

For the Appellant-State: Mr.Ramesh Thakur, Assistant Advocate General.
For the Respondent: Mr.G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is preferred by the State against the judgment, rendered on 31.12.2007, by the learned Sessions Judge, Mandi, H.P., in Sessions Trial No.31 of 2005, whereby, the accused-respondent has been acquitted for the commission of offences under Sections 452, 376 and 506 of the Indian Penal Code.

2. Brief facts of the case are that on 9.10.2004, at about 3.00 p.m., the prosecutrix was cleaning her house and in the meantime accused Thakur Dass came there and started threatening the prosecutrix by uttering word "Randi Ab Kahan Jayegi". The prosecutrix, owing to fear, went towards roof of her house and accused also came there and dragged and brought her down in the room and bolted the door from inside. The accused forcibly opened the string of her Salwar and when she tried to raise cries, the accused gagged her mouth. Thereafter, the accused subjected her to rape. The accused also threatened the prosecutrix not to disclose the incident to any person as he would kill her. At night, the accused sent his son to the house of the prosecutrix, who also threatened the prosecutrix not to disclose the incident to any person or defame his father, otherwise she would be finished. The son of the prosecutrix is working as Coolie and was away from her home at that

time and her daughter had gone to graze the cattle. On the third day of the incident, the prosecutrix went to District Courts Mandi and got written complaint Ext.PA which she filed before the S.P., Mandi. Thereafter, the S.P., Mandi ordered the registration of the case against the accused on the basis of which F.I.R. Ext.PN was registered.

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

4. The respondent-accused was charged for having committed offences punishable under Sections 452, 376 and 506 of the Indian Penal Code, by the learned trial Court, to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 17 witnesses. On closure of the prosecution evidence, the statement of respondent under Section 313 Cr.P.C. was recorded by the Court, in which he claimed false implication and pleaded innocence. In defence, the respondent/accused examined three witnesses.

6. On appraisal of the evidence on record, the learned trial Court acquitted the accused for the commission of offences punishable under Sections 452, 376 and 506 of the Indian Penal Code.

7. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Assistant Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

10. The first witness, who stepped into the witness box, to prove the prosecution case, the prosecutrix (PW-1), deposes that she knew the respondent-accused. He is deposed to be her neighbourer. She further deposes that she is widow and her husband died about three years back. She did not remember the date of occurrence, however, she deposes that it was Saturday and it was about 2 ½ years back. About 3.00 p.m., she was cleaning her house with broom, when the accused came inside her house and bolted the door from inside. Thereafter, the

accused forcibly removed her salwar. She continues to depose that she raised hue and cry and the accused tried to gag her mouth. Thereafter, the accused subjected her to forcible intercourse. She further deposes that at the relevant time she was all alone in the house and thereafter the accused left her house. She proceeds to depose that her two children had gone to school at that time and her elder son had gone to his work and a daughter to fields to cut grass. When her daughter Bhensru Devi came back to house from the fields, at about 4.30 p.m., she (the prosecutrix) was weeping and narrated herthe entire incident. She further deposes that she did not divulge the incident to her son Bhim, who also returned home in the evening. She proceeds to depose that at night, Raju, son of the accused, came to her house and he asked her that as to why her father was being defamed and threatened of dire consequences. Thereafter, the accused also came at her house and he also threatened and abused her. The prosecutrix (PW-1) further deposes that the accused also threatened her not to disclose the matter to any person and out of fear and shame, she could not report the matter to any person. On third day of the incident, she went to the District Court, Mandi where she got written an application from an Advocate and the same was submitted to S.P., Mandi. The said application is deposed to be Ext.PA and bearing her thumb impression. Thereafter, she submitted the said application at Police Station, Sadar and the case was registered against the accused. She continues to depose that she was got medically examined by the police at Zonal Hospital, Mandi. During her cross-examination, this witness concedes the fact that there are 80-90 houses in village Thata. She denies the fact that immediately adjacent to her house is the house of Vice President Khime Ram, which is at a distance of 10-15 foot steps. She also admits the fact that the house of her 'Devar' Labh Singh is in front of her house, adjoining to the house of Khime Ram. There are houses of Khub Ram and Beli Ram in front of her house. She further deposes that the accused had raped her again about 5-6 months back in Kuhl in the village and she had lodged formal report at Police Post, Pandoh. Police made inquiries about the incident and the accused was taken tothe Police Station. However, she was not medically examined. She admits the fact that the accused was claiming path through her land which she was opposing.

11. PW-2 (Bhensru Devi), the daughter of the prosecutrix (PW-1) deposes that on 9.10.2014, she had gone to cow shed which is far away from the house and came back at about 3.00 p.m. and when she returned home, her mother was brooming the room at home. In the meantime, the accused, present in the Court, came and bolted the room from inside. She further deposes that when she went to cow shed, her mother was all alone at home and when she returned, her mother told her that the accused subjected her mother to forcible sexual intercourse. During her cross-examination, PW-2, deposes that her brother (Bhim Singh) reached home prior to her arrival on that day, however, she feigns ignorance about the exact time of his arrival. She proceeds to depose that they are in good relations with the family of Khime Ram, Up-Pradhan. She admits the suggestion, put to her, that houses of Khime

Ram and Labh Singh are at a distance of 5 meters from her house and facing her house. She proceeds to depose that the cow shed is situated at a distance of 2 to 2 ½ hours distance from their house and her mother also went to the cow shed on the next day of the incident. She denies the suggestion, put to her, that she is deposing falsely because of inimical relations of her mother with the accused.

12. PW-3, Led Ram, Ward Panch, Gram Panchayat, Deori, deposes that on 13.10.2004, he was associated by the police in investigation of the case along with witness Churamani. On that very date, he deposes that, he came to know that the accused, present in the Court, had committed rape on the prosecutrix (PW-1) on 9.10.2004. He further deposes that the case property, search and seizure from comprised in Ext.PC was filled up by the police which deposed to be bearing his signatures and that of the above witness. During his cross-examination, he deposes that Bhim Singh was working as Coolie with him at the relevant time and he never divulged him about the incident prior to 13.10.2004. He concedes to the fact that the path by the side of house of the prosecutrix is common path. Labh Singh, who is brother of husband of the prosecutrix, was also working with him and he also not narrated any such incident to this witness.

13. PW-4 (Dr.Vanita Kappor) deposes that on 12.10.2004, an application comprised in Ext.PE was moved by the police for medical examination of the prosecutrix and she medically examined her at 3.30 p.m. on the same day after obtaining her consent. She found no sign of fresh injury on private parts and thigh of the prosecutrix. She proceeds to depose that after examination, she issued MLC comprised in Ext.PF, which is deposed to be in her hand and bearing her signatures.

14. PW-5 (Dr.Jiwa Nand Chauhan) deposes that on 18.10.2004, he examined the accused, present in the Court and identifies him to be the same person brought by the police with the history of raping a lady on 9.10.2004. In his opinion, it has been concluded that there is nothing to suggest that the person examined is not capable of performing sexual act. There was no injury on the surface of the penis of the person examined. He continues to depose that application comprised in Ext.PJ was produced before him by the police which deposes to be bearing his signatures and after examination, he issued MLC comprised in Ext.PJ. During his cross examination, he denies the suggestion, put to him, that initially he gave opinion that the person examined is not capable of performing sexual act.

15. PW-6 (Tara Chand Sharma) deposes that on 12.10.2004, the prosecutrix approached him and requested him to write in Hindi an application and he had written the application on the information given by her, which is Ext.PA. He continues to depose that later he read over the application to her and she put the thumb impression on the said application in his presence.

16. PW-7 (Dele Ram) has not supported the prosecution case since during their examination-in-chief having not supported the

prosecution witness, he was declared hostile and was requested by the learned public prosecutor to be cross-examined, on his request having come to be acceded to he was cross-examined by the learned public prosecutor but no incriminating material against the accused could be elicited from his cross-examination.

17. PW-8 (HHC Raj Kumar) deposes that on 12.10.2004 one complaint Ext.PA forwarded by the S.P. was received by him. He entered the said application in the daily diary at No. 11 dtd. 12.10.2004, copy of which is Ext.PM, which was sent to P.S. Sadar Mandi for the registration of the case under Section 376 IPC.

18. PW-9 (HC Rajeev Kumar) deposes that on 12.10.2004, he received copy of DD No.11 comprised in Ext.PM on the basis of which F.I.R. comprised in Ext.PN was registered by him, which is deposed to be in his hand and bearing his signatures. He further deposes that he also appended an endorsement at portion A to B on the back side of Ruqua comprised in Ext.PM and the case file was sent to Police Post, Pandoh for investigation.

19. PW-10 (Constable Prakash Chand) deposes that on 17.10.2004, he, along with Dole Ram witness, was associated in the investigation of the case. He further deposes that the accused, present in the Court, produced his underwear which was taken into possession vide recovery memo comprised in Ext.PK and seizure form Ext.PO which is deposed to be bearing his signatures as well as that of Dole Ram witness. In his cross-examination, he deposes that underwear Ext.P-8 was produced by the accused at his house in village Thata and village Thata is at a distance of 10 kilometers from Police Post, Pandoh.

20. PW-11 (ASI Bhim Sen) deposes that on 12.10.2004, the prosecutrix came to Police Post City, Mandi and produced complaint comprised in Ext.PA forwarded by the S.P., Mandi which was entered in the daily diary and thereafter he wrote Ext.PE to the M.O. for medical examination of the prosecutrix and obtained the MLC after deputing LC Rekha Devi with the prosecutrix.

21. PW-12 (N.K.Sharma) deposes that the investigation of the case was conducted by ASI Ram Lal, Incharge, Police Post, Pandoh, who is dead now and after verifying the investigation, he prepared the challan and presented the same in the Court. During his cross-examination, he denies the suggestion, put to him, that Ram Lal has conducted the investigation in a biased manner so as to implicate the accused.

22. PW-13 (LC Rekha Devi) deposes that on 13.10.2004, she accompanied the prosecutrix to Zonal Hospital, Mandi for her medical examination and after her medical examination, the doctor issued MLC and handed over two sealed parcels, along with specimen seals, to her. Both the sealed parcels, along with specimen seals, were deposited by her with HHC Baldev Singh. She further deposes that so long as the parcels remained in her possession, nobody tampered with the same.

23. PW-14 (Constable Jagdish Chand) deposes that on 13.10.2004, ASI Ram Lal, Incharge, Police Post, Pandoh, deposited with him one sealed parcel, sealed with seal-L, said to be containing Salwar and Kameez of the prosecutrix along with specimen seal-L which is deposed to be entered in the Malkhana Register. He continues to depose that on 17.10.2004, ASI Ram Lal deposited with him one sealed parcel said to be containing underwear of accused which was sealed with seal-R along with specimen seal-R and both the above sealed parcels were handed over to HHC Roshan Lal on 18.10.2004 along with specimen seals L and R vide RC No.21/04 for depositing the same in Police Station, Sadar, Mandi.

24. PW-15 (Dharam Chand) deposes that the sealed parcel handed over to him by HHC Baldev alongwith specimen seal were deposited by him at F.S.L.Junga vide R/C No. 171/04 and so long as these sealed parcels remained in his possession nobody tampered with the same. During his cross-examination he denies the suggestion put to him that no such articles were handed over to him by the Addl. MHC, P.S.Sadar, Mandi and then at FSL, Junga.

25. PW-16 (HHC Baldev Singh) deposes that he had made the entries regarding the receipt and dispatch of the case property in the Malkhana Register No. 19, which is Ext.PS.

26. PW-17 (HHC Roshan Lal) is a formal recovery witness and deposes that so long the case property remained with him none tampered with the same.

27. DW-1 (Khub Ram) deposes that he knows the prosecutrix and the accused as they are from his village. He deposes that his house is at a distance of 15 feet from the house of the prosecutrix. He further deposes that prosecutrix is his Bhabhi in relation. He further deposes that the police enquired from them about the incident and they divulged that nothing had happened in the way as mentioned by the prosecutrix in the F.I.R.

28. DW-2 (Ved Ram) deposes that his house is at a distance of 5-6 meters from the house of Gindu Devi. He further deposes that there are 5-6 houses near to his house. He continues to depose that Gindu Devi or any of her family member never told him any incident of rape prior to visit of the police.

29. DW-3 (Keshav Ram) deposes that his house is at a distance of 50 meters from that of the prosecutrix. He further deposes that on 13.10.2004, they came to know that the prosecutrix has made a report against the accused regarding rape. He continues to depose that the prosecutrix had a dispute with the accused relating to path. During his cross-examination, he feigns ignorance that the prosecutrix had lodged complaint in such like cases prior to the present incident in the Panchayat or Court.

30. The prosecutrix (PW-1) was allegedly subjected to forcible sexual intercourse at the instance of the accused. She, in her deposition,

comprised in her examination-in-chief, has concerted to corroborate the genesis of the occurrence, comprised in complaint Ext.PA. She purportedly has lent corroboration to the depositions of PW-2 and PW-3. On a wholesome analysis of the depositions of the prosecution witnesses, aforesaid, the learned trial Court concluded that no implicit reliance can be placed on the testimonies of the prosecution witnesses, hence, concluded that the charges against the accused convincingly stands not proved. The learned Sessions Judge, had found the version of the prosecution witnesses un-inspiring as well as discrepant, hence, had concluded that they were unworthy of credence nor carry any probative value. This Court would not upset or reverse the findings recorded by the learned Sessions Judge in favour of the accused unless on a discerning study of the testimonies of the prosecution witnesses, it emerges that even while their testimonies are bereft of any inter-se or intra-se contradictions, hence, credible as well as inspiring have been untenably construed to be discardable by the learned Sessions Judge or the learned Sessions Judge while recording findings of acquittal in favour of the accused had not appreciated the material placed on record or mis-appreciated the evidence on record which, hence, has occasioned substantial miscarriage of justice necessitating of warranting interference by this Court. While proceeding to analyze the testimonies of the prosecution witnesses, initially comprised in the deposition of the prosecutrix, who appeared as PW-1, for gauging, whether it is or is not bereft of any inter-se or intra-se contradictions vis-à-vis the depositions of other prosecution witnesses, namely, PW-2 (Bhensru Devi) and PW-3 (Led Ram) as well as DWs, so as to render it, hence, credible or not credible, the preponderant fact, which engages the attention of this Court, is (i) of hers having made an initial disclosure of the incident to her daughter PW-2, who purportedly arrived home prior to the arrival of her son Bhim Singh. Hence, in the face of the arrival of her daughter PW-2 prior to the arrival of her son Bhim Singh, she deposes that the initial disclosure of the incident could not be made to Bhim Singh. However, the factum of Bhim Singh, having arrived home later than PW-2 and which later arrival of her son Bhim Singh precluded the prosecutrix to make an initial disclosure of the incident to her son, stands belied and is stripped of its veracity, in the face of PW-2 deposing that Bhim Singh, son of PW-1 and her brother had reached home prior to her arrival. With falsity being lent to the factum of the deposition of the prosecutrix of her son Bhim Singh having arrived home later than PW-2, it, hence brings forth intra-se contradictions vis-à-vis the testimonies of PW-1 and PW-2 qua the fact of the disclosure of the incident to even PW-2 by the prosecutrix. If the above inference is drawable, consequently, it, (ii) appears that the prosecutrix omitted to disclose the incident promptly to even her daughter PW-2 as a concomitant then, if there was no prompt disclosure of the incident by the prosecutrix to her son Bhim Singh or even to PW-2, the natural sequel is that the prosecutrix had consensually succumbed to the purported forcible sexual intercourse perpetrated on her person by the accused. The inference, aforesaid, get impetus and momentum from the fact that (iii) even though the incident occurred on 9.10.2004, however, an F.I.R. qua the occurrence, as

divulged by PW-1 came to be lodged only on 12.10.2004. Even qua the belated lodging of the F.I.R. qua the occurrence, there is no palpable explanation emanating from the prosecution. When delay in the lodging of the F.I.R. has remained unexplained, despite the Police station being located at a distance of about 1 ½ kilometers, and her on the next date having gone to collect grass by covering a distance of about 2 ½ kilometers, this Court is, as such, constrained to conclude that the version comprised in the deposition of PW-2 is both concocted as well as pre-meditated, hence, enjoys no sanctity, besides it conveys that the sexual intercourse, if any, perpetrated on the person of the prosecutrix by the accused, was consensual.

31. The factum of the prosecutrix having voluntarily succumbed to the sexual overtures of the accused gets fortified by the factum of the MLC of the prosecutrix comprised in Ext.PF omitting to record any injury portraying hers having resisted the purported sexual intercourse perpetrated on her person by the accused. For omission of portrayal of any marks of injuries, abrasions and bruises on the person of the prosecutrix in the MLC of the prosecutrix prepared by Dr.Vanita Kapoor (PW-4) comprised in Ext.PF, secures a formidable conclusion that she consensually succumbed to the purported sexual intercourse. Even the MLC of the accused comprised in Ext.PJ does too also omit to demonstrate any bruises, injuries or abrasions on his person as would have existed in case the prosecutrix had violently resisted the perpetration of the alleged forcible sexual intercourse on her person by the accused. Omission of reflection in the MLC of the accused of any injuries, bruises or abrasions on his person, connotes as well as signifies, that such omissions of reflections of injuries, abrasions or bruises on his person, portray the fact that the prosecutrix had voluntarily succumbed to the alleged perpetration of the forcible sexual intercourse on her person by the accused.

32. Since the prosecutrix in her cross-examination has leveled allegations against the accused having also subsequent to the alleged incident inasmuch, as, 5-6 months prior to her statement being recorded in the Court subjected her to forcible sexual intercourse, whereas when such allegations per-se do not attain any truth in the face of her having not reported the matter either to the police or to the Panchayat hence begets the conclusion that even the fateful incident which occurred on 9.10.2004 is wholly concocted and invented or as the subsequent incident attributed to the accused is spurious so also the incident which occurred on 9.10.2004, is, both vitiated as well as spurious.

33. The defence witnesses who deposed as DW-1, DW-2 and DW-3 hence voiced in their respective deposition that they are in close proximity to the house of the prosecutrix and that they are closely related to the prosecutrix yet in one voice they have unanimously deposed that no disclosure qua the incident was made to them by the prosecutrix, besides they have omitted to depose in their respective examinations in chief that they over heard any shrieks or screams

emanating from the house of the prosecutrix where the said incident took place. The aforesaid disclosure in their depositions communicates that the prosecutrix has omitted to scream or shriek as she was a consenting partner or had consensually succumbed to the sexual act perpetrated on her person on the fateful day. Even the Investigating Officer, who, after completion of the investigation, died and, hence, the learned counsel for the defence was deprived of an opportunity to cross examine him for ascertaining the reason for his omitting to associate the DWs in the investigation, despite the fact that theirs houses are located in immediate proximity to the site of occurrence, renders open an inference that they were deliberately or intentionally not joined in the investigation carried out by him as he intended to smother the truth qua the incident. The impartisan investigation carried out by him, hence, does not gain any credence. The learned trial Court has appreciated the testimonies of the prosecution witnesses in a fair, balanced and mature manner. Its appreciation of the testimonies of the prosecution witnesses does not suffer from any vice or taint or perversity.

34. Consequently, the appeal is dismissed and the impugned judgment of acquittal rendered by the learned trial Court in favour of the respondent/accused does not warrant any interference from this Court and the same is maintained and affirmed. Records of the trial Court below be sent down forthwith.

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

Dharmender Singh and another …Appellants/plaintiffs.

Vs.

Layak Ram and others. …Respondents/defendants.

RSA No. 304 of 2003.
Reserved on: 03.09.2014.
Decided on: 11.09.2014.

H.P. Land Revenue Act- Sections 38 and 45- Entry in the revenue record- Plaintiff claiming to be the owner in possession of the suit land with the allegations that earlier suit land was owned and possessed by one 'K' and was inherited by his wife 'D' on his death who had executed a Will in favour of the plaintiff- defendant shown to be the owner in the column of the ownership- 'K' was recorded to be possession in the copy of Jamabandi in the year 1956-57- his status was "Bila Lagaan Batsawar Malkiyati Khud"- held, that this entry is not sufficient to construe that 'K' was the owner as the entry was never reflected in the column of the ownership- no mutation was attested in favour of 'K' on the basis of any sale deed or conveyance - therefore, 'K' had no title and plaintiff would not become the owner on the basis of will. (Para-8)

For the Appellants: Mr. Karan Singh Kanwar, Advocate.
For the Respondents: Mr. Onkar Jairath, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment and decree, rendered on 13.5.2003, in Civil Appeal No.61-CA/13 of 2002 by the learned District Judge, Sirmaur District at Nahan, H.P., whereby, the learned First Appellate Court allowed the appeal, preferred by the defendants.

2. Brief facts of the case are that the appellants/plaintiffs filed a suit for permanent prohibitory injunction restraining the defendants from interfering in their peaceful possession over the land comprised in Khasra No. 485/428 measuring 15.7 Bighas and land comprised in Khasra No. 165 measuring 4.15 Biswas situated in Village Bhuppur, Tehsil Paonta Sahib, District Sirmaur. The plaintiffs have alleged that the land was owned and possessed by Kalyan Singh and after his death, his wife Smt. Daropti Devi, inherited the same and after death of Smt. Daropti Devi the plaintiffs have inherited the entire property on the basis of a Will dated 22.3.1980 and necessary mutation No. 602 dated 3.9.1996 was also attested in their favour. The defendants, who are only shown owners in the column of ownership in the Jamabandi but they never remained in possession of the suit property as the land was sold to Shri Kalyan Singh, hence, the defendants have no concern with the suit property and even the entry in the column of ownership in favour of defendants and others is also illegal and is not binding on the plaintiffs. The defendants tried to take forcible possession of the suit property and they also threatened to dispossess the plaintiffs. The plaintiffs have prayed for the grant of the relief of permanent injunction restraining the defendants from interfering in the suit property.

3. The defendants/respondents contested the suit and filed written statement taking preliminary objections that the suit of the plaintiffs is not maintainable as they have no locus standi. The plaintiffs have no right, title or interest in the suit property and they have not come to Court with clean hands. They have further alleged that Khasra No. 165 measuring 4.15 bighas is in possession of the defendants, who are cultivating the same as owners and the entries in favour of Kalyan Singh regarding this land are incorrect and are not binding on them. On merits, they have admitted that Kalyan Singh was owner in possession of land measuring 15.7 bighas comprised in Khasra No. 485/428 and he was having no right, title or interest over land comprised in Khasra No. 165 measuring 4.15 Bighas. They have denied the remaining contents of the plaint and alleged that the question of dispossession of the plaintiffs does not arise as they have no right, title or interest over the suit property. Smt. Daropti has never inherited the suit property nor she was competent to execute any Will qua the suit property in favour of the plaintiffs and they have prayed for the dismissal of the suit.

4. The plaintiffs/appellants filed replication to the written statement of the defendants/respondents, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether Kalyan Singh was occupying the suit land as owner in possession on the basis of sale in his favour, as alleged? OPP.
2. Whether Smt. Daropti inherited the suit land from Sh. Kalyan Singh her husband after his death, as alleged? OPP.
3. Whether Smt. Daropti Devi had executed a valid Will dtd. 22.3.1980 in support of the suit land in favour of the plaintiffs, as alleged? OPP.
4. Whether the entries in favour of defendants and others regarding ownership of the suit land is illegal, wrong and fraudulent, as alleged? OPP.
5. Whether the plaintiffs are entitled for the relief of injunction, as claimed? OPP.
6. Whether the suit is not maintainable, as alleged? OPD.
7. Whether the plaintiffs have no locus-standi to filing the suit, as alleged?
   OPD.
8. Whether the plaintiffs have no cause of action, as alleged? OPD.
9. Whether the entries qua possession of Kalyan Singh over the suit land in the record are incorrect and false, as alleged? OPD.
10. Whether the mutation No. 602 in favour of plaintiffs is wrong and false, as alleged, if so its effect? OPD.
11. Relief.

6. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants, to the extent that the defendants were restrained from interfering in the suit land comprised in Khasra No. 165 measuring 4 bighas 15 biswas situated at village Bhuppur, Tehsil Paonta Sahib. In appeal, preferred before the learned first Appellate Court by the defendants against the judgment and decree of the learned trial Court, the learned first Appellate Court dismissed the suit of the plaintiffs.

7. Now the appellants/plaintiffs have instituted the instant Regular Second Appeal before this Court, assailing the findings, recorded in, the impugned judgment and decree rendered by the learned first Appellate Court. When the appeal came up for admission on 29.8.2003, this Court, admitted the appeal instituted by the appellants/plaintiffs,

against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

> 1. Whether the learned District Judge has misconstrued, misinterpreted and misapplied the evidence on record and the view taken by him in the impugned judgement, decree is not possible on the basis of material on record?

Substantial question of Law No.1.

8. Uncontrovertedly, the parties are not at contest qua the ownership of land measuring 15-7 bighas comprised in Khasra No. 485/428. The lis intere-se the parties at contest is qua an area measuring 4 bighas 15 biswas comprised in Khasra No. 165. Daropti Devi, since deceased, on demise of Kalyan Singh, the predecessor-in-interest of the plaintiffs, purported owner in possession of the suit property executed a Will qua the suit property in favour of the plaintiffs, on strength thereof, the plaintiffs canvassed that with their predecessors-in-interest having a valid and sustainable title qua the suit land, as such, now they step into his shoes and have acquired rights as owners in possession of the suit property. The controversy, which has to be put at rest is whether Kalyan Singh, under whom Daropti Devi, the mother of the plaintiffs, derived an interest in the suit property and conveyed it by way of a testamentary disposition executed by him in her favour by the plaintiffs, had any tenable as well as a valid and subsisting title, qua the suit property. For gauging the fact whether Kalyan Singh, under whom his widow Daropti Devi (since deceased), and now the plaintiffs on the strength of the latter, having executed a testamentary disposition qua the suit property, claim right of owners in possession of the suit property, ever had an invincible title qua the suit property, an advertence is required to make an entry existing in Ext.P-6 Jamabandi for the year 1956-57 qua the suit property wherein Kalyan Singh, predecessor-in-interest of the plaintiffs was reflected to have the status of "Bila Lagaan Batsawar Malkiyati Khud". On the strength of the aforesaid entry, the counsel for the plaintiffs/appellants contends that hence Kalyan Singh, the predecessor-in-interest of the plaintiffs had in the year 1956-57, as conveyed by Ext.P-6, become owner of the suit property, hence, his widow Daropti was empowered to execute a testamentary disposition qua the suit property in favour of the plaintiffs. A reading of the entry appearing in the column of possession existing in Jamabandi Ext.P-6 reflecting the status of Kalyan Singh the predecessor-in-interest of the plaintiffs over the suit land as "Bila Lagaan Batsawar Malkiyati Khud" does not for the reason; (a) of their being no reflection in the column of ownership of Kalyan Singh being the owner of the suit property; (b) their being no attestation of mutation on the score or on the strength of any purported sale transaction having occurred or taken place inter-se Kalyan Singh and the previous owners constitute it to be construable or connoting or communicating the fact of Kalyan Singh having ever acquired a valid and subsisting title over the suit property. The entry in the column of possession in Ext.P-6 does when rather forcefully

conveying the factum of Kalyan Singh, the predecessor-in-interest of the parties at contest to be "Bila Lagaan Batsawar Malkiyati Khud" does not empower it to articulate or bespeak the factum of Kalyan Singh being its recorded owner, in pursuance to a sale transaction having occurred inter-se him and the previous land owners, rather garners a conclusion that the occurrence of the aforesaid entry is significatory of the fact that it has mechanically or perfunctorily occurred therein without their being any sale transaction inter-se Kalyan Singh or the previous owners. Had a sale transaction inter-se Kalyan Singh and the previous owner occurred or taken place necessarily then its occurrence, would have found communication in the column of ownership of Jamabandi qua the suit land comprised in Ext.P-6 in pursuance to the attestation of a preceding mutation recording the fact of a sale transaction inter-se Kalyan Singh and the previous owners having taken place. An omission thereof, for reiteration, constrains this Court to conclude that no sale transaction inter-se Kalyan Singh and previous owners ever took place. Moreso, in absence of occurrence in the revenue record of an entry conveying the conferment of the status aforesaid upon Kalyan Singh, to be voiced by the recording of or attestation of mutation of sale which occurred inter se Kalyan Singh and the previous owners, for concluding that Kalyan Singh was bestowed or conferred the status as an owner qua the suit property, as a corollary, its absence constrains this Court to conclude that the entry in Ext.P-6 conferring the status of "Bila Lagaan Batsawar Malkiyati Khud" upon Kalyan Singh has been unilaterally or arbitrarily recorded or is not in pursuance or preceded to by any valid order of any revenue authority. Consequently, it has no force or sanctity, rather it has to be construed to be non-est. In sequel, it has to be emphatically concluded that Kalyan Singh, predecessor-in-interest of the plaintiffs never was bestowed with or conferred with the status of owner of the suit land and that the entry in Ext.P-6 comprising the Jamabandi for the year 1956-57 qua the suit land is liable to be construed to be of carrying no probative value in determining the issue over which the parties are engaged.

9. The effect of this Court construing Ext.P-6 to be non-est and its further sequelling the concomitant effect of the predecessor-in-interest of the plaintiffs having acquired no title over the suit land, as a corollary then the effect of Will, if any, executed by widow Daropti Devi in favour of plaintiffs does not vest in them any right, title or interest over the suit property. Even the effect of the extant Jamabandi apposite to the suit land omitting to convey that on the demise of Kalyan Singh in January, 1980, the name of Daropti Devi as widow was reflected in the column of possession qua the suit property, rather, fillips a conclusion that when presumption of truth is to be lent to the revenue record comprised in the Jamabandi qua the suit land comprised in Ext.P-13 conveying the fact of the suit property to be recorded in possession of the defendants and when no apposite evidence carrying any probative worth has been adduced to rebut the said presumption, it, has to be concluded that the defendants are in possession of the suit land, as aptly concluded by the learned First Appellate Court. Hence, the plaintiffs are not entitled to the relief of injunction. The substantial question of law is

answered against the plaintiffs-appellants and in favour of defendants-respondents. Appeal dismissed. Impugned judgment and decree of the first Appellate Court maintained and affirmed. The parties are left to bear their own costs.

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

State of H.P. ...Appellant.
Vs.
Babu Ram ...Respondent.

Criminal Appeal No.4 of 2007
Reserved on : 16.7.2014
Date of Decision: 11.09.2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 12.5 kgs of charas- prosecution not examining the driver of the vehicle who took the police party to the spot and one other witness – the testimonies of the police officials are contradicting each other- no independent witness was associated- non-examination of the independent witness and the other prosecution witness would be fatal to the prosecution.

(Para 9 to 15)

N.D.P.S. Act, 1985- Section 20- Link evidence- PW-5 stating that four sample seals of seal impression T were prepared, whereas, PW-1 and PW-3 stating that only one such sample was prepared- when the case property was opened in the Court, it was sealed with two impressions of seal 'K' and three impressions of seal T - report of CTL did not record that seal was received or it was tallied- in these circumstances, link evidence has not been proved and the acquittal of the accused is justified.

(Para-26 to 31)

Cases referred:

Prandas Vs. The State, AIR 1954 SC 36

Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Tika Ram Vs. State of Madhya Pradesh, (2007) 15 SCC 760

Girja Prasad Vs. State of M.P., (2007) 7 SCC 625)

Aher Raja Khima Vs. State of Saurashtra, AIR 1956

Tahir Vs. State (Delhi), (1996) 3 SCC 338

Mohammed Ankoos and others Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant : Mr. Ashok Chaudhary, Additional Advocate General, Mr.Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondent: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 18.9.2006 of the learned Special Judge, Fast Track, Kullu, District Kullu, Himachal Pradesh, passed in Sessions Trial No.5 of 2005, titled as *State v. Babu Ram,* challenging the acquittal of respondent Babu Ram (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Sec. 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. It is the case of prosecution that SI Dorje Ram (PW-5) alongwith Constable Partap Singh (PW-3), Constable Mehar Chand ((PW-4) and HC Narain Singh (not examined), left Police Station, Kullu on patrol duty and detection of crime. At about 12.30 a.m., police party laid Naka on a footpath, between Jai Nallah and Rasol Bridge. The footpath leads to Rasol Bridge constructed over Parbati River. On 25.8.2004 at about 3.15 a.m., accused was seen walking in a torch light carrying a sack. He was coming from the side of Rasol Bridge. In the flash of a torch light, police party saw the accused and stopped him. On query, accused disclosed that he was carrying Charas in the sack. Mehar Chand (PW-4), who was asked to search for independent witnesses, returned after 20 minutes, as Sadhus, who were present in the nearby temple, refused to associate themselves as witnesses. Consequently, after associating police officials Mehar Chand (PW-4) and Narain Singh (not examined) as witnesses, Dorje Ram (PW-5) searched the sack, from which Charas, in the shape of Chapattis, Tikkis and Battis, was recovered. The same was weighed and found to be 12.5 kgs. Two samples, each weighing 25 grams, were drawn. Sample parcels as also bulk parcel were sealed with six seals of impression 'T'. Sample seals, four in number, were prepared. Column No.8 of the NCB form, in triplicate, was filled up by Dorje Ram. Seal after use was handed over to Narain Singh. Ruka (Ex.PW-5/B) was sent through Constable Partap Singh (PW-3) to Police Station, Kullu, where FIR No.408, dated 25.8.2004 (Ex. PW-6/A), under the provisions of Section 20 of the NDPS Act, was registered. Partap Singh (PW-3) took the case file and handed it over to Dorje Ram. Accused was arrested on the spot and number of the FIR was recorded on all the documents so prepared on the spot. Thereafter, police party proceeded to the Police Station and handed over the case

property to SHO Badri Singh (PW-6), who resealed the samples as also the bulk parcel with his seal impression 'K' (three in number). He also filled up Column Nos.9 to 11 of the NCB form. Thereafter he deposited the case property, including the NCB forms and the sample seals, with MHC Rup Singh (PW-1). On 25.8.2004, Rup Singh (PW-1) sent one sample through Constable Partap Singh (PW-3) which was deposited at CTL Kandaghat, vide Road Certificate (Ex. PW-1/D) on 26.8.2004. Report (Ex. PA) of the Chemical Analyst, which revealed the sample to be Charas, was obtained by the police and taken on record. With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as six witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded innocence and false implication. He also examined two witnesses in his defence.

5. Based on the testimonies of witnesses and the material on record, trial Court acquitted the accused of the charged offence. Hence, the present appeal by the State.

6. We have heard Mr. Ashok Chaudhary, learned Additional Advocate General, on behalf of the State as also Mr. Sanjeev Kuthiala, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

8. In ***Prandas Vs. The State*, AIR 1954 SC 36**, Constitution Bench of the apex Court, has held as under:

"(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in

regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. Having minutely perused the testimonies of prosecution witnesses, we find no reason to interfere with the impugned judgment. Testimonies of prosecution witnesses cannot be said to be inspiring in confidence. There are contradictions, material in nature, impeaching credit of the witnesses, rendering them to be unreliable and unbelievable.

10 In the instant case, we find that two witnesses i.e. Narain Singh and driver of the vehicle in which the police party went to the spot have not been examined in Court. Their examination was absolutely necessary, in view of material contradictions, which have emerged on record, which we shall discuss herein after. Also, explanation for non-association of independent witnesses cannot be said to be convincing or inspiring in confidence.

11. There is no independent witness. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case

is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

12. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

13. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

[See: ***Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another,*** **(2012) 4 SCC 722;** ***Tika Ram Vs. State of Madhya Pradesh,*** **(2007) 15 SCC 760;** ***Girja Prasad Vs. State of M.P.,*** **(2007) 7 SCC 625); and** ***Aher Raja Khima Vs. State of Saurashtra,*** **AIR 1956**].

14. Apex Court in ***Tahir Vs. State (Delhi),*** **(1996) 3 SCC 338**, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

15. In view of the aforesaid statement of law, we shall now discuss the testimonies of police officials present on the spot, which we must state, on examination, we find to be absolutely uninspiring in confidence.

16. SI Dorje Ram (PW-5) admits that documents pertaining to search and seizure operations were scribed, under his instructions, by members of the police party, out of which only three have been examined in Court. Witness to recovery of the contraband substance is Mehar Chand (PW-4) and Narain Singh (not examined). Testimony of Mehar Chand (PW-4), as we shall discuss herein later, does not inspire confidence. Under these circumstances, non-examination of Narain Singh as also driver of the vehicle in which the police party proceeded to the spot acquires significance.

17. We find genesis of prosecution story of having left the Police Station in the late hours of night and having set up a Naka in the night intervening 24.8.2004 and 25.8.2004, not to be inspiring in confidence at all. This we say so for the contradictions/ improbabilities/variations/ discrepancies in the testimonies of police officials, namely Partap Singh (PW-3), Mehar Chand (PW-4) and Dorje Ram (PW-5). According to Dorje Ram (PW-5), he left Police Station, Kullu alongwith Narain Singh, Constable Partap Singh and Constable Mehar Chand in a Police vehicle driven by Tej Ram. Police party left on 24.8.2004 at 10.15 p.m. The purpose was "patrolling and detection of crime towards Manikaran side". Now, there is nothing on record to establish departure of the police party from the Police Station. What was the crime, which was sought to be detected towards Manikaran side, has not been disclosed. Now, if crime was to be detected at Manikaran side then why is it that police laid a Naka and that too on a foot path, at an isolated place between Jai Nallah and Rasol Bridge. This fact has not been disclosed. It is not the prosecution case that they had any prior intimation of drug trafficking and as such had set up a Naka at that point. How far was the Naka from the road, where the vehicle was parked, has not been disclosed by the prosecution.

18. Further, Rup Singh (PW-1) admits that Daily Diary does not record either the departure or arrival of the vehicle allegedly taken for patrol duty. Also, he could not state as to whether Tej Ram was posted as a driver at Police Station, Banjar or not. Thus, who took the police party in the vehicle remains unexplained and unestablished. The genesis of the prosecution story is thus rendered to be shaky and doubtful.

19. Partap Singh (PW-3) could not state as to whether there was any temple at a distance of 200-250 metres towards Manikaran side or not. He states not to have seen Katagla or Kalaith Bridge or for that matter Katagla village. It has nowhere come that Katagla Bridge is near Kasol. According to Mehar Chand (PW-4), Naka was laid at a place which is 100 metres behind Kasol Bridge. But then he does not know the distance between Kasol Bridge and Jai Nallah. He has not even seen village Rasol and does not know the distance between village Rasol and

Parbati River. He has not even seen Katagal or Kalaith Bridge. Was he really a member of the Police Party? It does not appear so.

20. Also, testimony of this witness belies version of Dorje Ram (PW-5), according to whom Naka was laid between Jai Nallah and Rasol Bridge, which is constructed over Parbati River. Thus, there is major discrepancy, variation or contradiction with regard to the place of recovery of Charas, rendering the prosecution case to be doubtful, if not false.

21. In the instant case, it has come on record through the testimony of Dorje Ram (PW-5) that a temple where Sadhus were residing was just at a distance of 150 metres. Also, village Katagla was just at a distance of 500 to 600 metres from the place where Naka had been set up. Dorje Ram admits that from the place where Naka was set up, he brought the accused alongwith the sack containing Charas, to the vehicle. The reason being that it had started to drizzle. Now, if search and seizure operations were not carried out on the spot i.e. the place of Naka, where he came to know that the sack contained Charas, then why is it that he did not deem it appropriate to take the accused either directly to the Police Station or the place where Sadhus were sleeping or the nearby village. Undisputedly, in the instant case no independent witness was associated for carrying out the search and seizure operations. By the time Dorje Ram brought the accused to the vehicle parked on the road he knew that Sadhus sleeping in the closeby temple had refused to associate themselves as witnesses. Under these circumstances, he could have conveniently driven the vehicle to the nearest place of habitation to associate independent witnesses.

22. What further renders the prosecution case to be doubtful is the version of Mehar Chand (PW-4) and Dorje Ram (PW-5), on the point of non-association of independent witnesses. According to Mehar Chand, on the asking of Dorje Ram he went to the nearby temple and despite his request, 2-3 Sadhus present there refused to associate themselves as witnesses. As such, he returned and informed Dorje Ram about the same. We do not find his version to be trustworthy, which in fact is self contradictory,for he could not state the exact number of Sadhus, who were sleeping and also clarifies to have spoken only with one Sadhu, whose name also he does not remember. Be that as it may, why is it that then Dorje Ram did not take the contraband substance to the Police Station or nearby village for carrying out search and seizure operations, instead of choosing to associate PW-4 and Narain Singh as witnesses for such purpose. It is not that police party had any threat from the accused or apprehension of his fleeing away from the spot. Also Dorje Ram (PW-5) admits not to have taken any action against the Sadhus for their refusal to be associated as witnesses.

23. Still further, Dorje Ram (PW-5) states that there were 3-4 Sadhus who had refused to associate themselves as witnesses but admits that “he had no talk with those Sadhus”. Then on what basis does he depose such fact. If Mehar Chand had spoken with only one Sadhu then how could Dorje Ram depose that 3-4 Sadhus had expressed

their unwillingness to be associated as witnesses. Thus, either of the witnesses has deposed falsely. Further, Dorje Ram (PW-5) did not make any inquiry about the Sadhus or the place of temple or the name of Pujari. It is not that Dorje Ram was not aware of the temple. He admits to have seen it for the last 2-3 years.

24. There is yet another unexplained circumstance. Dorje Ram (PW-5) does not state from where he got the scales or the weights. According to him, upon weighment, Charas was found to be 12.5 kgs, which was packed in a sack (Ex. P-3). Now, it is not the proven case that police party was carrying the IO Kit.

25. Further, we find there is discrepancy in the testimonies of Partap Singh (PW-3), Mehar Chand (PW-4) and Dorje Ram (PW-5), with regard to the form of the contraband substance. According to PW-3 accused was carrying a white coloured bag from which Charas wrapped in a polythene envelope was recovered. He is silent with regard to the form of Charas. PW-4 states that Charas was in the shape of Chappatis, Tikkis and Battis, which version is contradicted by PW-5, according to whom it was in the shape of Chappatis and sticks.

26. Noticeably, there is discrepancy with regard to the number of samples of seal impression 'T'. PW-5 states that four sample seals of seal impression 'T' were prepared whereas according to Rup Singh (PW-1) and Partap Singh (PW-3) only one such sample was prepared. Also, PW-5 states that sample seal was handed over to Narain Singh, who remains unexamined in Court.

27. Contradiction with regard to sample seal acquires significance when we further examine the prosecution case on the point of link evidence.

28. While recording statement of Mehar Chand (PW-4), trial Court observed that:-

> "(At this stage the learned P.P. has produced parcel Ex. P-1 (larger) and has put forth a request that the same may be allowed to be opened by him in order to get the case property identified from the witnesses. The sealed parcel is containing <u>two seal impressions of seal K and 3 seal impressions of seal T which are intact.</u> Two seal impressions are partially broken and the seal impressions are nto visible. There are signs of two seal impressions but neither there is vax nor seal impressions but it appears from the parcel that same is fully stitched on and has not been tampered with in any manner. Hence allowed to be opened. It is found t o contain sack and charas in the shape of Chapati Tikki and Baties."
>
> (Emphasis supplied)

29. This observation of the Court totally knocks down the prosecution case, rendering the testimony of Dorje Ram (PW-5) to be unbelievable, according to whom, he had affixed six seal impressions of

impression 'T' on each parcel. Significantly, Court observed that the parcel produced was having three seal impressions of seal 'T'. Further report of CTL does not record that sample of the seal was received or tallied, though it is so recorded in the Road Certificate (Ex. PW-1/D) that three seals of impression 'K' were sent but whether they were handed over or not remains unexplained and proven on record.

30. According to Dorje Ram (PW-5), four samples of seal impression 'T' were prepared. Sample seal was handed over by him to Narain Singh who has not been examined in Court. Why so? has not been explained. In view of weak evidence on the point of link evidence, it became incumbent upon the prosecution to have examined the witness and produce the sample seal in Court. Absence thereof has seriously prejudiced the accused as major link of evidence stands concealed.

31. Be that as it may, Dorje Ram states that he handed over the case property alongwith the sample seals to Badri Singh (PW-6), who in turn states that he deposited the same with Rup Singh (PW-1). In Court PW-1 states that he received only two seal samples but in the Road Certificate there is mention of three seals and as per the record only one sample was deposited with the CTL. Significantly, in the report of the expert, it is not so recorded that seal on the sample was compared with the sample seal. This is to be seen in the backdrop of contradiction pertaining to the number of seals affixed on the samples and the observation made by the trial Court with regard to the broken seals on the contraband substance. Link evidence is not complete. Most importantly, bulk parcel produced in the Court was having broken seals for which no explanation is forthcoming. This has caused serious apprehension and doubt about the factum of search and seizure of the contraband substance from the conscious possession of the accused.

32. Also identity of the seized contraband substance produced in the Court itself is in doubt. Dorje Ram had also raided the video parlour of the accused at a place known as Jari. This was on 26.8.2004 when an unclaimed sack (Ex. P-3) was recovered. While exhibiting this parcel in Court there is no typographical error. Now if Ex. P-3 was recovered at the time when video parlour was raided, then how is it that the sack having same exhibit was recovered on 25.8.2004. Rup Singh (PW-1) admits that alongwith the sample in question he had also sent samples of other cases to the laboratory. Hence, possibility of the samples being mixed up cannot be ruled out, particularly when Partap Singh (PW-3) states that only one sample seal was prepared on the spot.

33. There is yet another contradiction on record. According to Dorje Ram (PW-5), he gave his personal search to the accused whereas according to Mehar Chand (PW-4) same was given to Narain Singh, the person who scribed such memo has not been examined in Court.

34. The testimonies of prosecution witnesses are uninspiring in confidence. No reasonable explanation for non-association of independent witness is forthcoming. Also, link evidence is weak. As such, it cannot be said that prosecution has been able to prove its case,

by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused was found in conscious and exclusive possession of 12.5 kgs of Charas.

35. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

36. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in **Mohammed Ankoos and others Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94**, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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

State of H.P. ...Appellant/Plaintiff.
Vs.
Prabhu & Anr. ...Respondents/Defendants.

RSA No.294 of 2003.
Reserved on: 01.09.2014.
Decided on: 11.09.2014.

Limitation Act, 1963- Article 58- State instituting a suit on 16.1.1992 seeking declaration that decree passed on 31.5.1971 was bad being collusive- further asserting that it came to the knowledge of the plaintiff on 21.1.1990 and limitation started running from the said day- held, that Ld. A.C. 2nd Grade had ordered the correction of the revenue record in 1973- matter was carried in the appeal and the order was set aside- further an appeal was taken to the Collector who ordered that the name of the defendant No.1 be recorded as tenant- State was represented by ADA- State was also a party in an appeal against rejection of the mutation- these facts clearly show that the State was aware of the pendency of the proceedings- hence, its plea that the State was not aware that the any proceedings were pending cannot be accepted.

For the Appellant: Mr.Ravinder Thakur, Addl.A.G. with Mr.Vivek Attri, Dy.A.G.
For the Respondents: Mr.K.D.Sood, Sr.Advocate with Mr.Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment and decree, rendered on 29.10.2002, in Civil Appeal No. 64 of 1995, by the learned District Judge, Hamirpur, H.P., whereby, the learned First Appellate Court dismissed the appeal, preferred by the plaintiff/appellant.

2. Brief facts of the case are that the plaintiff/appellant instituted a suit for declaration on the allegations that the land, comprised in Khasra No. 245 (old Khasra No. 510) measuring 42 kanals 10 marlas was in the ownership and possession of the plaintiff-State of Himachal Pradesh, which fact is evident from the entries of copy of jamabandi for the year 1977-78 and prior to that it was shown recorded in the name of Gram Sabha. This land has now been vested in the State of H.P. free from all encumbrances under the H.P.Village Common Land (vesting and Utilisation) Act, 1974 vide mutation No. 175. Defendant No.1 obtained a decree against Gram Sabha, Dhanwan represented through defendant No.2 from the Court of Sub Judge, 1st Class, Hamirpur in Civil Suit No. 378 of 1969 decided on 31.5.1971. This decree is collusive obtained fraudulently by defendant No.1 in connivance with defendant No.2 as in the above noted suit the defendant No.2 filed written statement and contested the suit of defendant No.1. But in the meantime the learned counsel for defendant No.2 Sh. B.C.Uppal, Advocate, made statement in the Court and admitted the claim of defendant No.1. In the entries of Jamabandi for the year 1966-67 there is nothing in the revenue record to show that defendant No.1 was tenant at will under defendant No.2 and the entry qua tenancy was incorporated only in jamabandi for the year 1971-72 which shows that at the time when the aforesaid suit was filed in Court, neither defendant No.1 was tenant at will nor in hostile possession over the suit land for the last 35-36 years. Thus it is clear that the entry showing Sh.Prabhu Ram defendant No.1 as tenant at will of the suit land was recorded in jamabandi for the year 1971-72 collusively. An enquiry was also conducted by the Land Reforms Officer, Bhoranj, on 26.4.1990 and this entry showing defendant No.1 Prabhu Ram tenant at will was found to have been recorded wrongly. The collusion of defendants is also clear as they got the compromise decree dated 31.6.1971 on the basis of statements made by the learned counsel for the parties. Even the Sarpanch himself had no authority to make any statement as an application had been filed by Sh. Hari Singh and other under Order 1 Rule 10 CPC for making them party in which it was alleged that defendant No.1 had filed suit in collusion with defendant No.2. The said settlement of the defendants No. 1 and 2 was to defeat the legitimate right, title and interest of the plaintiff-State of H.P. Therefore, the judgement and decree dated 31.5.1971 passed by Sub Judge, Ist Class, Hamirpur, being collusive is null and void and inoperative against the plaintiff. The plaintiff came to know about the said collusion only on

22.11.1990 when defendant Prabhu Ram filed an appeal against the order of Assistant Collector, 1st Grade, Bhoranj, dated 26.4.1990. From the documents attached with the appeal, the plaintiff came to know that in the civil suit vide which decree was passed in favour of said Prabhu, the plaintiff-State of H.P. was not party in that suit. As such, the plaintiff filed this suit for declaration against the defendants.

3. The defendants/respondents contested the suit and filed written statement, thereby they took preliminary objections firstly to the effect that the suit is not within limitation, secondly that the plaintiff has no cause of action, thirdly that the plaintiff is stopped from challenging the entry of tenancy in favour of Prabhu Ram as this entry was incorporated as per order passed by the Collector himself and lastly that the suit against defendant No.2 is not maintainable as he is not Pradhan of Gram Sabha, Dhanwan. On merits, the defendants denied the allegations contained in the plaint. The defendants alleged that Prabhu Ram was tenant qua the suit land on payment of rent at the rate of Rs.10/- per annum as is evident from the entries of Jamabandi for the year 1971-72. The defendants further alleged that no doubt in the year 1973 correction was made against the entry of said Prabhu in the column of possession but it was without jurisdiction as on an appeal filed by said Prabhu before Collector the case was remanded to Assistant Collector, 1st Grade for further inquiry and fresh decision. Consequently, the Assistant Collector, Ist Grade made fresh enquiry who referred to the judgement and decree of Sub Judge, 1st Class date 31.5.1971 and also of appeal filed by Sh. Bakshi Ram etc. in the Court of learned District Judge, Hamirpur who dismissed their appeal on 25.7.1972 and Prabhu Ram was held in possession of Khasra No. 510 measuring 42 kanals 10 marlas and his entry of possession was ordered to be restored from Kharif 1973. Therefore, the plaintiff cannot take advantage of the entries of Jamabandi for the year 1977-78 which are quite wrong. After the enforcement of H.P.Tenancy and Land Reforms Act, Prabhu Ram automatically became owner qua the suit land from 3.10.1973. The judgment and decree obtained by Prabhu Ram against Gram Sabha Dhanwan is perfectly right, legal and sustainable. All the other allegations made by the plaintiffs in plaint are denied by the defendants in toto. As such, the defendants alleged that the suit of the plaintiff is not maintainable and is liable to be dismissed.

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

1. Whether the judgment and decree dated 31.5.1971 in civil suit No. 378 of 1969 of Sub Judge, 1st Class, Hamirpur, is null and void and not binding on the rights of the plaintiff? OPP.
2. Whether the suit is not maintainable as alleged?
3. Whether the suit is barred by time? OPD-1.
4. Whether the plaintiff is estopped from challenging the entry of tenancy of defendant as alleged? OPD-1.

5. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff. In appeal, preferred before the learned first Appellate Court by the plaintiff/appellant, against the judgment and decree of the learned trial Court, the learned first Appellate Court also dismissed the appeal.

6. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings, recorded in the impugned judgment and decree recorded by the learned first Appellate Court. When the appeal came up for admission on 29.10.2003, this Court, admitted the appeal instituted by the plaintiff/appellant, against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. That the judgment and decree of both the Courts below are contrary to the provisions of the Punjab Village Common Land Act, 1961 and H.P.Village Common Land (Vesting, Utilisation and Regulation) Act, 1974 and are liable to be set-aside.

2. That the findings of both the Courts below qua the limitation are contrary to the provisions of Article 112 of the Limitation Act, 1963. Hence, the judgment and decree of both the Courts below are liable to be set-aside.

Substantial Questions of Law No.1&2.

7. Initially, it will be apposite to advert to the relevant material, available on record, for adjudging the factum of the tenability of the contention of the learned Additional Advocate General focused upon the effect of erroneous findings, having been rendered by both the Courts below, on the apposite issue of the non-maintainability of the suit on the score of it having been barred by limitation, as rendition of findings on the preceding substantial question of law would hinge upon the fate of adjudication of the substantial question of law relating to maintainability of the suit on the ground of it, as returned by both the Courts below being barred by limitation. For the reasons, to be recorded hereinafter, this Court does not find any merit or tenacity in the contention of the learned Additional Advocate General who has with full force and vehemence, canvassed that the view adopted by the learned Courts below in declaring the suit of the plaintiff/appellant to be not maintainable while being hit by Article 58 of the Limitation Act, is both perverse as well as unreasonable and warrants interference by this Court.

(a) The suit, instituted by the plaintiff-appellant, was for setting-aside the decree, rendered in a previous suit, in which the State was not a party, bearing registration No.378 of 1969 on score of it having been obtained by collusion inter-se the plaintiff and defendant No.1. The period prescribed in Article 58 of the Limitation Act for a decree of declaration in a previous suit being set-aside, on the score of it being obtained by fraud or collusion, is a period of three years from the accrual of the right to sue. The learned Additional Advocate General contends that the factum

of the previous decree sought to be declared null and void, on the score it having been obtained by fraud or collusion came to the knowledge of the plaintiff or the plaintiff became aware of it on 22.1.1990, as such, he contends that hence the limitation for institution of a suit for setting aside the previous decree, aforesaid, commenced there-from and the civil suit having been instituted by the plaintiff within three years from the date of its acquiring knowledge or having become aware of the factum of the previous decree renders it to be within limitation. However, for the following reasons the said contention necessitates its being dispelled (a) The material on record demonstrating the fact of the Assistant Collector 2nd Grade in 1973 on noticing defendant No.1 to be neither owner or in possession of the suit land had proceeded to order correction of the entries in the revenue record, inasmuch, as, of defendant No.1 being directed to be reflected as tenant under the State of H.P. Consequently, entries qua the suit land were corrected. However, the defendant No.1 preferred an appeal against the order of the Assistant Collector 2nd Grade before the Assistant Collector 1st Grade, Hamirpur. The Assistant Collector 1st Grade, Hamirpur, dis-concurred with the order rendered by the Assistant Collector 2nd Grade and proceeded to hence restore the entries qua the suit land in favour of defendant No.1 from Kharif crop 1973. However, the order of the Assistant Collector 1st Grade, Hamirpur, was carried in appeal by one Ganga Ram before the Collector, Hamirpur in case being No. 92 of 1981 decided under Ext.D-14. In the aforesaid appeal, preferred by one Ganga Ram against the order of the Collector 1st Grade before the Collector, Hamirpur, the State of Himachal Pradesh was arrayed as respondent No.3 apart there-from the Collector, Hamirpur in the said appeal was respondent No.3 and was represented by the Additional District Attorney. The Collector while being seized of the appeal preferred before him agreed with the order rendered by the Assistant Collector 2nd Grade whereby the latter had directed the correction of the revenue entries qua the suit land, inasmuch, as, the State of H.P. being ordered to be reflected as owner thereof, whereas defendant No.1 being ordered to be incorporated as a tenant under the State of H.P. in the apposite column of the Jamabandi qua the suit land. Moreover, the Collector, Hamirpur, ordered for the carrying out a fresh enquiry with a further direction to associate the State of Himachal Pradesh before the Assistant Collector, Hamirpur. What is pre-eminently divulged by Ext.D-14, the order rendered by the Collector, Hamirpur is that the State of H.P. which was arrayed as respondent No.3 in appeal before him was represented by the Additional District Attorney. Consequently, with the representation of the plaintiff in the proceedings before the District Collector, Hamirpur, it is not open for the learned Additional Advocate General to contend that in the proceedings in appeal taken up before the Collector, Hamirpur and which sequelled the rendition of a judgment by him comprised in Ext.D-14 qua the suit land that then the factum of the rendition of a judgment and decree in case Civil Suit No. 378 of 1969 previously decided in favour of defendant No.1 on 31.5.1971 was neither in the know of the plaintiff nor it was aware of its rendition till 1990. Consequently, it has to be firmly held that even though the State of H.P. acquired knowledge of the judgment of the

previous litigation inter-se the defendant and Gram Sabha, Dhanwan in the year 1981, yet, it having omitted to as prescribed by Article 58 of the limitation Act, challenge the judgment and decree previously rendered in favour of defendant No.1 by the Civil Court of competent jurisdiction on 31.5.1971, within three years thereafter, bars the suit instituted on 16.1.1992, to be hit by limitation. Consequently, it is rendered not maintainable.

(b) It is manifest from the material on record that the State of Himachal Pradesh, the plaintiff in the instant case, was a party in case No.36 of 1988, which constituted an appeal preferred by defendant No.1 against the rejection of mutation No.253 under order of 29.2.1988 by the Assistant Collector, 2nd Grade Bhoranj. The said order rendered by the Assistant Collector, 2nd Grade Bhoranj is comprised in Ext.D-15 and is rendered on 17.11.1988. In the face their being a revelation in Ext.D-15 of a judgment having been rendered previously in favour of defendant No. 1 on 31.5.1971 bespeaks the fact that in the year 1988 also, the plaintiff-State of H.P. was in the know of or was aware of the judgment and decree rendered in favour of defendant No.1 in the previous litigation adjudicated on 31.5.1971. In face thereof, the plaintiff-State of H.P. having omitted to within the period of limitation prescribed under Article 58 of the Limitation Act for setting aside the decree previously rendered by the Civil Court of competent jurisdiction on the score of it having been obtained by fraud or collusion or despite it having then acquired knowledge of the rendition of a decree in favour of defendant No.1 by a Civil Court of competent jurisdiction, to assail it within the prescribed period of limitation inasmuch, as, within three years of its having acquired such knowledge, renders the suit time barred, as aptly concluded by both the Courts below.

8. The summon bonum of the above discussion is that this Court is constrained to uphold the findings recorded by both the Courts below on the issue of maintainability as also on the issue of the suit of plaintiff being barred by limitation. The view as taken by both the Courts below is reasonable and based on a proper appreciation of material on record and does not suffer from any perversity or absurdity nor also warrants any interference by this Court, sequelling this Court to hold that tenable and sustainable findings on the issue of limitation as well as maintainability of the suit of the plaintiff, have been recorded by both the Courts below. This Court is constrained to answer both the substantial questions of law in favour of the defendants/respondents and against the plaintiff/appellant.

9. The result of the above discussion is that the appeal, preferred by the plaintiff/appellant, is dismissed and the judgments, rendered by the learned Courts below, are affirmed and maintained and suit of the plaintiff is dismissed. However, the parties are left to bear their own costs.

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

Smt. Biasan Devi and others ...Appellants.
Vs.
Kartar Chand and others ...Respondents.

FAO (MVA) No. 160 of 2013.
Judgment reserved on 5.9.2014
Date of decision: 12.09. 2014.

Motor Vehicle Act, 1988- Section 166- Tribunal holding that claimants had failed to prove that the vehicle was being driven in a rash and negligent manner- held, that there was sufficient evidence on record to prove that vehicle was being driven in a rash and negligent manner – further held that evidence is not to be appreciated as in a criminal case- acquittal in criminal case cannot have any effect on the proceedings before the MACT – when the respondents had admitted that the deceased fell down while boarding Trala- the principle of the *res-ipsa loquitur* would be applicable and the burden would shift upon the respondents to prove that there was no rashness or negligence. (Para- 15 to 19)

Cases referred:

NKV Bros. (P) Ltd Vs. M. karumai Ammal and others reported in AIR 1980 SC 1354

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another (2013) 10 SCC 646

Sarla Verma Vs. Delhi Road Transport Corporation, reported in AIR 2009 SC 3104

For the appellants: Mr.Jagdish Thakur, Advocate.
For the respondents Mr.K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate, for respondents No. 1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The claimants have invoked the jurisdiction of this court by the medium of this appeal under Section 173 of the Motor Vehicles Act, hereinafter referred to as "the Act" for short, for setting aside the award dated 16.1.2013, passed by the Motor Accidents Claims Tribunal Hamirpur, H.P, for short "The Tribunal" in MAC Petition No. 63 of 2010 titled Smt. Biasan Devi and others vs. Shri Kartar Chand and others, whereby the claim petition of the claimants came to be dismissed, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants/appellants being the victims of a vehicular accident had filed claim petition before the Tribunal below for the grant of compensation to the tune of Rs.10 lacs with interest @ Rs. 12% per annum, as per the break-ups given in the claim petition.

Brief Facts:

3. It is averred in the claim petition that the deceased Rattan Chand was an ex-serviceman, drawing Rs.10,000/- per month as pension, was also employed as clerk in Dev Bhumi Tralla Union, Hamirpur, drawing a salary of Rs.4000/- per month, became victims of a vehicular accident on 1.6.2008 while going to his home in a vehicle (Tralla) bearing registration No. HP-22-6618, being driven by respondent No. 2 Rakesh Khan in a rash and negligent manner, sustained injuries and succumbed the injuries. FIR No. 174 of 2008 came to be registered in police station Hamipur under Sections 279 and 304-A Indian Penal Code, for short "IPC".

4. Respondents resisted the clam petition by filing replies.

5. The following issues came to be framed by the Tribunal on 19.8.2011.

(i) Whether Rattan Chand died in accident, which had taken place due to rash and negligent driving of vehicle No. HP-22-6618 by its driver Rakesh Khan, as alleged? OPP.

(ii) If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP.

(iii) Whether the petition is not maintainable? OPRs

(iv) Whether the petitioners have no cause of action and locus-standi to file the present petition? OPRs.

(v) Whether the driver of the vehicle No. HP-22-6618 was not holding a valid and effective driving licence at the time of accident? OPR3.

(vi) Whether the vehicle in question was being driven in contravention of terms and conditions of the Insurance Policy? OPR3.

(vii) Relief.

6. The claimants examined PW1 Dr. K.C. Chopra, PW2 H.C. Sunil Kumar, PW3 Bakshi Ram, claimant No. 1 Smt. Biasan Devi herself appeared as witnesse in the witness-box as PW4, PW5 Surender Kumar and PW6 Khem Chand. The claimants have also placed on record documents, i.e., postmortem report, FIR, salary certificate, Pariwar Register, Pension Payment Order, exhibited as Ext. PW1/A to Ext. PW3/A, Ext. PW5/A and Ext. PW6/A respectively.

7. The respondents have also placed on record copy of insurance policy, driving licence and copy of judgment dated 9.8.2010 passed in criminal case No. 156-I of 2008/146-II of 2008 titled State of

H.P. versus Rakesh Khan exhibited as Ext. R-1, Ext. RW1/A and Ext. RX, respectively.

8. The Tribunal held that the claimants have failed to prove that driver has driven the vehicle rashly and negligently and decided issue No.1 against the claimants/appellants and in favour of the respondents and dismissed the claim petition.

9. The finding returned by the Tribunal on issue No.1 is trash one and it appears that perhaps, the Presiding Officer has not gone through the mandate of Section 168 of the Act read with the Rules, even has ignored the aim and object for the grant of compensation and what is the standard of proof. However less said is the better.

Brief resume of the evidence on the record.

10. PW1 Dr. K.C. Chopra deposed that he has conducted the postmortem Ext. PW1/A of deceased Rattan Chand and opined that the death was outcome of the road accident.

11. PW2 Head Constable Sunil Kumar deposed that he has conducted the investigation of the FIR No. 174 of 2008 Ext. PW2/A and during the investigation he found that accused-driver-respondent No. 2 herein was, prima facie, involved in the commission of the offence punishable under Sections 279 and 304-A, of the IPC and presented the challan against him before the Chief Judicial Magistrate, Hamirpur, H.P. On conclusion of the trial, the said Court acquitted the accused-respondent No. 2 herein.

12. PW3 Bakshi Ram deposed that deceased Rattan Chand was working as Clerk in the Tralla Union and was drawing salary to the tune of Rs.4000/- per month and proved the contents of the salary certificate Ext. PW3/A. He further stated that on the unfortunate date, i.e., on the day of the accident, the deceased was going back to his home after performing duties, met with an accident which was caused by the driver of the offending vehicle (Tralla) mentioned supra. The family members of the deceased were dependent upon him and they have lost the source of dependency.

13. One of the claimants Biasan Devi also appeared as witness in the witness-box as PW4, as stated above and deposed that she is the widow of her husband who was earning Rs.10,000/- as pension and drawing Rs. 4000/- as salary from the Tralla Union and was also performing other vocations, met with an accident when he was coming back to his home in offending vehicle (tralla). PW5 Surender Kumar proved the copy of Pariwar Register Ext. PW5/A and PW6 Khem Chand proved the contents of Pension Payment Order Ext. PW6/A.

14. The respondents have not led any evidence in rebuttal except statement of driver Rakesh Khan who appeared as RW1 in the witness-box. Thus, the evidence led by the claimants have remained unrebutted.

15. While examining the evidence, oral as well as documentary, it is crystal clear that the claimants have proved that the driver has driven the offending vehicle rashly and negligently and caused the accident in which deceased lost his life. Thus, there was sufficient evidence on record that the claimants are victims of a vehicular accident which was caused by the driver of the vehicle, i.e., respondent No. 2 herein while driving the vehicle in a rash and negligent manner. The Tribunal has fallen in error in discussing and appreciating the evidence as if he was discussing and appreciating the evidence in a criminal case, which is to be proved beyond reasonable doubt. The apex court in case titled **NKV Bros. (P) Ltd Vs. M. karumai Ammal and others** reported in **AIR 1980 SC 1354** held that the acquittal cannot be a ground for dismissal of a claim petition. In a criminal case, the case is to be proved beyond reasonable doubt, while determining the claim petition; it is to be proved by preponderance of probabilities and strict proof of pleadings is not required. It is apt to reproduce para 3 of the said judgment herein:

> "3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the Courts, as has been observed by us earlier in other case, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasissing this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained

> may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

16. The apex court in **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another (2013) 10 SCC 646,** held that rules of pleadings are not strictly applicable in the claim petitions. It is apt to reproduce relevant portion of para-8 of the aforesaid judgment herein:-

> "8.In United India Insurance Company Limited V. Shila Datta & Ors. while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-judge-bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10)
>
> "10(ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal."
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> ** **

17. It is also apt to mention herein that the Tribunal has also lost sight of the replies filed by the owner, driver and insurer. The driver and owner have admitted paras 8 and 9 of the claim petition. Thus, admitted the accident, which took place on 1.6.2008 within the jurisdiction of police station Hamirpur and FIR was lodged. They have admitted para 24 of the claim petition, but has stated that the deceased died due to his own fault. Thus, it is admitted by the driver and owner that deceased died in the road accident in use of the aforesaid motor vehicle.

18. The insurer has also pleaded and admitted in para 2 of the reply that deceased died while he tried to board himself in the tralla from the back side of the tralla and he fell down on the road as the tralla was going in normal speed on left side. It is apt to reproduce para 2 of the reply filed by insurer herein:

> "2.That no cause of action accrued to the petitioners against the answering respondent to file the petition because the deceased Rattan Chand was a gratuitous/ unauthorized passenger whose risk is not covered under the Insurance Policy. Moreover, the deceased Rattan Chand died due to his own act of negligence while he tried to board himself in the traula from the back side of the traula and the deceased fell down on the road as the Traula was going in normal speed on left side. Thus, the accident has occurred due to rash and negligent act of the deceased Rattan Chand."

19. It is beaten law of the land that risk lies on the driver and principle of res ipsa loquitur is attracted.

20. Having said so, it is held that claimants have proved by leading oral as well as documentary evidence that driver has driven the offending vehicle in a rash and negligent manner and caused the accident.

21. The onus to prove issues No. 3 to 6 was on the respondents but they have not led any evidence thus, are to be decided against the respondents.

22. The learned counsel for the respondents have not addressed any argument, in order to show how the claim petition was not maintainable. Thus, Issue No. 3 is decided against the respondents and in favour of the claimants.

23. Respondents have also failed to prove that claimants had no locus standi or cause of action to file the claim petition. However, as discussed hereinabove, the claimants being victims of a vehicular accident have rightly invoked the jurisdiction of the Tribunal and had locus standi to file the claim petition. Accordingly, Issue No. 4 is decided in favour of the claimants and against the respondents.

24. It was for the insurer to plead and prove that the driver of offending vehicle was not holding a valid and effective driving licence at the time of the accident and the vehicle was being driven in violation of the terms and conditions of the insurance policy. The insurer has not led any evidence. Thus, Issues No. 5 and 6 are to be decided in favour of the claimants and against the respondents. Therefore, issues No. 5 and 6 are decided accordingly.

25. The factum of insurance policy is not disputed. Mr. B.M. Chauhan, learned counsel for respondent No. 3 stated that deceased was a gratuitous passenger, thus owner has committed willful breach and insurer is not liable. The argument is misconceived for the simple reason that insurer has pleaded in para 2, quoted supra that deceased tried to board the tralla and died. It was for the insurer to plead and prove that deceased was a gratuitous passenger and owner has committed willful breach. As discussed hereinabove, it has failed to do so. Thus, the insurer is to be saddled with the liability.

26. The claimants have pleaded and proved that deceased was receiving pension to the tune of Rs.10,000/- per month and drawing Rs.4000/- as salary from Tralla Union, at the time of the accident and have lost source of dependency. Keeping in view the age of the deceased read with other factors, I deem it proper to hold that claimants have, at least, lost source of dependency to the tune of Rs.8000/- per month after deducting 1/3rd his pocket expenses.

27. The claimants have given the age of the deceased as “50” years in the claim petition, which is not denied by the respondents. Claimant No. 1 Biasan Devi herself appeared as witness and deposed

that age of the deceased was 50 years, which is supported by the statement of doctor, who has conducted the postmortem and recorded the age of the deceased as "50" years in Ext. PW1/A. Therefore, keeping in view the Schedule appended to the Act read with **Sarla Verma Vs. Delhi Road Transport Corporation, reported in AIR 2009 SC 3104**, multiplier of "9" is just and appropriate multiplier.

28. Accordingly, it is held that the claimants are entitled to the compensation to the tune of Rs.8000x12x9 total of which comes to Rs.8,64,000/- with interest @ 6 % per annum from the date of filing the claim petition till its realization.

29. As a corollary, the insurer-respondent No. 3 is held liable to pay the compensation. Respondent No.3 is directed to deposit the aforementioned amount alongwith interest, within six weeks from today in the Registry of this Court and on deposit, the same shall be released to the claimants in equal shares.

30. The impugned award is set aside. The claim petition is allowed, as indicated above. The appeal is accordingly allowed. Send down the record, forthwith.

****

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

Hamid Mohd. .....Appellant

Vs.

Rishi Pal & others ..... Respondents

FAO No.8 of 2007
Date of decision: 12.09.2014

Motor Vehicle Act, 1988- Section 166- Tribunal holding that the claimant was earning Rs. 6,000/- per month, it applied the multiplier of 12 and awarded a sum of Rs.8,64,000/- under the head "loss of income" and Rs.1,23,324.70 under the head "medical expenses', but the Tribunal had not awarded any compensation under the heads of "pain and suffering" and "loss of amenities of life"- held, that the Tribunal is bound to award the compensation under the heads of "pain and suffering" and "loss of amenities of life"- hence, Rs.1 lakh awarded under the heads of "pain and suffering" and Rs.1,00,000/- awarded under the head of ' loss of amenities of life'. (Para-12 & 13)

Cases referred:

R.D. Hattangadi Vs. M/s Pest Control (India) Pvt. Ltd. & others, reported in AIR 1995 SC 755

Josphine James Vs. United India Insurance Co. Ltd. & anr, reported in 2013 AIR SCW 6633

For the appellant: Mr. C.N. Singh, Advocate.
For the respondents: Nemo for respondents No.1 and 2.
Ms. Sunita Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 10th September, 2009, passed by the Motor Accident Claims Tribunal, Mandi (for short, "the Tribunal") in Claim Petition No.23 of 1999, titled Sh. Hamid Mohd. vs. Rishi Pal & others, whereby a sum of Rs.9,90,000/- - alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimant and against the insurer (for short the "impugned award").

2. The claimants have questioned the impugned award only on the ground of adequacy of compensation.

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

4. Despite service, there is no representation on behalf of respondents No.1 and 2 are set ex-parte.

Brief facts

5. It is averred in the claim petition that the claimant is the victim of vehicular accident, which was caused by the driver, namely, Rajinder Kumar while driving the offending vehicle bearing registration No.CHO IV-1459 on 4.6.1998 rashly and negligently, the said vehicle hit the claimant, who was driving the Scooter bearing registration No.HP-33-2923, sustained injuries, rendering him permanent disabled.

6. The claimant has filed the claim petition for grant of compensation to the tune of Rs.50,00,000/- as per the break-ups given in the claim petition.

7. The respondents resisted the claim petition by filing replies.

8. The following issues came to be framed in the claim petition:-

> "1. Whether the claimant sustained injuries due to the rash and negligent driving on the part of respondent No.2? OPP
>
> 2. Whether the claimant sustained injuries due to his own rash and negligent driving as alleged? OPR-2
>
> 3. Whether the claim petition is bad for non-joinder of necessary parties as alleged? OPR-2

4. Whether the insurer is not liable to indemnify the injured as alleged? OPR-3

5. To what amount the claimant is entitled to receive as compensation? OPP.

6. Relief."

9. The claimant has examined eight witnesses. The respondents have not examined any witness. Thus, the evidence of the claimant remained un-rebutted.

10. The Tribunal, after scanning the evidence, held that the claimant has proved that due to the rash and negligent driving of the driver he sustained injuries. At the cost of repetition, the owner, driver and the insurer have not questioned the same. Thus, it has attained finality and the findings returned on issues No.1 to 4 are upheld.

11. The Tribunal has held that the claimant was earning Rs.6,000/- per month and applied the multiplier of '12' though on lower side and awarded Rs.8,64,000/- under the head "loss of income" and Rs.1,23,324.70 under the head "medical expenses', but the Tribunal has not awarded any compensation under the heads of "pain and suffering" and "loss of amenities of life".

12. The Apex Court in case titled as **R.D. Hattangadi Vs. M/s Pest Control (India) Pvt. Ltd. & others, reported in AIR 1995 SC 755,** has discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under the heads pecuniary and non-pecuniary damages. In other judgment, the Apex Court in **Josphine James Vs. United India Insurance Co. Ltd. & anr, reported in 2013 AIR SCW 6633**, has laid down the guidelines.

13. Keeping in view the guidelines laid down by the Apex Court in the judgments (supra), I deem it proper to award Rs.1,00,000/- under the head of 'pain and suffering' and Rs.1,00,000/- under the head of ' loss of amenities of life'.

14. The award amount is enhanced and the claimant is held entitled to Rs.11,90,000/-. The insurer is directed to deposit the enhanced amount of Rs.2,00,000/- within eight weeks in the Registry of this Court and in default, it will carry interest at the rate of 6% per annum from today till the date of deposit. On deposition, the Registry is directed to release the award amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payee's account cheque, after proper identification.

15. The impugned award is modified, as indicated above. The appeal stands disposed of alongwith all miscellaneous applications accordingly.

****

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

Karam Chand .....Appellant
Vs.
Kanta Devi & others ..... Respondents

FAO No.6 of 2007
Date of decision: 12.09.2014

Motor Vehicle Act, 1988- Section 166- Claimant had not led any evidence to prove that he was travelling in the offending vehicle as a passenger and that he had met with an accident- therefore, MACT had rightly dismissed his claim. (Para 1 & 2)

For the appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Nemo for respondent No.1.
Mr. Vinod Chauhan, Advocate vice Mr. Ajay Sharma, Advocate, for respondent No.2.
Mr. Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 10th November, 2006, passed by the Motor Accident Claims Tribunal (II), Fast Track Court, Hamirpur (for short, "the Tribunal") in MAC Petition No.38 of 2004/RBT 28 of 2005, titled Karam Chand vs. Kanta Devi & others, whereby the claim petition came to be dismissed(for short the "impugned award").

2. At least, the claimant has to plead and prove that he is the victim of vehicular accident, has not led any evidence to that effect.

3. I have gone through the record. There is not an iota of evidence to the effect that the claimant was traveling in the offending vehicle as passenger, which met with an accident. Even as per the medical record/evidence, the claimant has not suffered even a simple injury or bruise due to the said alleged accident.

4. The appellant-claimant has failed to prove all the ingredients which are required in order to grant compensation as per the mandate of Section 166 of the Motor Vehicles Act, 1988.

5. Having said so, the impugned award is upheld and the appeal is dismissed alongwith all pending applications.

****

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

Smt. Narbada Devi .....Appellant.
Vs.
Smt. Kamla Devi and another ...Respondents.

FAO (MVA) No. 75 of 2007
Date of decision: 12.09. 2014.

Motor Vehicle Act, 1988- Section 166- Tribunal assessing the income of the deceased who was a bachelor as Rs. 2,400/- per month and thereafter assessing the loss of the dependency as Rs. 800/- per month- held, that the assessment is contrary to the decision of the Hon'ble Supreme Court of India in ***Sarla Verma vs. Delhi Road Transport Corporation AIR 2009 SC 3104***- high court assessedthe income of the deceased as Rs.3,000/- per month and loss of the dependency as 50% i.e. Rs.1,500/- per month and awarded compensation of Rs.2,70,000/-. (Para-4 & 5)

Cases referred:
Sarla Verma Vs. Delhi Road Transport Corporation, reported in AIR 2009 SC 3104
Reshma Kumari & ors vs. Madan Mohan & anr., reported in 2013 AIR SCW 3120

For the appellant: Mr. B.S. Chauhan, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Deepak Bhasin, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral).

This appeal is directed against the award dated 02.01.2007, passed by the Motor Accident Claims Tribunal (Fast Track) Shimla, H.P, for short "The Tribunal" in MAC Petition No. 77-S/2 of 2005/2004 titled Smt. Narbada Devi vs. Smt. Kamla Devi and another, on the ground of adequacy of compensation, hereinafter referred to as "the impugned award", for short.

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

3. The claimant has questioned the impugned award on the ground of adequacy of compensation.

4. The Tribunal while determining issue No. 5 held that deceased being bachelor at the time of accident, was earning Rs.2400/-

per month and after making deductions held that the claimant has lost source of dependency to the tune of Rs.800/- per month, i.e., 1/3rd of the monthly income of the deceased. The assessment made by the Tribunal, on the face of it, is bad in law and not in accordance with the mandate rendered in **Sarla Verma Vs. Delhi Road Transport Corporation,** reported in **AIR 2009 SC 3104**, upheld in **Reshma Kumari & ors vs. Madan Mohan & anr.,** reported in **2013 AIR SCW 3120.**

5. Having said so, I hereby hold that the Tribunal has fallen in error in assessing the income of the deceased and the loss of income. It can be safely held that the income of the deceased was Rs.3000/- per month while treating him as a labourer. 50% is to be deducted towards his personal expenses and 50% is loss of source of dependency. Thus, it is held that the claimant has lost source of dependency to the tune of Rs.1500/- per month.

6. Admittedly, the age of the deceased was 21 years at the time of the accident and the Tribunal has rightly held that the age of the deceased was 21 years but has fallen in error in applying the multiplier. The multiplier of "15" was applicable, as per the Schedule appended to the Motor Vehicles Act read with **Sarla Verma's** judgment supra. Thus, I hereby hold that the multiplier of "15" is applicable.

7. In the given circumstances, it is hereby held that the claimant is entitled to compensation to the tune of Rs.1500x12x15 total of which comes to Rs.2,70,000/- with interest @ Rs.6 % per annum, as awarded by the Tribunal, from the date of filing the claim petition, till its realization.

8. Other issues are not in dispute. Thus, findings on the said issues have attained finality and are upheld.

9. Accordingly, the compensation is enhanced and impugned award is modified, as indicated above. Respondent No. 2 is directed to deposit the enhanced amount within eight weeks in the Registry of this Court. On deposit, the amount be released in favour of the claimant, through payee's account cheque.

10. The appeal stands disposed of accordingly. Send down the record, forthwith.

****

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

Shri Sewak Ram .....Appellant.

Vs.

Desh Raj and another ...Respondents.

FAO (MVA) No. 442 of 2010
Date of decision: 12.09. 2014.

Motor Vehicle Act, 1988- Section 166- Deceased, abachelor had income of Rs. 4,500/- per month- claim petition filed by his father- held, that the loss of the dependency is to be taken 50% and thus, compensation of Rs. 4,50,000/- along with interest @ 9% per annum awarded.

(Para 9 to 11)

Cases referred:

Sarla Verma versus Delhi Road Transport Corporation, reported in AIR 2009 SC 3104

Reshma Kumari & ors vs. Madan Mohan & anr. reported in 2013 AIR SCW 3120

For the appellant:	Mr.G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents	Mr.Satyen Vaidya, Advocate, for respondent No. 1.
	Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral).

Respondent No. 2, despite service and despite having given power of attorney on the file is neither present nor there is any representation on its behalf, hence ex parte proceedings are drawn against him.

2. The challenge in this appeal is to the award dated 31.8.2010, passed by the Motor Accident Claims Tribunal Shimla, H.P, for short "The Tribunal" in MAC Petition No. 1-S/2 of 2009 titled Sh. Sewak Ram vs. Shri Desh Raj and another, on the ground of adequacy of compensation, hereinafter referred to as "the impugned award", for short.

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

4. The claimant has not questioned the impugned award on any other ground. In the given circumstances, I deem it proper not to return findings on issues No. 1, 3 and 4, are upheld.

5. In order to determine whether the compensation is adequate, just or otherwise, brief facts are to be noticed.

6. The claimant/appellant being the victim of a vehicular accident, had filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition, on the ground that respondent No. 1, namely, Desh Raj driver of the offending HRTC Bus No. HP-07-5487 had driven the said vehicle in a rash and negligent manner on 17.11.2008 at Mundaghat and

caused the accident. The deceased sustained injuries while de-boarding the said bus and succumbed to the injuries. The deceased was 25 years of age at the time of accident and his income was Rs.5000/- per month and was also having income from agricultural vocations to the tune of Rs. 10,000/-, per month.

7. The Tribunal, after making assessment came to the conclusion that monthly income of the deceased was Rs.4500/-.

8. I am of the considered view that the Tribunal has rightly made the assessment but has fallen in error in assessing the loss of dependency and has lost sight of the judgment of the apex Court delivered in **Sarla Verma versus Delhi Road Transport Corporation,** reported in **AIR 2009 SC 3104**, upheld in **Reshma Kumari & ors vs. Madan Mohan & anr.** reported in **2013 AIR SCW 3120.**

9. The claimant is father of the deceased, who has lost his budding son, source of help and hope in the old age. 50% was to be deducted towards his personal expenses and 50% was to be held as loss of source of income. Thus, it is held that the claimant has lost source of dependency to the tune of Rs.2250/- per month.

10. Admittedly, the age of the deceased was 25 years at the time of the accident and the Tribunal has rightly held that the age of the deceased was 25 years but has again fallen in error in applying the multiplier. The multiplier of "15" was applicable, after taking deductions, as per the Schedule appended to the Motor Vehicles Act read with **Sarla Verma's** judgment supra. Thus, I hereby hold that the multiplier of "15" is applicable.

11. Viewed thus, it is hereby held that the claimant is entitled to compensation to the tune of Rs.2250x12= 2,70,000x15 = Rs.4,05,000/- with interest @ Rs.9 % per annum, as awarded by the Tribunal, from the date of filing the claim petition, till its realization.

12. Accordingly, the compensation is enhanced and impugned award is modified, as indicated above. Respondent No. 2 is directed to deposit the enhanced amount within six weeks from today in the Registry of this Court. On deposit, the amount be released in favour of the claimant, through payee's cheque account.

13. The Tribunal is directed to release the entire amount deposited before it, in favour of the claimant, as per the terms and conditions contained in the impugned award.

14. The appeal stands disposed of accordingly. Send down the record, forthwith.

****

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

Trishal Devi & others .....Appellants
Vs.
Jai Kumar & others ..... Respondents

FAO No.42 of 2007 a/w Anr.
Date of decision: 12.09.2014

Motor Vehicle Act, 1988- Sections 147 and 149- there is no requirement of getting the PSV endorsement in case of LMV, and the insurance company is liable to indemnify the insured- Appeal dismissed. (Para- 4 to 6)

For the appellants: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Bhuvnesh Sharma, Advocate, for respondents No.1 and 2.
Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

These appeals are directed against the award dated 29th November, 2006, passed by the Motor Accident Claims Tribunal (II), Fast Track Court, Hamirpur (for short, "the Tribunal") in MAC Petition No.24 of 2004 RBT 51 of 2005, titled Trishla Devi & others vs. Jai Kumar & others, whereby a sum of Rs.4,51,100/- alongwith interest at the rate of 6% per annum came to be awarded as compensation in favour of the claimants and against the insurer (for short the "impugned award").

2. In FAO No.55 of 2007, the insurer has questioned the impugned award on the ground that the driver, namely, Jai Kumar of the offending vehicle was not having the valid and effective driving licence, the owner has committed willful breach of the terms and conditions of the insurance policy read with the mandate of Section 149 of the Motor Vehicles Act, 1988 (for short "the M.V. Act"). Thus, the Tribunal has fallen in error in saddling the insurer with liability to satisfy the award.

3. In FAO No.42 of 2007, the claimants have sought enhancement of compensation on the grounds taken in the memo of appeal read with the claim petition.

4. I have gone through the claim petition and perused the record. The Tribunal, after scanning the evidence, oral as well as documentary, rightly held the claimants are entitled to compensation to the tune of Rs.4,51,100/-, is just and appropriate compensation.

5. In view of the facts and circumstances of the case, the Tribunal has rightly saddled the insurer with liability for the following

reasons. This Court in judgment dated 25th July, 2014, passed in **FAO No.54 of 2012**, tilted **Mahesh Kumar and another vs. Smt. Piaro Devi and others** held that the driver who was having the effective and valid driving licence to drive the light motor vehicle requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> "10. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:
>
> > "2. .....
> >
> > (10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.
> >
> > xxx xxx xxx
> >
> > "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.
> >
> > xxx xxx xxx
> >
> > (35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.
> >
> > xxx xxx xxx
> >
> > (47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."
>
> 11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

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

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

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

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

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

> "**10. Form and contents of licences to drive.** -
> (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.
>
> (2) A learner's licence or, as the case may be, driving licence shall also be expressed as

entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

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

17. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> "The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-
>
> > "13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both

> Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.
>
> .....
>
> 17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."

In the given circumstances of the case PSV endorsement was not required at all."

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

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any

vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

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

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

> "8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.
>
> A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.
>
> Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].
>
> 9. .....
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> 10. .....
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> 11. .....
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> 12. .....
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> 13. .....
>
> 14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.
>
> Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.
>
> 15. .....
>
> 16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.
>
> A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

6. Having glance of the above discussions, I hold that the endorsement of PSV was not required and the owner has not committed

any breach of the insurance policy. Thus, the Tribunal has rightly saddled the insurer with the liability.

7. Viewed thus, both the appeals are dismissed alongwith all pending applications.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Dilesh Kumar ...Petitioner

Vs.

Central Bureau of Investigation & others. ...Respondents.

Cr. Revision No. 168 of 2014
Date of Decision: 15.09.2014.

Code of Criminal Procedure, 1973- Section 306 – pardon was tendered by CJM to two accused and the case was also tried by her- it was contended that after tendering the pardon, accused has to be committed to the Court of Sessions, irrespective of the fact whether it is triable as a warrant trial or a Sessions trial- held, that the Court of Chief Judicial Magistrate, Shimla was a designated Court to hear and try matters arising out of investigation conducted by the CBI, therefore, accused could not have been committed to the Court of the Sessions or the case could not have been transferred to any other Courts. (Para-9)

Cases referred;

Bawa Faqir Singh Vs. Emperor, AIR 1938 Privy Council 266

Suresh Chandra Bahri Vs.State of Bihar, AIR 1994 SC 2420

Sitaram Sao alias Mungeri Vs.State of Jharkhand, (2007) 12 SCC 630

Dilip Sudhakar Pendse & another Vs. Central Bureau of Investigation, (2013) 9 SCC 391 (rel. on)

For the Petitioner: Mr. K.S. Thakur, Advocate.

For the Respondents: Mr. Sandeep Sharma, Sr. Advocate with Mr.Pankaj Negi, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

On 22.04.2010 a complaint came to be lodged with the Superintendent of Police, State Vigilance and Anti Corruption Bureau,

Dharamshala, District Kangra. In crux, a grievance was made out that Rajesh Thakur, Director, Thakur College of Education, Kangra, H.P., sought job at Government College, Dhaliara (H.P.) on the basis of false/forged certificates of Magadh University Bodh Gaya. Also his family members obtained forged certificates from the Bihar Intermediate Education Council Patna, used again for seeking employment with the Government of Himachal Pradesh. On the asking of the original complainant, this Court vide judgment dated 03.05.2012 in CWP No.6453 of 2010, titled as V.P. Alhuwalia Versus State of H.P. & others, directed the investigation to be conducted by the Central Bureau of Investigation. Accordingly regular case FIR No.RC0962012S0007 dated 06.06.2012 was registered with the Central Bureau of Investigation, Shimla Branch. With the completion of investigation, final report dated 15.05.2013 was presented before the Court of Chief Judicial Magistrate, Shimla-cum-Special Judicial Magistrate, CBI, Shimla naming the present petitioner Dilesh Kumar to be one of the accused persons. Allegedly he is the kingpin and issued/procured fake and forged degrees and certificates in favour of gullible persons of the State. On 24.10.2013, Court of Chief Judicial Magistrate, Shimla, in an application filed under Section 306 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.), for grant of tender of pardon, passed order(s) in favour of applicants, accused Mohd. Mazahar and Lal Bihari Singh (Annexures P-3 and P-4). Applicants were examined on oath by the concerned Magistrate at the time of grant of tender of pardon.

2. Subsequently on 25.10.2013, supplementary final report was filed by the Investigating Agency, specially recording grant of tender of pardon in favour of accused Mohd. Mazahar and Lal Bihari Singh. It appears that perhaps this fact escaped attention of the Court and as such on 29.10.2013, the concerned Court also took cognizance, amongst others, against them. As such, cognizance against all eleven accused persons was erroneously taken, which mistake was subsequently rectified with the passing of order dated 12.11.2013, when names of the approvers (Mohd. Mazahar and Lal Bihari Singh) were deleted from the column of accused persons who were then added as witnesses in the column of witnesses. Noticeably there was no challenge to this order. Also propriety and legality of such order is not a subject matter of challenge in these proceedings.

3. Present petitioner, who was arrested in connection with the case, applied for regular bail, which prayer was not only turned down by this Court, but also by Hon'ble the Supreme Court of India vide order dated 07.02.2014, when trial was expedited with a direction to be concluded within a period of nine months.

4. It is also not in dispute that subsequent to filing of the present petition dated 24.06.2014, statements of Mohd. Mazahar and Lal Bihari Singh stand recorded as witnesses during trial, with adequate opportunity afforded to all the accused persons, including the present petitioner, for cross-examining them. Undisputedly, pursuant to

directions issued by Hon'ble the Supreme Court of India, out of 147 witnesses, 48 witnesses already stand examined.

5. Now petitioner is seeking quashing of proceedings in the following terms:-

"It is, therefore, most respectfully and humbly prayed that this petition may very kindly be allowed and the impugned proceedings in case RC No.096012S0007, dated 06.06.2012 titled as CBI versus Rajesh Thakur & others for offences under Sections 420, 467, 468, 471 read with 120-B of the Indian Penal Code, pending before the Learned Chief Judicial Magistrate Shimla, now fixed for remaining prosecution witnesses w.e.f. 02.07.2014 to 08.07.2014, may kindly be quashed as the entire proceedings stands vitiated, after calling for the record of the Trial Court case, in the interest of justice and fair play. In case Hon'ble Court is of the view that the provisions of S. 397 Cr.PC. are not attracted, the provisions of S. 482 Cr.P.C. may be involved."

6. Mr. K.S. Thakur, learned counsel for the petitioner, has urged that (1) Under Section 306(5) (a) (i) Cr.P.C. when cognizance is taken by the Chief Judicial Magistrate, case has to be committed for trial to the Court of Sessions, irrespective of the fact whether it is triable as a warrant trial or a Sessions trial. (2) Under sub clause (a) of Section 306(4) Cr.P.C. at the time of taking cognizance by the Court below, both the approvers were required to be examined with an opportunity afforded to the accused, for cross-examination. This was not done in the present case. Thus according to the learned counsel trial stands vitiated. In support, he refers to decision reported in **Bawa Faqir Singh Vs. Emperor, AIR 1938 Privy Council 266**; **Suresh Chandra Bahri Vs.State of Bihar, AIR 1994 SC 2420** and **Sitaram Sao alias Mungeri Vs.State of Jharkhand, (2007) 12 SCC 630**.

7. Mr. Sandeep Sharma, learned Senior counsel appearing on behalf of Central Bureau of Investigation, vehemently opposed the petition and invited my attention to the decision in **Dilip Sudhakar Pendse & another Vs. Central Bureau of Investigation, (2013) 9 SCC 391.**

8. For the sake of ready reference and better appreciation, provisions of Section 306 Cr.P.C. are reproduced as under:-

> "306. Tender of pardon to accomplice. – (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every

other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to –

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952).

(b) any offence punishable with imprisonment which may extended seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1) –

(a) shall be examined as a witness in the Court of the magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case, –

(a) commit it for trial –

(i) to the Court of Session if the offence is triable exclusively by the Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by the Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself." (Emphasis supplied)

9. Dealing with the first contention, it be only observed that in the present case, only the Chief Judicial Magistrate, Shimla is the concerned designated Court to hear and try matters arising out of investigation conducted by the Central Bureau of Investigation. Thus Mr. Sandeep Sharma, learned Senior counsel is right in contending that in the given facts and circumstances, relevant provisions applicable are sub-Section 5(b) of Section 306 Cr.P.C, for in the instant case, Chief Judicial Magistrate, being the designated Court alone had the jurisdiction to conduct the trial. Neither the matter was triable by the

Court of Sessions nor was cognizance taken by any Magistrate. In the instant case question of committal does not arise. The apex Court in **Dilip Sudhakar (supra)** has also dealt with the issue holding that :-

> "12. Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing for the respondent, on the other hand, contended that under sub-section (5)(a)(i) two options were available. He submitted that the matter has to be committed to the Court of Sessions undisputedly if the offence was triable exclusively by that court. He, however, maintained that even if the matter was not exclusively triable by the Court of Session, it could still be committed to that court, if the cognizance is taken by the Chief Metropolitan Magistrate. In the facts of the present case, the charges which are leveled against the appellants are all triable by the Magistrate's court, and there is no dispute about that, the cognizance is taken by the Additional Chief Magistrate and not by the Chief Metropolitan Magistrate. That being so, it is not possible to accept this submission of Mr. Khanna." (Emphasis supplied)

10. In view of the aforesaid discussion, ratio of law laid down in **Bawa Faqir (supra)** and **Suresh Chandra (supra**) is inapplicable in given facts and circumstances.

11. Coming to the second point, it be only observed that accused Mohd. Mazahar and Lal Bihari Singh were granted tender of pardon on 24.10.2013 and at that time both of them were examined on oath by the concerned Court. Subsequently during trial, these persons stand examined as witnesses and opportunity afforded to all the accused for cross-examining them. Provisions of sub-section 4 of Section 306 Cr.P.C. are unambiguously clear. The requirement being that a person accepting tender of pardon be examined as a witness, first by the Court taking cognizance of the offence and then during trial. In the instant case, initially Court taking cognizance had examined these persons and their statements recorded on oath. Also during trial these persons stand examined as witnesses with adequate opportunity afforded to the accused to cross-examine them. Thus there is no procedural illegality committed by the Court below, vitiating the trial in any manner.

12. The decision rendered in **Sitaram Sao (supra),** in the given facts and circumstances, is squarely inapplicable. There the Court was dealing with the case where accused stood convicted on the basis of testimony of an accomplice in whose favour no formal order of pardon was passed by the concerned Court. In an appeal, the High Court remanded the matter back, when such defect was cured by passing of order of pardon and examination of such approver with opportunity afforded to the accused to cross-examine. It is in this backdrop, contentions raised by the convicts in para 14, were answered in para 23 of the said report, wherein Court held that the stage of examining the approver comes only after grant of pardon whereafter he is examined as a witness in the presence of the accused and also cross-examined.

13. In view of the aforesaid discussion, I do not find any favour with the submissions so made at the Bar on behalf of present accused and as such, present petition, devoid of merit, is dismissed. Pending application(s), if any, also stand disposed of.

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

Rajesh Kumar .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No. 443 of 2012.
Reserved on: September 11, 2014.
Decided on: 15.09.2014.

Code of Criminal Procedure, 1973- Section 313- Statement recorded under Section 313 Cr.P.C is not substantive piece of evidence, but it can be used to corroborate the prosecution version- it can be used in conjunction with the prosecution evidence but no conviction can be recorded on the basis of statement recorded under Section 313 Cr.P.C. (Para-30)

Indian Penal Code, 1860- Section 201- Essential ingredients to prove offence punishable under Section 201 IPC are that an offence was committed and accused had reasons to believe the commission of such an offence and that they had caused disappearance of the evidence to screen themselves.

Case referred:
Ashok Kumar Vs. State of Haryana, reported in (2010) 12 SCC 350

For the appellant: Mr. N.S.Chandel, Advocate.
For the respondent: Mr. M.A. Khan, Mr. Ashok Chaudhary and Mr. Parmod Thakur, Addl. AGs with Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 24..9.2012 rendered by the learned Addl. Sessions Judge, Fast Track Court, Shimla, in Sessions Trial No. 1-R/7 of 2011, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 302, 201 and 392 IPC, was convicted and sentenced for the offence punishable under Section 302 IPC to undergo imprisonment for life and to pay fine of Rs. 5,000/-. He was also sentenced to undergo rigorous imprisonment for a period of five years for the commission of offence under Section 392 IPC

and also sentenced to undergo rigorous imprisonment for a period of one year for commission of offence under Section 201 IPC. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that on 18.8.2011 some unidentified person informed the police that the dead body was floating in Pabbar river near Mandli Bridge. The police reached the spot. The photographs of the dead body inside the river were clicked and it was taken out from the river. The dead body was sent to C.H.C. Sandhasu, for post mortem. The viscera and sample of blood were also preserved. The wife of the deceased, Sunita Devi got her statement recorded with the police that on 17.8.2011 her husband went to Chirgaon for gambling. Her husband disclosed to her son Prince that he was taking Rs. 45,000/- alongwith him. At about 1:00 PM her son received call from her husband whereby the deceased instructed him to look after the orchard properly. At about 4:00 PM, her husband again rang up Prince and told him that he is playing cards in the rented place of Sethi at Sandshu. On 18.8.2011 at about 6:30 AM, her husband again instructed her son to protect the orchard from the menace of monkeys and also gave instructions that he should tie a dog in the orchard. On 19.8.2011, the local residents and her other relatives asked her to accompany to hospital. She saw the dead body of her husband. The dead body was having injury on the back side of the head. In order to destroy the evidence, somebody had thrown the body in the Pabbar river. On the basis of statement of PW-1 Sunita Devi FIR Ext PW-21/A was also registered. The police investigated the matter. Site plan was prepared. The police took into possession the disposable cups, blood stained soil and leaves of the apple plants. The investigation was competed and the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 21 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated in the case and claimed to be innocent. He also deposed that the police took all money which he brought from Delhi after selling the apples. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. Mr. N.S.Chandel, Advocate, appearing for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, Fast Track Court, Shimla, H.P. dated 24.9.2012.

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

6. The statement of Sunita Devi, PW-1 was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A. According to the averments contained in the *'rukka'*, her husband used to gamble. On 17.8.2011, her husband left the house at 9:30 AM telling them that he was going to Chirgaon. Her son Prince Kumar, PW-2 told her that her husband had

taken Rs. 30,000/- from the house and Rs. 15,000/- were already in his pocket. On the same day at about 1:00 PM, her husband telephoned Prince Kumar that he was at Sandashu. He asked to take care of the orchard and protect it from the parrots. Her husband again gave a telephonic call from Sandashu that he is in the quarter of Sethi and they were playing cards. On 18.8.2011, in the morning at 6:30 AM, her husband told her son PW-2, Prince that he should take care of the orchard from the monkey menace. On 19.8.2011, she was told to visit Chirgaon Sandashu hospital. She went to the hospital. She came to know that her husband has died. The dead body was kept in the hospital. She noticed injury on the back side of her husband's head and blood was oozing out. According to her, somebody has killed her husband by hitting him on the back of his head and the body was disposed of in Pabbar river to destroy the evidence.

7. Sunita Devi has appeared as PW-1. According to her, on 17.8.2011 at about 9:00 AM, her husband told her that he was going to Chirgaon. He disclosed to her son Prince that he is having Rs. 15,000/- and is also taking Rs. 30,000/- from the house. At about 6:00 PM, her husband informed prince that he was at Sandashu in the house of Sethi, Forest Guard. He also told to her son that he will come in the morning as he was betting money on cards in the house of Sethi. He gave instructions to her son that he should convey his mother to prepare local eatables for him. He also instructed Prince on 18.8.2011 at 7:00 AM on telephone to take the dog to the orchard. Her husband did not return on 18.8.2011. On 19.8.2011, the villagers asked her to accompany them to Sandhasu hospital alongwith her son. She alongwith her son reached at hospital and found her husband dead. He was having wound on his head. The police recorded the statement under Section 154 Cr.P.C. vide memo Ext. PW-1/A. In her cross-examination, she testified that on 18.8.2011, they received telephone call from the residence of Sethi, Forest Guard, Sandhasu. Her husband and son, both were having mobile phones.

8. PW-2, Prince Kumar deposed that on 17.8.2011, at about 9:00 AM, his father told him that he was going to Chirgaon. His father used to gamble a lot. At about 1:00 PM, his father asked to look after the orchard properly and to protect it from the parrots. He told him that he was at Sandhasu. At about 4:00 PM he received another call from his father and his father disclosed to him that he was in the house of Forest Guard, Sethi. He also gave instructions that he should convey to his mother that she should prepare a local dish for him. He also instructed him on 18.8.2011 at 6:30 AM on telephone, to take the dog to the orchard. On 18.8.2011, his father did not return. On 19.8.2011, the villagers asked them to accompany them to Sandhasu hospital. He went to the hospital alongwith his mother. His father was dead having injury on the head. It appeared from the wound that some heavy object was struck against his head. In his cross-examination, he has categorically admitted that all the telephonic calls were received by him from the house of Sethi situated at Sandhasu. He did not know where his father had gone on 18.8.2011. He admitted that his father had altercation with

Manoj and Mehar Chand of their village for betted amounts. He denied that his father was intoxicated when his body was recovered.

9. PW-3, Shashi Kant deposed that on 17.8.2011, he handed over the keys of his official accommodation to his friend Virender Sethi and came to Rohru. He came back from Rohru in the night. He saw some persons including Virender Sethi gambling in his official accommodation. He asked them not to play cards in his room but they replied that they were playing cards just for time pass. He took the meals and went for sleep. Those persons kept on playing the cards. When he woke up in the morning at about 6:30 AM, he found no one in his quarter. In the evening, he came to know that Khem Singh who was playing cards in his room was found dead on the banks of river Pabbar. He inquired from the villagers about the dead body. In his cross-examination, he admitted that he used to visit the government accommodation of Virender Sethi situated at Sandhasu.

10. PW-4, Jai Pal deposed that he was staying with Virender Sethi in his room for the last 5-6 months. On 17.8.2011, Virender Sethi called him at Jangla in the quarter of Shashi Kant. There were 6-7 persons in the room of Shashi Kant. They were talking to each other. He was declared hostile and cross-examined by the learned Public Prosecutor. He did not remember whether the accused was amongst those persons who were playing cards in the house of Shashi Kant. He remained in the house of Shashi Kant for some time and thereafter he kept on roaming on the road for 3-4 hours. He admitted that he went to his house on a motorcycle at 11:00 PM. He admitted that Virender Sethi called him on 18.8.2011 at 6:00 AM and asked him to come on motorcycle to take him back to the room. When he was coming to Jangla, then he saw Khem Singh coming alongwith another person about 1 km ahead of Jangla and they were going towards Badiara. He denied the suggestion that the person who was alongwith Khem Singh was also present in the room of Shashi Kant on 17.8.2011. Volunteered that, there were about 6-7 persons in the house of Shashi Kant, but he did not recognize them. Khem Singh requested him to give him lift to village Badiara but he told him that he was going to pick up Virender Sethi from Jangla. He did not disclose the name of second person to the police.

11. PW-5, Virender Sethi deposed that he had hired accommodation at Sandhasu and earlier Jai Pal was sharing accommodation with him. Now-a-days, he was residing alone. They used to gamble. They were 9-10 friends and they used to remain in contact with each other on telephone. On 17.8.2011, they contacted each other at about 5:00 PM and planned to assemble at the accommodation of Shashi Kant. They all reached by 8:00 PM in the quarter of Shashi Kant. He alongwith Panna Lal, Suresh, Rajesh alias Guddu alias Lagnu, Naresh, Baldev, Satish, Khem Singh and Hari Krishan assembled in the house of Shashi Kant. Jai Pal dropped him at Jangla on motorcycle and returned back to Sandhasu. They continued playing cards at 8:00 PM till 3:00 AM. Jai Pal went to Sandhasu after 10:00 PM after taking meals. Khem Singh won most of the games and collected huge amount of money

in that gambling. The accused lost almost all his money in gambling. He also lost Rs. 10,000/-. Khem Singh and Lagnu left that place in between 5:30 to 6:00 AM. At about 6:00 AM, he rang up his roommate to pick him up from Jangla. He came on his motorcycle towards Sandhasu side. Jai Pal told him that Khem Singh and Rajesh met him 1 Km away from Jangla and they were going towards Badiara. Panna Lal and Hari Krishan disclosed to him on telephone that Secretary Dev Raj told them that Khem Singh met them at about 6:00 AM near Village Badiara. He was associated by the police on 29.8.2011 alongwith Panna Lal and Hari Krishan. Manita, the sister of accused produced his washed clothes. The accused admitted that he wore those clothes on the date of incident and he also identified those clothes worn by the accused on the date of incident. These were taken into possession by the police vide recovery memo Ext. PW-5/A. Ext. P-2 is the pant and Ext. P-3 is the shirt. Thereafter, Panna Lal handed over 30 currency notes of Rs. 500/- each to the police which he won from accused Lagnu at about 1:00 PM on 18.8.2011 in gambling bet. Panna Lal also told him that when he inquired from accused that from where he brought the money, when he lost all his money in gambling at Jangla. The accused disclosed to Panna Lal that the money was taken from *Aharati.* In his cross-examination, he admitted that Jai Pal did not tell him about the name of second person walking alongwith Khem Singh. His statement qua this effect in examination-in-chief that Jai Pal told him about the name of the accused was not correct to that extent.

12. PW-6, Padam Singh deposed that on 18.8.2011 at about 9:00 AM accused Rajesh alias Lagnu came to his house and handed over Rs. 20,000/- to him in the denomination of Rs. 500/-and 1000/-. The accused also handed over documents related to sale purchase of apple which he brought from Delhi alongwith that money. He also handed over to him Rs. 20,000/-.

13 PW-7, Dev Raj deposed that at about 7:15 AM on 18.8.2011 when he reached near Badiara godown, then two persons met him. One of them was Khem Singh resident of Kharshali. They were going from Badiara to Chirgaon. The second person who was accompanying Khem Singh was not identified by him anywhere after 18.8.2011. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that his statement was recorded by the police on 22.8.2011.

14. PW-8, Panna Lal deposed that he was running a meat shop at Chirgaon bazaar. On 17.8.2011, at about 5:00 PM Sethi Guard called him to Jangla for playing cards. At about 8:00 PM, they all reached in the house of Shashi Kant, Forest Guard. They continued playing cards till 3:00 AM. He alongwith Raju Shop-keeper came back in his own vehicle. He lost Rs. 10,000/- to Rs. 11,000/-. Lagnu also lost all his money in gambling. Lagnu picked Rs.2500/- for meeting out expenses. On 18.8.2011 at about 12.45 Hari Krishan and Guddu reached at his house and again started playing cards. Guddu alias Rajesh lost Rs.15,000/- and thereafter he left his house. In his cross examination, he admitted that they were called to the Police Station for 5-6 days

continuously. He admitted that the accused has told them that he was coming from Delhi after selling his apples.

15. PW-9, Gian Devi is the wife of the accused. She deposed that her husband went to Delhi with consignment of apple on 13.8.2011. He returned back from Delhi on 17.8.2011 at 8.30 PM.

16. PW-10, Hari Krishan deposed that he alongwith Up Pradhan Raj Kumar of Sundha Gaura came to the Police Station. In their presence, the accused made disclosure statement to the police that he could identify the place where he committed the murder. The disclosure statement was recorded vide memo Ext. PW-10/A. They started from the police station on two vehicles, one official and one private and went to Mandli. The accused in their presence identified the place where he killed Khem Singh by the side of river Pabbar. Memo to this effect Ext. PW-10/B was prepared. The police also picked up three stones from that place having blood stains. The accused also disclosed that he killed him with those stones. Three stones were taken into possession vide recovery memo Ext. PW-10/C. The police also took into possession six other stones having blood stains vide recovery memo Ext. PW-10/D. The soil was also lifted from the bank of the river Pabbar vide recovery memo Ext. PW-10/E. He was declared hostile. In his cross examination by the learned Public Prosecutor, he admitted that his statement was recorded by the police on 22.8.2011. In his cross examination by the learned defence counsel, he admitted that the signatures on all the memos, identification memo and disclosure statement were taken at the Police Station, Chairgaon after preparing all the documents within two hours. He also admitted that the police had called him telephonically to the Police Station. He visited the spot on 18.8.2011 and then he did not notice any stone or hair etc. on the spot. Volunteered that, he only identified the dead body on that day.

17. PW-11, Narayan Singh deposed that he gave Rs.17,000/- to accused Rajesh Kumar. The accused met him on 19.8.2011 at village Jagholi. He asked him to return his money but he showed his inability to return the whole amount. In his cross examination, he admitted that accused used to earn Rs.70,000/- to Rs.80,000/- by selling apple crops.

18. PW-12, H.H.C. Sheeshi Ram has deposed that on 14.9.2011, wife of the accused handed over 40 currency notes of Rs.500/- denomination i.e. Rs. 20,000/- to the I.O. The currency notes were taken into possession vide recovery memo Ext. PW-9/A.

19. PW-13, Shamsher Singh has taken the photographs of stones, disposable cups, dry leaves and the soil having blood stains. The police also took into possession the disposable cups having blood stains and dried leaves. All the articles were wrapped in a parcel and taken into possession by the police.

20. PW-14, Surinder Singh is a formal witness.

21 PW-15, Constable Rajesh Kumar deposed that Narayan Singh in his presence handed over 20 currency notes of Rs. 500/- denomination to the police and disclosed that the alleged money was handed over to him by Rajesh alias Guddu on 20.8.2011. He also disclosed to the police that Rajesh borrowed Rs.17,000/- from him.

22. PW-16, Constable Arun Kumar is a formal witness.

23. PW-17, Dr. Mahesh Jaswal has conducted the post mortem. The post mortem report is Ext. PW-17/C. According to him, the deceased died due to intracranial hemorrhage with excessive blood loss leading to hypovolemic shock. The probable time between injury and death was instantaneous to a few minutes. The time between death and post mortem was 18 to 30 hours. In his cross examination he has admitted that he has not gone through the FSL report nor it was shown to him at any time by the police, so he could not say that deceased was drunk at the relevant time.

24. PW-18, H.C. Balbir Singh deposed that he deposited the Punlidas in the Malkhana after making relevant entries.

25. PW-19, A.S.I. Kalil Ahmad deposed that on 18.8.2011 some unknown person informed the police telephonically that a dead body was lying in the river Pabbar near Mandli bridge. He visited the spot and found the dead body near Forest Rest House in river Pabbar. The dead body was taken out from river Pabbar to the bank. The photographs of the dead body were again clicked and the dead body was identified by the local inhabitants. The dead body was taken to C.H.C. Sandashu for conducting the post mortem. The post mortem was conduced on 20.8.2011. The viscera was preserved. In his cross-examination, he admitted that it has come in his investigation that the deceased was chronic gambler. Khem Singh went to Sandhasu side for gambling at about 9:30 PM on 17.8.2011. He admitted that the son of the deceased told him that he received telephonic call at about 4:30 PM on 17.8.2011 from his father that he is playing cards in the quarter of Sethi at Sandhasu. He also admitted that the son of the deceased told him that he is still playing cards in the quarter of Sethi and asked him to tie a dog in the orchard at about 6:30 AM on 18.8.2011.

26. PW-20, S.I.Kanshi Ram deposed that the wife of the accused associated the police. She handed over Rs. 20,000/-given to her by her husband.

27. PW-21, Rajinder Singh deposed that he received the statement of Sunita Devi through Constable Rajesh Kumar at about 4:30 PM. FIR Ext. PW-21/A was registered by him. He prepared the site plan. On conducting search of nearby places where the dead body was recovered, he found stones having blood stains and disposable glasses in the apple orchard near the road. In the presence of Hari Krishan and Raj Kumar the accused made the disclosure statement Ext. PW-10/A that he could identify the place where he killed the deceased on 18.8.2011. The accused led the police party and the witnesses to that place where he

committed the offence. The identification memo Ext. PW-10/B was prepared. He also prepared the site plan Ext. PW-21/E. The police also noticed blood stains on the stones lying by the side of river Pabbar. The stones were also taken into possession. The accused was arrested on 22.8.2011. In his cross-examination, he admitted that it has come in the investigation that the accused returned from Delhi with money after selling his apple crop.

28. According to Ext. PW-1/A, PW-2 Prince Kumar received telephonic call at 1:00 PM from his father that he was at Sandhasu on 17.8.2011 and he should take care of the orchard. He again received a telephonic call at 4:00 PM on the same day from his father informing him that he was at Sandhasu in the house of Sethi and they were playing cards. He again received a telephonic call on 18.8.2011 at 6:30 AM from her husband and he told his son to save the orchard from monkey menace. PW-1, Sunita Devi in her cross-examination has also deposed that at about 6:00 PM her husband informed Prince that he was at Sandhasu in the house of Sethi, Forest Guard. He also told her son that he would come in the morning as he was gambling in the house of Sethi. In her cross-examination, she has also reiterated that on 18.8.2011, they received telephone from the residence of Sethi Forest Guard, Sandhasu. PW-2, Prince Kumar has also deposed that on 17.8.2011 at about 1:00 PM, her father asked to look after the orchard and to save them from Parrots. His father told him that he was at Sandhasu. At about 4:00 PM on the same day, he received another call from his father who disclosed to him that he is in the house of Forest Guard, Sethi. He also gave him instructions that he should convey to his mother that she should prepare food for him. He also instructed him on 18.8.2011 at 6:30 AM to take the dog to the orchard. In his cross-examination, he admitted that all the telephonic calls were received by him from the house of Sethi situated at Sandhasu. However, PW-3 Shashi Kant, deposed that he handed over the keys of his official residence to his friend Virender Sethi and came to Rohru. He returned from Rohru and reached in the house at night. He saw some persons gambling in his official accommodation. He took meals and went for sleep but they kept on playing the cards. When he woke up at about 6:30 AM, he found no one in the quarter. In his cross-examination he admitted that he used to visit the government accommodation of Virender Sethi which was situated at Sandhasu. PW-4 Jai Pal deposed in his cross-examination that on 17.8.2011, Virender Sethi called him at Jangla in the quarter of Shashi Kant. There were 6-7 persons in the room of Shashi Kant. It discloses that the house of Shashi Kant was at Jangla. PW-5, Virender Sethi deposed that he had accommodation at Sandhasu and earlier Jai Pal was sharing accommodation with him. Now-a-days, he was residing alone. In the adjoining beat Shashi Kant was posted as Forest Guard. He hired accommodation at Jangla. They used to play cards. They were 9-10 friends and remained in contact with each other on telephone. On 17.8.2011, they contacted each other at about 5:00 PM and planned to assemble at the accommodation of Shashi Kant.

29. What emerges from the statements of the witnesses is that there are two versions. According to the contents of PW-1/A, the statement of PW-1 Sunita Devi and PW-2 Prince Kumar, the deceased was playing cards in the house of Virender Sethi (PW-5) at Sandhasu. However, as per the statements of PW-3 Shashi Kant, PW-4 Jai Pal and PW-5 Virender Sethi, they were playing cards in the house of Shashi Kant at Jangla. Virender Sethi PW-5 had hired accommodation at Sandhasu and Shashi Kant PW-4 at Jangla. It has also come in the statement of PW-19 ASI Kalil Ahmad that the son of deceased told him that he received telephonic call at about 4:30 PM on 17.8.2011 from his father that he was playing cards in the quarter of Sethi at Sandhasu. He admitted that the son of the deceased told him that he is still playing cards in the quarter of Sethi and asked him to tie a dog in the orchard at about 6:30 AM on 18.8.2011. PW-21, Rajinder Singh in his cross-examination has deposed that he was not told by the son of the deceased that he was playing cards in the quarter of Virender Sethi at Sandhasu but that statement was made to ASI Khalil Ahmad, by the son of the deceased.

30. The learned Trial Court has taken into consideration the statement made by the accused under Section 313 Cr.P.C. that he was playing cards at Jangla. The statement recorded under Section 313 Cr.P.C. is not a substantive piece of evidence. The purpose of statement under Section 313 Cr.P.C. is to put the entire incriminating circumstances gathered by the prosecution to the accused. Their lordships' of the Hon'ble Supreme Court in the case of ***Ashok Kumar Vs. State of Haryana,*** reported in ***(2010) 12 SCC 350,*** have held that the prosecution case must stand on its own legs. It cannot take weakness of the defence case. Their lordships' have held that the statement of the accused under Section 313 Cr.P.C. cannot be regarded as substantive evidence but it can be used to corroborate prosecution case. The use of the statement under Section 313 Cr.P.C in evidence is permissible. The Courts' may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. The conviction of the accused cannot be based merely on the statement made under Section 313 Cr.P.C. as it cannot be regarded as a substantive piece of evidence. Their lordships' have held as under:

> "29. Now we may proceed to discuss the evidence led by the prosecution in the present case. In order to bring the issues raised within a narrow compass we may refer to the statement of the accused made under Section 313, Cr.PC. It is a settled principle of law that dual purpose is sought to be achieved when the Courts comply with the mandatory requirement of recording the statement of an accused under this provision. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms and secondly,

the accused should have a fair chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. This dual purpose has to be achieved in the interest of the proper administration of criminal justice and in accordance with the provisions of the Cr.P.C. Furthermore, the statement under Section 313 of the Cr.PC can be used by the Court in so far as it corroborates the case of the prosecution. Of course, conviction per se cannot be based upon the statement under Section 313 of the Cr.PC.

30. Let us examine the essential features of this section and the principles of law as enunciated by judgments of this Court, which are the guiding factor for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.PC. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime.

31. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

32. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by

> the accused. It can be taken into consideration in any, enquiry or trial but still it is not strictly an evidence in the case. The provisions of Section 313 (4) of the Cr.PC explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in as evidence for or against the accused in any other enquiry or trial for any other offence for which, such answers may tend to show he has committed. In other words, the use of a statement under Section 313 of Cr.PC as an evidence is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.
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> 33. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.PC as it cannot be regarded as a substantive piece of evidence. In the case of Vijendrajit Ayodhya Prasad Goel v. State of Bombay [AIR 1953 SC 247], the Court held as under:
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> "3. .....As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

31. The statement of the accused under Section 313 Cr.P.C. was required to be read in conjunction with the statements of PW-1 Sunita Devi, PW-2 Prince Kumar, PW-4 Jai Pal, PW-5 Virender Sethi and PW-7 Dev Raj.

32. The learned trial Court has also relied upon the theory of '*last seen together*' to convict the accused and has relied upon the statements of PW-4 Jai Pal, PW-5 Virender Sethi and PW-8 Panna Lal. PW-4 Jai Pal, deposed that on 17.8.2011, Virender Sethi called him at

Jangla in the quarter of Shashi Kant. There were 6-7 persons in the room of the Shashi Kant. They were talking with each other. He was declared hostile. He did not tell the police that Virender disclosed him that they were gambling. He also denied the suggestion that some persons also came to the house of Shashi Kant and they also started playing the cards. He did not remember whether accused was amongst them or not. He admitted that Khem Singh deceased was there in the house of Shashi Kant. According to him, he was called by Virender Sethi on 18.8.2011 at 6:00 AM. He asked him to come on motorcycle to take him back to the room. When he came back to Jangla, he saw Khem Singh coming alongwith another person about 1 Km ahead of Jangla and they were going towards Badiara. He denied the suggestion that the person who was alongwith Khem Singh was also present in the room of Shashi Kant on 17.8.2011. Volunteered that, there were 6-7 persons in the house of Shashi Kant, but he did not recognize them. He admitted that Khem Singh told him that the person accompanying him is related to him and they were going to the house of the relative of that person. He has not disclosed the name of second person to the police.

33. PW-5, Virender Sethi deposed that they continued playing cards from 8:00 PM till 3:00 AM. Jai Pal went to Sandhasu at about 10:00 PM after taking the meals. He did not play cards with them. Khem Singh won most of the games and collected huge amount of money in that gambling. The accused lost the entire money. He also lost Rs. 10,000/-. Khem Singh and Lagnu left that place in between 5:30 to 6:00 AM. He rang up Jai Pal to pick him up from Jangla at about 6:00 AM. He along with Baldev and Jai Pal went on the same motorcycle towards Sandhasu side. Jai Pal told him that Khem Singh and Rajesh met him 1 Km away from Jangla and they were going towards Badiara. PW-4, Jai Pal has categorically deposed that he has only seen another person with the deceased when he was coming to Jangla. However, he has denied the suggestion that the person alongwith Khem Singh was also present in the room of Shashi Kant on 17.8.2011. PW-4, Jai Pal has also deposed that he has not disclosed the name of second person to the police. PW-5 Virender Sethi, in his cross-examination has admitted that Jai Pal did not tell him about the name of the second person walking alongwith Khem Singh deceased and his statement qua this fact in examination-in-chief that Jai Pal told him about the name of the accused was not correct to that extent.

34. PW-8, Panna Lal has testified that at about 8:00 PM, they all reached in the house of Shashi Kant Forest Guard. They continued playing cards till 3:00 AM. He alongwith Raju, Shopkeeper came back in his own vehicle. He lost Rs. 10,000/- to 11,000/-. Lagnu also lost all his money in gambling. Lagnu picked Rs. 2500/- for meeting out his expenses. On 18.8.2011, at about 12:45 PM, Hari Krishan and Guddu reached at his house and again started playing cards. Guddu alias Rajesh lost Rs. 15,000/- and thereafter he left his house. In his cross-examination, he admitted that the police has summoned them to the Police Station for 3-4 days. It is not believable that the accused after committing murder would visit the house of PW-8, Panna Lal and again

gamble. According to the prosecution evidence, the accused has lost the entire money. However, PW-8 Panna Lal deposed, as noticed hereinabove, that Hari Krishan and Guddu again started playing cards and Guddu alias Rajesh lost Rs. 15,000/-.

35. PW-7, Dev Raj has deposed that at about 7:15 AM, when he reached near Badiara godown, then two persons met him. One of them was Khem Singh resident of Kharshali. They were going from Badiara to Chirgaon. The second person who was accompanying Khem Singh was not identified by him anywhere after 18.8.2011. He was declared hostile. He denied the suggestion that he identified the accused at Police Station Chirgaon, when he was alongwith other person. He also denied the suggestion that the accused disclosed his name as Rajesh alias Lagnu. PW-7, Dev Raj has merely stated that he has seen a person with Khem Singh but he has not seen that person after 18.8.2011. Thus, the theory of '*last seen together*' has not been proved by the prosecution.

36. PW-5, Virender Sethi deposed that the sister of the accused produced his washed clothes from her house and the same were taken into possession by the police vide recovery memo Ext. PW-5/A. Ext. P-2 is the pant and shirt is Ext. P-3. PW-10, Hari Krishan deposed that the accused made disclosure statement Ext. PW-10/A to the effect that he could get the place identified where he has committed the murder. Memo Ext. PW-10/B was prepared identifying the place. The police also picked up three stones from the spot and these were taken into possession vide recovery memo Ext. PW-10/D. In his cross-examination, he admitted that the signatures on all the memos, identification memo and disclosure statement were taken at the Police Station Chirgaon, after preparing all the documents within two hours. The documents were prepared by one Hawaldar. He was called to the Police Station telephonically. When he visited the spot on 18.8.2011, he did not notice any stone or hair on the spot. Volunteered that, he had only identified the dead body on that day.

37. The statement of PW-10, Hari Krishan makes the identification of the spot and recovery of stones doubtful. The defence taken by the accused was that he had gone to Delhi to sell his apple and has come back with the money. PW-8, Panna Lal has admitted in his cross-examination that accused had told him that he was coming from Delhi after selling his apples. PW-9, Gian Devi is the wife of the accused. She has also deposed that her husband had gone to Delhi with the consignment of apple on 13.8.2011 and came back from Delhi on 17.8.2011 at 8:30 PM. PW-11 Narain Singh, in his cross-examination, has admitted that accused Guddu earns Rs. 70,000/- to 80,000/- by selling apple crop. PW-21, Rajinder Singh has also admitted in his cross-examination that it has come during the course of investigation that accused returned from Delhi with money after selling his apple crop.

38. According to PW-2 Prince Kumar, his father was not intoxicated at the time of his death. However, as per the opinion in the FSL report Ext. PW-20/B, the traces of ethyl alcohol were detected in the contents of parcels P-1 and P-2.

39. Mr. M.A. Khan, Addl. Advocate General, has drawn the attention of the Court to Ext. PW-20/D. According to the conclusions of Ext. PW-20/D, complete DNA profile of deceased Khem Singh has been obtained from Ext. P-12, stone. Complete DNA profile of accused Rajesh Kumar has also been obtained from Ext. P-16b, shirt of the accused. According to PW-5, Virender Sethi, he was associated by the police on 29.8.2011 alongwith Panna Lal and Hari Krishan. Manita, the sister of the accused produced his washed clothes. Thus, it shows that the recovered clothes were washed and there could not be any blood on the shirt of the accused. According to PW-5 Virender Sethi, the accused has admitted that he wore those clothes on the date of incident and he also identified those clothes worn by the accused on the date of the incident. The dead body was recovered on 18.8.2011. The statements of PW-4, Jai Pal and PW-7, Dev Raj were recorded on 22.8.2011. The statement of Gian Devi, PW-9 was recorded on 14.9.2011. Similarly, the statement of PW-10, Hari Krishan was recorded on 22.8.2011. The statement of PW-11, Narain Singh was recorded on 30.8.2011. The statements under Section 161 Cr.P.C. are required to be recorded with promptitude. There is no explanation given by the I.O. as to why the statements of these witnesses were recorded after a considerable lapse of time. There is reasonable doubt whether the accused was at place Sandhasu or at Jangla. The theory of '*last seen together'* has also not been proved by the prosecution. The disclosure statement is also doubtful, on the basis of which, the spot was identified and stones recovered. The DNA profile cannot be believed in view of the statement of PW-5, Virender Sethi.

40. The prosecution has also failed to prove that the accused has robbed Khem Singh, killed him and threw his body in the Pabbar river to destroy the evidence. According to the accused, he had gone to Delhi to sell his apples and has got the money by sale proceeds of the apples. His defence is also probablized from the statements of the witnesses i.e. PW-8 Panna Lal, PW-9 Gian Devi and PW-21 Rajinder Singh that he had gone to Delhi to sell his apples. The facts and circumstances from which conclusion for guilt is sought to be drawn by the prosecution, has not been established beyond doubt. Thus, the accused cannot be convicted under Section 302 and 392 of the IPC.

41. The essential ingredients to prove offence under Section 201 IPC are that an offence was committed and accused had reasons to believe the commission of such an offence, that with such knowledge or belief he caused any evidence of the commission of that offence to disappear or gave any information relating to that offence which he then knew or believed to be false and he did so with the intention of screening the offender from legal punishment. Since, we have already held that the prosecution has failed to prove the case against the accused under Sections 302 and 392 IPC beyond reasonable doubt, Section 201 IPC is also not attracted. The case is based on circumstantial evidence. It is necessary for the prosecution to prove the entire chain of circumstances in order to prove the guilt. In the instant case, the prosecution has failed to prove the entire chain of circumstances. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

42. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 24.9.2012, rendered by the learned Addl. Sessions Judge, Fast Track Court, Shimla, in Sessions trial No. 1-R/7 of 2011, is set aside. The accused is acquitted of the charges framed under Sections 302, 201 and 392 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Shri Mohar Singh and others. .....Appellants.

Vs.

Shri Krishan Chand and others. .....Respondents.

RSA No.549 of 2001.
Judgment reserved on: 19.08.2014.
Decided on: 16.09.2014.

Transfer of Property Act, 1882- Sections 3 and 41- Suit land was earlier owned by defendants No.1 & 2 and others- defendant No.2 and others sold the suit land to predecessor in interest of the plaintiffs vide sale deed dated 20.3.1967- mutation No.644 was attested- however, on the death of the predecessor-in-interest of the plaintiff mutation of inheritance was not sanctioned and the suit land was recorded in the ownership and possession of the defendant No.1 and defendant No.2 filed a Civil Suit against the defendant No.1 in which the suit land was sold in the execution to defendant No.3- held- when defendant No.1 and others had sold the land belonging to them to the predecessor-in-interest of the plaintiff by way of registered sale deed, defendant No.3 cannot claim to be one of the purchasers for consideration as he would have a notice of the sale deed. (Para- 19 and 20)

Code of Civil Procedure, 1908- Section 100- In case of concurrent finding of fact recorded by Trial Court and Appellate Court, the High Court should be slow to interfere with them unless and until the findings so recorded are perverse. (Para-17)

H.P. Land Revenue Act- Section 45- Entries in the revenue record do not confer any title in favour of any person. (Para-21)

Cases referred:

Amiya Bala Dutta and others Vs. Mukut Adhikari and others, (2011) 11 SCC 628.

B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others, (2006) 13 SCC 449.

Union of India and others Vs. Vasavi Co-operative Housing Society Ltd. and others, 2014(1) Shim. LC 411

Dharam Singh Kapoor and others Vs. Om Parkash and others, 2008(2) Shim.LC 370

For the appellants Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. Anand Sharma, Advocate, for respondent No.3.
None for respondents No.1 and 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Plaintiffs, in the trial Court, are in second appeal as they are aggrieved by the judgment and decree dated 20.8.2001, passed by learned District Judge, Kullu, in Civil Appeal No.49 of 2001, whereby the judgment and decree dated 16.1.2001, passed by learned Senior Sub Judge, Kullu in Civil Suit No.168 of 1993 has been affirmed.

2. The subject matter of dispute is the land entered in Khasra No.1048, Khata Khatauni No.196/230, measuring 3-3 bighas, situate in Phati Kalwari, Kothi Palach, Tehsil Banjar, District Kullu, of which, as per copy of Jamabandi for the year 1965-66 Ext.PX, Devta Lakshmi Narayan was recorded as owner through its "*Kardar*" Atma Ram, whereas defendant No.1 Beli Ram and others in possession thereof in lieu of rendering services to the deity. Defendant No.2 and others had sold the entire suit land, i.e., 3 bighas 3 biswas to Saran Pat, the predecessor-in-interest of the plaintiffs vide sale deed dated 20.3.1967 Ext.PW-2/A. Mutation No.644 was also attested and sanctioned in favour of said Shri Saran Pat on 17.5.1967 as is apparent from the entries below remarks column of the Jamabandi Ext.PX. Rapat Ext.PY also came to be entered to this effect in the *Roznamacha Wakyati* for the year 1966-67 of Patwar Circle Chehani, Tehsil Banjar. On the death of Saran Pat, mutation of inheritance of the suit land was not sanctioned and attested in the names of plaintiffs, his legal heirs, and the suit land in subsequent Jamabandis for the year 1990-91, Ext.P.3/Ext.DG, 1985-86 Ext.DE and Khasra Girdawari Ex.DH came to be recorded in the ownership and possession of Shri Beli Ram, defendant No.1 and others. The possession thereof allegedly remained initially with late Shri Saran Pat and after his death with the plaintiffs.

3. Defendant No.2 filed the suit against defendant No.1 for the recovery of Rs.10,000/-. The same was decreed *ex-parte* vide judgment and decree dated 28.6.1988, Ext.P.1 and P.2, respectively against

defendant No.1. Defendant No.2 initiated execution proceedings and the suit land to the extent of 1/4th share was attached as well as ordered to be sold by the Court in an open auction to realize the suit amount. Defendant No.3 being the highest bidder, purchased 1/4th share of defendant No.1 in the suit land alongwith his other landed property in an open auction and sale certificate Ext.DA came to be issued in her favour by learned Sub Judge 1st Class, Kullu District at Kullu. Rapat Ext.DI to this effect came to be recorded in *Roznamcha Wakyati* for the year 1990-91.

4. The grouse of the plaintiffs, as disclosed from the plaint, is that defendant No.1 Beli Ram an intelligent and shrewd man taking advantage of the simplicity of Saran Pat, their father, in connivance with the revenue staff managed that the mutation of inheritance on the death of their father is not attested and sanctioned in their names and to the contrary got civil suit filed from defendant No.2, not opted to appear and contest the same deliberately and intentionally. Not only this, but later on got the suit land attached during the execution proceedings and put the same on auction. The plaintiffs, who on the death of their father occupied the suit land, were under the impression that they are owners thereof. The sale of the suit land in favour of defendant No.3, therefore, has been sought to be declared illegal, null and void and the result of fraud played upon the plaintiffs by defendants No.1 and 2. The plaintiffs came to know about sale of the suit land to defendant No.3 in an open auction during the first week of September, 1993 when the said defendant herself disclosed to plaintiff No.2 that the suit land was purchased by her in an open auction and that sale certificate also stands issued in her favour by the Court on 19.12.1990, hence the suit for declaration and permanent prohibitory injunction against the defendants.

5. Defendant No.1, when put to notice, has admitted the plaintiffs' claim in toto as set out in the plaint.

6. Defendant No.2 while denying the plaintiffs' case being wrong, has submitted that neither suit land was sold to Saran Pat nor he was ever put in possession thereof. It is also denied that they raised an orchard over the suit land. The suit land throughout remained in the ownership and possession of defendant No.1. It is submitted that had the plaintiffs been in possession of the suit land, they could have filed objections and got the same released from attachment. It is further submitted that he got the suit land attached and sold in an open auction because he had to recover money from defendant No.1, Beli Ram.

7. Defendant No.3 in separately filed written statement has raised preliminary objections qua maintainability, estoppel, limitation, jurisdiction of the civil Court to try and entertain the suit and non-joinder of necessary parties. On merits, she has also denied the entire case as set out in the plaint and has come forward with the version that in the year 1967 the suit land was recorded in the ownership of Devta Lakshmi Narayan of Phati Kalwari, whereas in possession of defendant No.1, Smt. Uttmu, Prem Singh, Parmeshwari Lal and others in the

capacity of tenants under the deity. On coming into force of HP Ceiling on Land Holdings Act the suit land was declared surplus and vide orders passed by Collector all rights, title and interest of Devta Lakshmi Narayan stood extinguished as well as vested in the State of Himachal Pradesh. Defendant No.2 and others, however, continued to be in possession thereof in the capacity of tenants under the State of Himachal Pradesh and ultimately on conferment of proprietary rights became owners thereof. Thereafter in the year 1989 Prem Singh, one of the co-sharers, has sold his share in the suit land and some other land to one Bhole Ram, the husband of defendant No.3 and one Thakru, whereas Parmeshwari Lal, another co-sharer also sold his share to Bhole Ram and Thakru aforesaid in the year 1987. Shri Bhole Ram and Thakru became owners of the suit land to the extent of their share sold to them by S/Shri Prem Singh and Parmeshwari Lal. The share of defendant No.1, Beli Ram, was purchased by defendant No.3 in an open auction. It has further been submitted that in the year 1967 Beli Ram, Prem Singh and Smt. Uttmu were not in exclusive possession of the suit land but occupying the same in the capacity of tenants alongwith their co-tenants Paremshwari Lal and Krishan Chand etc. They, however, could have not sold the suit land to Saran Pat.

8. In replication to the written statements filed on behalf of defendants No.2 and 3 the plaintiffs have denied the contents of preliminary objections being wrong and reiterated the entire case as set out in the plaint.

9. Learned trial Court after holding full trial has dismissed the suit while recording findings on issues No.1 to 5 as follow:

"15. Thus, having regard to entire evidence on record, it can safely be concluded that land in suit was never owned and possessed by Shri Beli Ram, Smt. Uttmu and Prem Singh at the time of sale, i.e., on 23.3.1967 nor Shri Beli Ram, Smt. Uttmu and Prem Singh could sell the same to Saran Pat, predecessor-in-interest of plaintiffs vide sale deed dated 23.3.1967 being not the owners of the same and the alleged sale deed dated 23.3.1967 is merely the fictitious sale deed and as such is of no consequence as plaintiffs are not the owners in possession of the land in suit and the sale certificate dated 19.12.1990 issued by Sub Judge, 1st Class, Kullu in favour of Smt. Sheela Devi, defendant No.3 is legal, valid and binding on plaintiffs and defendants No.1 and 2 and since the plaintiffs are not found to be owners o the land in suit hence they are not entitled to relief of possession. Accordingly, all the above issues are decided against the plaintiffs and in favour of defendant No.3."

10 The question qua maintainability of the suit, estoppel, limitation, jurisdiction and non-joinder of necessary parties have, however, been answered against the defendants while answering issues No.6 to 11 in favour of the plaintiffs.

11. In appeal, learned lower appellate Court after taking into consideration the given facts and circumstances and also the evidence

available on record as well as the case law dismissed the appeal with following observations:

> "35. On facts and face of the case in hand, the authorities referred, appear to have no application with due apology to their Lordship I say so. Because it has come through admission of PW4 Sher Singh who participated in court auction that auction was conducted and defendant-3 was highest bidder. There were also other bidders. Plaintiffs are not proved possessing the land nor they have any right, title or interest therein. So sale was rightly held valid because defendant-2 obtained decree against defendant-1 and as a result executed decree qua his interest in the suit land. In such auction it was rightly purchased for valuable consideration by the defendant-3.
>
> 36. In such circumstances, it is apparent that plaintiffs are neither owners nor in possession of the suit land. It has been rightly purchased in court auction by defendant-3. Plaintiffs are also not entitled to alternative plea of possession. Hence suit was rightly dismissed by the learned trial Court. Points answered accordingly."

12. Challenge to the judgment and decree passed by learned lower appellate Court is on the grounds, *inter alia*, that the same suffers with material illegalities and irregularities on account of non-framing of proper points which were required to be adjudicated upon. The area where the property in dispute situates, has the application of Punjab Tenancy Act and Punjab Security of Land Tenures Act, the provisions thereof are stated to be ignored. The findings that the land was vested in the State of Himachal Pradesh are stated to be beyond the scope of pleadings nor any issue was framed to this effect. The findings that the sale of the suit land in favour of Saran Pat are bad in law and contrary to the evidence available on record not sustainable. The revenue record produced in evidence rather stated to be misled and misconstrued. The admission made by defendant No.1 in the written statement qua the title of the plaintiffs in the suit land, the suit could have not been dismissed. In case Beli Ram (defendant No.1) allegedly has no title in the suit land and the competency to transfer the same in favour of Saran Pat by way of sale proceedings in execution petition should have also been held illegal, null and void and the sale of the suit land to defendant No.3 in an open auction should also have been held illegal, null and void, having conveyed no title in her favour.

13. This appeal has been admitted on the following substantial questions of law:

> 1. Whether the lower appellate Court has wrongly formulated point No.1 which was beyond the scope of the pleadings of the parties and was not a subject matter of issue before the trial Court, is not the impugned judgment rendered by the lower appellate Court vitiated by taking

into consideration such question which was extraneous to the dispute?

2. Whether both the Courts below have acted beyond their jurisdiction to put unnecessary reliance on the entries in the revenue records, presumption to which stood rebutted on account of Exhibit PW-2/A and Exhibit PY showing the valid transfer of title in favour of Saran Pat, predecessor in interest of the plaintiff-appellants and delivery of possession? When the title of the plaintiff-appellants over the suit property was not in question, are not the findings of both the Courts below holding the plaintiff-appellants not to be owner in possession, illegal, erroneous and perverse?

3. Whether the findings of both the courts below in upholding the validity of the decree obtained ex-parte by defendant No.2 as the sale of the property in favour of defendant No.3 in execution of such decree, behind the back of the plaintiff-appellants to be valid are incapable of being sustained being on account of misreading of the pleadings and relevant evidence and non-consideration of the material evidence rendered such findings to be erroneous, illegal and perverse?

4. Whether the lower appellate Court has misread the provisions of Punjab Tenancy Act and Punjab Security of Land Tenures Act to record the findings that the sale made by defendant No.1 and other co-owners in favour of Shri Saran Pat was illegal, null and void, when the same could not have been questioned by the defendants who were claiming title through the same person? Have not both the Courts below gone beyond their jurisdiction in setting aside the title of the plaintiff-appellants when no other part of the property was sold?

5. Whether both the Courts below have ignored the basic principles of law that even if the title of the predecessor-in-interest of the plaintiff-appellants was invalid for any reason, the same matured due to afflux of time in assertion of the right of the plaintiff-appellants as owner, has not the correct legal position misunderstood vitiating the entire judgment and decree?

6. Whether both the Courts below have misread the evidence in denying the relief of injunction to the plaintiff-appellants by holding that the plaintiff-appellants are neither owner nor in possession of the suit property?

14. Shri Bhupender Gupta, learned Senior Advocate assisted by Shri Neeraj Gupta, Advocate, appearing on behalf of appellants-plaintiffs has mainly emphasized that the factum of the suit land having been purchased by the father of the plaintiffs, Shri Saran Pat, stands

established on record as per own stand of the first defendant in written statement he filed to the suit and also by way of the sale deed Ext.PW-2/A. The said sale transaction having not been challenged nor questioned by any one in the Court of law, establish the title of the plaintiffs in the suit land. The question that the vendor Beli Ram (defendant No.1), Smt. Uttmu and Prem Singh were not owners of the suit land and rather tenants under the deity (Devta Lakshmi Narayan), hence could have not conveyed the title qua suit land by way of sale thereof to Saran Pat, should have not been taken to non-suit the plaintiffs, as according to Mr. Gupta, had Beli Ram etc. been not owners of the suit land how defendant No.3 could have acquired the same even if it is presumed that she has purchased the same in an open auction. It has further been argued that undue weightage cannot be given to the entries in the revenue record nor such entries prove the title of a person in any property and it is the sale deed like in the present case, which proves the title of a person qua the property purchased. Therefore, according to Mr. Gupta, when the sale deed Ext.PW-2/A stands satisfactorily proved and mutation of the suit land was also attested in the name of Saran Pat, the suit could have not been dismissed.

15. On the other hand, Shri Anand Sharma, Advocate, learned Counsel representing respondent No.3-defendant, has strenuously contended that the concurrent findings of facts recorded by both Courts below can not be interfered with in the present appeal. Also that defendant No.3 is the bonafide purchaser of the suit land. The land according to him, was attached in execution proceedings and when put to sale in an open auction defendant No.3 purchased the same being the highest bidder. It has further been contended that defendant No.3 has purchased the suit land to the extent of the share of Beli Ram, the first defendant. Learned Counsel, therefore, has sought the dismissal of the appeal.

16. On analyzing the rival submissions and also taking into consideration the evidence available on record, it is 1/4th share of defendant No.1 Beli Ram in the suit land measuring 3-3 bighas, i.e., less than one bigha, the subject matter of dispute in the present lis. True it is that both Courts below have non-suited the plaintiffs and the present is a case of concurrent findings.

17. As per the settled legal principles, in a case of concurrent findings, recorded after proper analysis and appreciation of evidence by the trial Court and lower appellate Court, in a Regular Second Appeal under Section 100 of the Code of Civil Procedure, the High Court should be slow and normally not interfere therewith, unless and until the findings so recorded are perverse. It is held so by the Hon'ble Apex Court in **Amiya Bala Dutta and others Vs. Mukut Adhikari and others, (2011) 11 SCC 628.** Similar is the ratio of the judgment, again that of Hon'ble Apex Court in **B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others, (2006) 13 SCC 449**.

18. The legal questions arise for determination by this Court, besides mis-appreciation and misreading of the evidence produced by the parties on both sides also pertain to the validity and legality of the sale deed Ext.PW-2/A which was never assailed by any one in a Court of law and acquiring of title pursuant to this document by the predecessor-in-interest of the plaintiffs, Shri Saran Pat.

19. No doubt, Devta Lakshmi Narayan was recorded owner of the land in dispute. Defendant No.1, Beli Ram, his daughter-in-law, Smt. Uttmu were in possession of half portion thereof in equal shares, whereas the remaining half was in the possession of S/Shri Prem Singh, Parmeshwari Lal and Krishan Chand sons and Smt. Ram Dei daughter as well as Smt. Piar Dassi, widow of Chande Ram in equal shares. The sale deed Ext.PW-2/A reveals that it is Beli Ram (defendant No.1), Smt. Uttmu and Prem Singh had sold their entire share in the suit land and also other landed property belonging to them to Saran Pat, the predecessor-in-interest of the plaintiffs. The execution of this document stands proved from the testimony of Shri Budh Ram (PW-2), one of the marginal witnesses to this document. Even defendant No.1 Beli Ram himself has admitted in the written statement filed to the suit that the suit land was sold by Prem Singh etc. to Saran Pat vide sale deed Ext.PW-2/A. Rapat Ext.PY was also recorded in the *Roznmacha Wakiati*. The entries under the remarks column of Jamabandi Ext.PX/PZ demonstrate the attestation of mutation No.644 on 17.5.1967 consequent upon the sale of the suit land vide sale deed Ext.PW-2/A in the name of Saran Pat. The sale deed Ext.PW-2/A is duly registered with Sub Registrar. The same has not been questioned by any one including defendant No.3, who purchased the suit land to the extent of share of defendant No.1 Beli Ram in an open auction. On the other hand, in view of such entries in the revenue record showing conveyance of the suit land to Saran Pat, the said defendant cannot be said to be a bonafide purchaser because had the revenue record been examined by her carefully, would have come to know about the transaction of sale having already taken place between Beli Ram aforesaid and his daughter-in-law Smt. Uttmu as well as Prem Singh on one side and Saran Pat on the other.

20. True it is that in the subsequent Jamabandis for the year 1985-86 Ext.DE and 1990-91 Ext.P.3/DG as well as Khasra Girdawari from Kharif 1991 to Kharif 1993 Ext.DH Beli Ram etc. have been shown owners in possession of the suit land and there is no reference of the name of Saran Pat in the said record. Said Shri Saran Pat or the plaintiffs cannot be held responsible for not maintaining the subsequent revenue record as per actual and factual position because of not the Incharge of the said record. Rather in view of execution of the sale deed Ext.PW-2/A in favour of Saran Pat, entry qua this transaction in *Roznamcha Wakyati* Ext.PY as well as attestation and sanction of mutation No.644 in his favour should have been taken care of by the revenue staff for making entries with respect to the suit land in the records prepared subsequently.

21. It is in this backdrop, there being no entries in subsequent record reflecting the name of Saran Pat or his successors, i.e., the plaintiffs, is hardly of any help to the defendants nor is a circumstance to be relied upon against the plaintiffs for the reasons that as per settled legal principles entries in revenue record do not confer title in respect of any property. This Court draws support in this behalf from the judgment of the Apex Court in **Union of India and others Vs. Vasavi Co-operative Housing Society Ltd. and others, 2014(1) Shim. LC 411**, which reads as follows:

> "17. This Court in several Judgments has held that the revenue record does not confer title. In ***Corporation of the City of Bangalore*** *v.* **M. Papaiah and another** *(1989) 3 SCC 612* held that "it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law." In ***Guru Amarjit Singh*** v. ***Rattan Chand and others*** (1993) 4 SCC 349 this Court has held that "that the entries in Jamabandi are not proof of title". In ***State of Himachal Pradesh*** v. ***Keshav Ram and others*** (1996) 11 SCC 257 this Court held that "the entries in the revenue papers, by no stretch of imagination can form the basis for declaration of title in favour of the plaintiff."
>
> 18. The Plaintiff has also maintained the stand that their predecessor-in-interest was the Pattadar of the suit land. In a given case, the conferment of Patta as such does not confer title. Reference may be made to the judgment of this Court in ***Syndicate Bank*** *v.* ***Estate Officer & Manager, APIIC Ltd. & Ors.*** (2007) 8 SCC 361 and ***Vatticherukuru Village Panchayat*** *v.* ***Nori Venkatarama Deekshithulu & Ors.*** (1991) Supp. (2) SCC 228."

22. Similar is the ratio of the judgment delivered by a Co-ordinate Bench of this Court in **Dharam Singh Kapoor and others Vs. Om Parkash and others, 2008(2) Shim.LC 370.**

23. Both Courts below have erroneously placed reliance on the entries in the revenue record while non-suiting the plaintiffs and discarding the sale deed Ext.PW-2/A as well as the other record, i.e., Jamabandi for the year 1965-66 Ext.PX and the Rapat *Roznamcha Wakyati* Ext.PY. As a matter of fact, it is the sale deed which could have been given weightage and without there being any evidence to show that the same was ever declared illegal or null and void, should have been relied upon and the suit decreed.

24. The plaintiffs have pleaded fraud having been played by defendant No.1 in connivance with defendants No.2 and 3. Jai Singh,

plaintiff No.1, as PW-1 has also stated so in so many words while in the witness box. Even from the given facts and circumstances also, it can be gathered that Civil Suit No.104 of 1987 was filed by defendant No.2 in connivance with defendant No.1. It is for this reason defendant No.1 allowed himself to be proceeded against *ex-parte* and the suit was decreed *ex-parte*. Defendant No.2 Krishan Chand though contested the suit and filed written statement, however, opted not to step into witness box to the reasons best known to him. Meaning thereby that he did so intentionally and deliberately in order to avoid the questions which could have been put to him on behalf of the plaintiffs qua his connivance with defendants No.1 and 3. The ingredients of fraud played upon the plaintiffs by Beli Ram in connivance with defendant No.2, therefore, also stand established. Though, defendant No.3 is an auction purchaser as is apparent from the sale certificate Ext.DA issued by learned Sub Judge 1st Class, Kullu, District Kullu and also the entries in *Roznamcha Wakyati* vide Rapat Ex.DI. Mutation No.1527 qua 1/4th share of defendant No.1 in the suit land also stands sanctioned and attested in her favour. She, however, cannot be said to be a bonafide purchaser for the reason that defendant No.1 Beli Ram had already sold the same to Saran Pat, therefore, the share of Beli Ram in the suit land could have not been sold. Even if Beli Ram etc. have no title in the suit land when it was sold to Saran Pat in that event also with the passage of time Saran Pat and on his death his successors, the plaintiffs can reasonably be believed to have acquired title therein, particularly when sale deed Ext.PW-2/A and mutation of the suit land attested in the name of Saran Pat, not has been challenged by anyone. Merely that deity was owner of the suit land at the relevant time and also there being no entries showing the name of Saran Pat or his successors in the subsequent records, in the light of the discussion hereinabove should have not taken into consideration to non-suit the plaintiffs. The findings to the contrary recorded by both the Courts below, therefore, are certainly the result of misreading and mis-appreciation of the evidence available on record, hence perverse. The substantial questions of law stand answered accordingly. The impugned judgment and decree is, therefore, quashed and set aside. Consequently, the appeal is allowed and the suit of the plaintiffs is decreed for the relief of declaration that they are owners in possession of the suit land to the extent of the share of defendant No.1, Beli Ram and the auction thereof in favour of defendant No.3 is illegal, null and void as well as not binding on the plaintiffs. The sale certificate Ext.DA is also held to be illegal, null and void. The defendants are restrained from causing any interference over the possession of the plaintiffs in the suit land. The parties to bear their own costs.

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

Paryatan Avam Jan Kalyan Samiti. …Petitioner.

Vs.

State of Himachal Pradesh and others. …Respondents.

CWP No. 3040 of 2013
Reserved on: 10.9.2014
Decided on: 16.9. 2014

Constitution of India: Article 226- Municipal Corporation Act, 1994- Section 170- M.C. Shimla passed a resolution revising the water rates for domestic water connection within and outside the area of Municipal Corporation- the State Government issued a notification regarding the increased water rates- held, that Section 170(2) of M.C. Act provides that the rates of the domestic supply shall be fixed by the Government- Section 85 of the Act empowers the Corporation to levy a fee and user charges for the services provided by it- provision of Section 170(2) excludes the applicability of the Section 85- therefore, Municipal Corporation had no authority to pass the resolution and State was not competent to notify the water rates. (Para-8 and 9)

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Anup Rattan, Mr. M.A. Khan, Addl. A.Gs with Mr. Ramesh Thakur, Asstt. A.G. for respondents No.1 and 2.

Mr. Hamender Chandel, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Members of the petitioner's Samiti are residents of Kufri and Chharbara. They are supplied water by respondent No.3-Municipal Corporation, Shimla. Respondent-State has issued notification dated 6.10.2013 under section 170 of the Municipal Corporation Act, 1994 (hereinafter referred to as the 'Act' for brevity sake) revising the rates of water supply within and outside the areas of Municipal Corporation with immediate effect. These rates were to be increased @ 10% every year. Respondent-Corporation vide resolutions dated 29.9.2012, 28.2.2013, 15.3.2013 and 29.3.2013 has revised the water rates for domestic water connections within and outside the areas of Municipal Corporation.

2. Mr. Ajay Sharma has vehemently argued that water charges are to be fixed by the State Government and the Municipal Corporation, Shimla has no authority to do so.

3. Mr. Anup Rattan, learned Additional Advocate General for respondent No.1 and 2 and Mr. Hamender Chandel, Advocate for respondent No.3, have vehemently argued that the Municipal Corporation has the authority to prescribe the water charges under newly substituted section 85 of the Act.

4. We have heard the learned counsel for the parties and have gone through the pleadings carefully.

5. Chapter-VIII of the Himachal Pradesh Municipal Corporation Act, 1994 deals with the taxes and fees. Un-amended section 85 of the Act reads as under:

> "85. (1) Subject to the prior approval of the State Government the Corporation may in the manner prescribed, levy a fee with regard to the following:-
>
> (i) a fee on advertisements other than advertisements in the newspapers;
>
> (ii) a fee on building applications;
>
> (iii) development fee for providing and maintaining civic amenities in certain areas;
>
> (iv) a fee with regard to lighting;
>
> (v) a fee with regard to scavenging;
>
> (vi) a fee in the nature of costs for providing internal services in a building scheme or town planning scheme;
>
> (vii) any other fee as deemed fit by the corporation for services rendered.
>
> 2. The rates at which and the conditions subject to which the fees as laid down in sub-section (1), may be levied by the Corporation, would be decided by the Government."

6. Section 85 was substituted vide Act No.32 of 2011. According to the reply filed by respondent No.1, amendment was carried out with effect from 20.2.2012.

7. Mr. Ajay Sharma has drawn the attention of the Court to sub-section (2) of section 170 of the Act. Section 170 reads as under:

> "170. Supply of water to connected premises.
>
> (1) The Commissioner may, on application by the owner of any building arrange for supplying water from the nearest main to such building for domestic purposes in such quantities as he deems reasonable, and may at any time limit the amount of water to be supplied whenever he considers necessary.

(2) Apart from the charges for the domestic supply at rates as may be fixed by the Government, additional charges will be payable for the following supplies of water:-

(a) for animals or for washing vehicles where such animals or vehicles are kept for sale or hire;

(b) for any trade, manufacture or business;

(c) for fountains, swimming baths, or for any ornamental or mechanical purposes;

(d) for gardens or for purposes of irrigation;

(e) for watering loads and paths;

(f) for building purposes."

8. Sub-section (2) of section 170 is contained in Chapter-XII of the Act. Section 170 is a charging section and specifically provides that the rates of the domestic supply shall be fixed by the Government. Section 85 is general and empowers the Corporation to levy a fee and user charges for the services provided by it at such rates and in such manner as may be determined by the Corporation from time to time. Provisions of sub-section (2) of section 170 of the Act exclude the applicability of section 85 contained in Chapter-VIII. Earlier rates as per notification dated 6.10.2003 were also prescribed by the State Government.

9. Mr. Hamender Chandel has also drawn the attention of the Court to Annexure R-3/A dated 19.2.2014 whereby the State Government has conveyed the ex-post facto approval to water tariff approved by the Municipal Corporation vide resolution No. 3 (II) dated 29.9.2012. The water tariff/charges are to be fixed by the State Government and the Corporation had no authority to pass the resolution. Since the resolution was in contravention of the mandatory provisions of section 170 (2) of the Act, there was no occasion for the State Government to grant ex-post facto sanction to the resolution dated 29.9.2012. Section 85 has been substituted, as noticed hereinabove with effect from 20.2.2012, but there is no corresponding amendment in sub-section (2) of section 170 of the Act.

10. Accordingly, the present petition is allowed. Annexures P-5 and P-6 are quashed and set aside. However, it shall be open to the respondent-State to fix the rates of water charges henceforth in accordance with law. Pending application(s), if any, also stands disposed of. No costs.

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

Ajay Sipahiya & others ..... Petitioners.
Vs.
State of H.P. and others .....Respondents

CWPIL No. 12/2014.
Date of decision: 17.09. 2014**.**

Constitution of India, 1950- Article 226- The direction issued to the authorities to alleviate the suffering of the accident victims.

(Para-3)

For the petitioners: Mr. Ajay Sipahiya petitioner in person.
r the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General, Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1,2,4, 5 and 6.
Mr. G.S. Rathore, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice(Oral)

Respondents have failed to file reply and compliance report, in terms of order dated 4th September, 2014.

2. Mr. Shrawan Dogra, the learned Advocate General and Mr. G.S. Rathore, Advocate, for respondent No. 3 sought and are granted four weeks' time to do the needful, in terms of order dated 4th September, 2014.

3. Keeping in view the interest of public at large read with the fact that vehicular traffic accidents are occurring in the entire State of Himachal Pradesh at the highest rate, may be because of the conditions of the roads or the reckless driving or for any other reasons, the ultimate sufferer/victim of which is public at large, who loses their lives in the accidents or become permanent and partially disabled, we deem it proper to pass the following directions, in addition to the directions already passed vide order dated 4th September, 2014:

(I) The Himachal Pradesh Police to start the website in which all the relevant information/documents are placed, which can be downloaded by the claimants, insurance companies as well as the Tribunals;

(II) The registers be maintained at police Station level indicating the details which shall contain details of date of dispatch of FIR and Form 54 of the Motor Accidents Claims Tribunals. The column containing details of information not included in Form 54 along

with the reasons for non-availability, shall also be maintained in the Register;

(III) The supply of copies of FIR and other documents to the claimants/Tribunal on the date of registration and other documents within a stipulated period prescribed by sub clause 6 of Section 158 of the Act;

(IV) Entries be made in red ink in the index of FIR about the date of dispatch of report and information, supra;

(V) The Deputy Superintendents of police in each district must check the dispatch registers mandatorily in every six months and must ensure the compliance;

(VI) The Superintendents of Police, Deputy Superintendents of Police and Station House Officers to record in the final reports, submitted to the Magistrate in terms of sub clause 2 of Section 173 of the Code of Criminal Procedure about the compliance of Sub section (6) of Section 158 of the Act-Rule 150 of the Rules and Form 54. It must also contain details to whom the information was given and what kind of information was given;

(VII) The monitoring cell, i.e., "MAC Monitoring Cell" be created in each district headed by the Deputy Superintendents of Police to monitor the delivery of Form 54 and other requisite information, i.e., to ensure the compliance of the mandate of Section 158 (6) of the Act;

(VIII) The Presiding Officers of Motor Accidents Claims Tribunals must convene meeting once in a month with all the stake holders, i.e. police, prosecution agencies, insurance officers in order to ensure that the compliance is made and the grievance of the sufferers is redressed without delay;

(IX) The Superintendents of Police must weekly conduct review and ensure that the entire information, i.e. submission of FIRs, documents in terms of Form 54 and other information which is not contained in Form 54 must be placed on the website, so that, it can be downloaded by the Claims Tribunals/claimants;

(X) The Station House Officers must ensure installation of the Check-List Boards in their Office Rooms;

(XI) The Magistrate while granting the remand must ensure that the Investigating Agencies and Station House Officers have complied with the mandate of Section 158 (6) of the Act.

4. The Principal Secretary (Home) to the Government of Himachal Pradesh, the Director General of Police, District and Sessions Judges and Superintendents of Police of all the districts are directed to report compliance, in terms of the directions made supra and also in terms of directions contained in order dated 4th September, 2014. List on 3rd November, 2014. Copy dasti.

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

Mr. Inderjit Kumar Dhir .....Appellant
Vs.
State of HP and others ...Respondents.

LPA No. 150 of 2014.
Date of decision: 17.09.2014.

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking a direction that the pension and the other retiral benefits be granted to him and he be enrolled as the member of ECHS- petitioner was discharged from the Army on 30.6.1970 and he had given a representation to the President of India on 9.10.2006- his petition was dismissed on the ground that delay from 30.6.1970 till 9.10.2006 was not explained- held, that the delay is an important factor and has to be taken into consideration while granting the relief under Article 226 of the Constitution of India- there is no infirmity in the order passed by the Court- Appeal dismissed.

Cases referred:

R & M Trust Vs. Koramangala Residents Vigilance Group and others, reported in (2005) 3 Supreme Court Cases 91

S.D.O. Grid Corporation of Orissa Ltd. and others Vs. Timudu Oram, reported in 2005 AIR SCW 3715

Srinivasa Bhat (Dead) by L.Rs. & Ors. Vs. A. Sarvothama Kini (Dead) by L.Rs. & Ors., reported in AIR 2010 Supreme Court 2106

Bhakra Beas Management Board Vs. Kirshan Kumar Vij & Anr., reported in AIR 2010 Supreme Court 3342

Delhi Administration and Ors. Vs. Kaushilya Thakur and Anr., reported in AIR 2012 Supreme Court 2515

Chennai Metropolitan Water Supply and Sewerage Board and others Vs. T.T. Murali Babu, reported in (2014) 4 Supreme Court Cases 108

For the appellant: Mr. Vijender Katoch, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. Kush

Sharma, Deputy Advocate General, for respondents No. 1 to 3.

Mr. Vipul Sharda, proxy counsel for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the judgment and order dated 07.08.2013, passed by the learned Single Judge in CWP No. 5291/2012, titled Inderjeet Kumar Dhir vs. State of H.P. and others, whereby the writ petition filed by the writ petitioner came to be dismissed, on the grounds taken in the memo of appeal, hereinafter referred to as "the impugned judgment" for short.

2. The petitioner in the writ petition had sought following reliefs:

> "(a) Appropriate writ, order or direction for quashing the letter dated 14.12.2011 issued by the respondent whereby pension and other retiral benefits have been denied to the petitioner and direct the respondent to release pension and other retiral benefits to the petitioner alongwith entire arrears;
>
> (b) Direct the respondent to enroll the petitioner member of ECHS or other Government health scheme so that at least medical care of the petitioner and his wife can be taken care of at this advance stage of life."

3. The petitioner had joined the Himachal Government Transport Department in the month of October, 1954. When the petitioner was working as Garage Supervisor, he was relieved to join Indian Army on 8.1.1964, was discharged from the Indian Army on 30.6.1970. He made first representation to His Excellency President of India on 9.10.2006 for the grant of pension.

4. The Writ Court, after examining the pleadings, dismissed the writ petition on the ground that petitioner has not explained the delay, which had crept-in in filing the writ petition right from 30.6.1970 to 9.10.2006.

5. The Apex Court in a case titled as **R & M Trust Vs. Koramangala Residents Vigilance Group and others,** reported in **(2005) 3 Supreme Court Cases 91,** held that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution; delay defeats equity and delay cannot be brushed aside without any plausible explanation. It is apt to reproduce para 34 of the judgment herein:

> "34. There is no doubt that delay is a very important factor while exercising extraordinary jurisdiction under

> Article 226 of the Constitution. We cannot disturb the third-party interest created on account of delay. Even otherwise also why should the Court come to the rescue of a person who is not vigilant of his rights?"

6. The Apex Court in cases titled as **S.D.O. Grid Corporation of Orissa Ltd. and others Vs. Timudu Oram, reported in 2005 AIR SCW 3715,** and **Srinivasa Bhat (Dead) by L.Rs. & Ors. Vs. A. Sarvothama Kini (Dead) by L.Rs. & Ors.,** reported in **AIR 2010 Supreme Court 2106,** has also discussed the same principle. It would be profitable to reproduce para 9 of the judgment in **Timudu Oram's case (supra)** herein:

> "9. In the present case, the appellants had disputed the negligence attributed to it and no finding has been recorded by the High Court that the GRIDCO was in any way negligent in the performance of its duty. The present case is squarely covered by the decision of this Court in Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others (supra), 1999 AIR SCW 3383 : AIR 1999 SC 3412. The High Court has also erred in awarding compensation in Civil Appeal No. ..... of 2005 (arising out of SLP (C) No. 9788 of 1998). The subsequent suit or writ petition would not be maintainable in view of the dismissal of the suit. The writ petition was filed after a lapse of 10 years. No reasons have been given for such an inordinate delay. The High Court erred in entertaining the writ petition after a lapse of 10 years. In such a case, awarding of compensation in exercise of its jurisdiction under Article 226 cannot be justified."

7. It would also be apt to reproduce para 39 of the judgment rendered by the Apex Court in **Bhakra Beas Management Board Vs. Kirshan Kumar Vij & Anr.,** reported in **AIR 2010 Supreme Court 3342,** herein:

> "39. Yet, another question that draws our attention is with regard to delay and laches. In fact, respondent No. 1's petition deserved to be dismissed only on that ground but surprisingly the High Court overlooked that aspect of the mater and dealt with it in a rather casual and cursory manner. The appellant had categorically raised the ground of delay of over eight years in approaching the High Court for grant of the said relief. But the High Court has simply brushed it aside and condoned such an inordinate, long and unexplained delay in a casual manner. Since, we have decided the matter on merits, thus it is not proper to make avoidable observations, except to say that the approach of the High Court was neither proper nor legal."

8. The Apex Court has considered the same issue and point in a case titled as **Delhi Administration and Ors. Vs. Kaushilya Thakur**

and Anr., reported in **AIR 2012 Supreme Court 2515.** It is apt to reproduce para 10 of the judgment herein:

> "10. We have heard Shri H.P. Raval, learned Additional Solicitor General and Shri Rishikesh, learned counsel for respondent No.1 and perused the record. In our view, the impugned order as also the one passed by the learned Single Judge are liable to be set aside because,
>
> (i) While granting relief to the husband of respondent No. 1, the learned Single Judge overlooked the fact that the writ petition had been filed after almost 4 years of the rejection of an application for allotment of 1000 sq. yards plot made by Ranjodh Kumar Thakur. The fact that the writ petitioner made further representations could not be made a ground for ignoring the delay of more than 3 years, more so because in the subsequent communication the concerned authorities had merely indicated that the decision contained in the first letter would stand. It is trite to say that in exercise of the power under Article 226 of the Constitution, the High Court cannot entertain belated claims unless the petitioner offers tangible explanation State of M.P. v. Bhailal Bhai (1964) 6 SCR 261.
>
> (ii) The claim of Ranjodh Kumar Thakur for allotment of land was clearly misconceived and was rightly rejected by the Joint Secretary (L&B), Delhi Administration on the ground that he was not the owner of land comprised in khasra No. 70/2. A bare reading of Sale Deed dated 12.7.1959 executed by Shri Hari Chand in favour of Ranjodh Kumar Thakur shows that the former had sold land forming part of khasra Nos. 166, 167 and 168 of village Kotla and not khasra No.70/2. This being the position, Ranjodh Kumar Thakur did not have the locus to seek allotment of land in terms of the policy framed by the Government of India. The payment of compensation to Ranjodh Kumar Thakur in terms of the award passed by the Land Acquisition Collector and the enhanced compensation determined by the Reference Court cannot lead to an inference that he was the owner of land forming part of Khasra No.70/2. In any case, before issuing a mandamus for allotment of 1000 square yards plot to the writ petitioner, the High Court should have called upon him to produce some tangible evidence to prove his ownership of land forming part of Khasra No.70/2. Unfortunately, the learned Single Judge and the Division Bench of the High Court did not pay serious attention to the stark reality that Ranjodh Kumar Thakur was not the owner of land mentioned in the application filed by him for allotment of 1000 square yards land."

9. The Apex Court in a latest case titled as **Chennai Metropolitan Water Supply and Sewerage Board and others Vs. T.T. Murali Babu,** reported in **(2014) 4 Supreme Court Cases 108,** has taken into consideration all the judgments and the development of law and held that delay cannot be brushed aside without any reason. It is apt to reproduce paras 13 to 17 of the judgment herein:

> "13. First, we shall deal with the facet of delay. In Maharashtra SRTC v. Balwant Regular Motor Service,, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Hurd, (1874) LR 5 PC 221, which is as follows: (Balwant Regular Motor Service case, AIR 1969 SC 329, AIR pp. 335-36, para 11)

"11. .....Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' (Lindsay Petroleum Co. case, PC pp/ 239-40)"

> 14. In State of Maharashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that: (SCC p. 692, para 19)
>
> > "19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

15. In State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566 : AIR 1987 SC 251, the Court observed that : (SCC p. 594, para 24)

> " 24. .....it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic."
>
> It has been further stated therein that: (Nandlal Jaiswal case, (1986) 4 SCC 566 : AIR 1987 SC 251, SCC p. 594, para 24)
>
> "24. ..... If there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction."

Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis.

17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court

> to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold.

10. The same principles have been laid down by this Court in **LPA No. 48 of 2011** titled **Shri Satija Rajesh N. vs. State of Himachal Pradesh and others** decided on 26.8.2014.

11. The petitioner is stated to have not joined back the respondent-Corporation. The Writ Court has rightly recorded the reasons given in para 2 of the impugned judgment. It is apt to reproduce para 2 of the judgment herein.

> "2. It is averred in the petition that he has approached respondent-Corporation to join duties. This averment has been denied by the respondents. The petitioner has failed to lead any tangible evidence to prove that he ever tried to join back his parent Department. The petitioner was discharged from Indian Army on 30.6.1970. He has made first representation to His Excellency President of India only on 9.10.2006 for grant of pension. Delay between 30.6.1970 to 9.10.2006 has not been explained by the petitioner. It is also not in dispute that the petitioner has not joined the respondent-Corporation after serving the Indian Army. The petitioner had served the respondent-Corporation w.e.f. October 1954 to 8.1.1964. Thereafter, he joined Indian Army. In case the petitioner had joined back the respondent-Corporation in that eventuality his service rendered in the Military could be counted under Rule 19 of the CCS (Pension) Rules. Since the petitioner was not reemployed in civil service, he is not entitled to benefit of service rendered by him in the Army towards pension. The petitioner has left the Himachal Government Transport

Department on 8.1.1964. The case of the petitioner at this belated stage cannot be ordered to be considered towards release of the pension/pensionary benefits."

12. Having said so, the impugned judgment is upheld and the appeal is dismissed. The pending applications, if any, stand disposed of.

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

Laxmi Narain & Ors. ...Appellants

Vs.

Kuldeep Singh & Ors. ...Respondents.

LPA No. 236 of 2011 a/w Ors.
Reserved on 23.8.2014
Decided on: 17.09.2014

Constitution of India, 1950- Article 12- Whether a Writ Petition is maintainable against the Jogindra Central Cooperative Bank Ltd. – held, that Bank is discharging similar duties and functions as H.P. State co-op. Bank and is also engaged in banking business- since, H.P. State Co.-op. Bank has already been held to be not a State in ***C.K. Malhotra vs. H.P. State Coop Bank and others 1993 (2) Sim.L.C 243***- therefore, Joginder Central Co. Operative Bank will not fall within the definition of the State.

Constitution of India, 1950- Article 226- Whether a Writ Petition will lie against the Jogindra Central Co. Op. Bank- held, that although, the Writ can be issued against any person or authority, yet language of Article 226 cannot be interpreted literally to include private person to settle the private dispute- therefore, a Writ does not lie against the Jogindra Central Co. op. Bank.

Cases referred;

Binny Ltd Vs. Sadavisan 2005 (6) SCC 657

C.K. Malhotra Vs. H.P. State Coop Bank and others 1993 (2) Sim.L.C 243

Central Board of Dawoodi Bohra Community Vs. State of Maharashtra (2005) 2 SCC 673

Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala and others 2013 AIR SCW 5683

For the Appellants : Mr. Surinder Saklani, Advocate

For the Respondents : Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate, for respondent No. 1 to 3.
Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Addl.AGs, Mr. J.K. Verma, and Mr. Kush Sharma, Dy. AGs, for respondents No. 4 and 5.
Mr. Ramakant Sharma, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The preliminary question required to be determined in these appeals is whether a writ petition is maintainable against Jogindra Central Co operative Bank Ltd. The learned Single Judge considered this objection and concluded as follows:

> "1. the respondent-Bank, i.e. Central Cooperative Bank Ltd. is an "instrumentality"/agency" of the State Government, thus it is a State within the meaning of Article 12 of the Constitution of India and is amenable to the writ jurisdiction of this Court;
>
> 2. that the Central Cooperative Bank Ltd. is an "authority" as well as "person" within the meaning of Article 226 (1) of the Constitution of India and amenable to the writ jurisdiction of this Court;
>
> 3. the writ would lie against the functionaries of the State who passes the order under the Himachal Pradesh Cooperative Societies Act, 1968 and Rules framed thereunder.
>
> 4. the State Government is having majority share capital in the respondent-Bank;
>
> 5. the State of Himachal Pradesh exercises deep and pervasive control over the Bank financially, functionally and administratively since out of 13 Directors, 4 are nominated through the State Government and one Managing Director who is also appointed by the State Government is also one of the Directors of the respondent-Bank;
>
> 6. the State Government exercises control over the functioning of the respondent-Bank in view of the provisions cited here-in-above commencing from the registration up to the winding up of the Co-operative Societies;……."

2. Before we proceed, it may be noticed that after the aforesaid impugned judgment had been rendered by the learned Single Judge, a learned Division of this court, while hearing CWP No.3634 of 2012 vide order dated 20.7.2012 referred the following question of law for consideration by Full Bench:

> (i) "Whether the Kangra Central Co operative Bank, the Himachal Pradesh State Co operative Bank Ltd and the Central Co operative Bank are State within the meaning of Article 12 of the Constitution of India and;
>
> (ii) whether a writ would lie against them?".

3. While answering the first part of the question insofar the respondent Bank is concerned, it was held

> "10. That takes us to Central Cooperative Bank, whether it is a State within the meaning of Article 12. As regards this Bank, the decision pressed into service is of the learned Single Judge of this Court in the case of Mehar Chand and another vs. Central Cooperative Bank and others12. No decision of the Division Bench of this court has been brought to our notice, which has taken in CWP No. 641 of 2002 decided on 26th September, 2007 the view that the said Bank was State within the meaning of Article 12 of the Constitution. Thus understood, it is again not a case of conflicting opinion of two coordinate Benches of the same High Court on the point. If the matter of Bank were to proceed before the learned Single Judge of this Court perhaps the Single Judge Bench would be bound by the said decision, unless it was persuaded to take a different view in which case the only option available to that Judge would be to refer the matter to Larger Bench. In that case, the matter could proceed before the Division Bench of two Judges of our High Court and may not require consideration by a Full Bench. On the other hand, if the issue was to be raised before the Division Bench, in the first instance, and that Bench was not inclined to follow the view taken by the learned Single Judge Bench of this Court, it would be free to take a different view and hold that the Bank is not a State within the meaning of Article 12 of the Constitution of India. Since the writ petition pertaining to Bank is still pending, ordinarily, therefore, the issue ought to be dealt with by the Division Bench in the first instance and not by the Full Bench of the High Court. In other words, the pending writ petition pertaining to Bank must proceed before the concerned Bench, who would be free to take appropriate decision in the matter and including keeping in mind the contours expounded by the Apex Court in S.S. Rana's case (supra). We are inclined to take this view as the question would be a mixed question of fact and law, which can be conveniently dealt with by the concerned

Bench. In other words, we do not intend to express any view one way or the other with regard to the correctness of the decision in the case of Mehar Chand (supra) and leave the same open to be considered by the appropriate Bench."

4. Thereafter the Hon'ble Full Bench answered the reference in the following manner :

"15. For the view taken by us on both facets of the referred questions, we proceed to answer the Reference as under:

(1) The question as to whether Kangra Bank is a State within the meaning of Article 12 of the Constitution of India, is no more res integra. It has been authoritatively answered by the Apex Court in S.S. Rana's case (supra).

(2) Even in the case of H.P. State Cooperative Bank Ltd., the question has been answered by the Division Bench of our High Court in Chandresh Kumar Malhotra's case (supra). There is no conflicting decision of coordinate Bench of this Court necessitating pronouncement on that question by the Full Bench.

(3) In the case of Central Cooperative Bank, the decision in Mehar Chand's case (supra) is rendered by the learned Single Judge of this Court and no conflicting decision of the co-ordinate Bench muchless of the Division Bench or Larger Bench of our High Court with regard to the stated Bank has been brought to our notice. In any case, the said question can be conveniently answered by the Division Bench in appropriate proceedings whether in the form of writ petition or Reference made by the learned Single Judge of this Court, as the case may be. As and when such occasion arises, the issue can be answered on the basis of settled legal principles and including keeping in mind the exposition of S.S. Rana's case (supra) of the Apex Court concerning another Cooperative Bank constituted under the Himachal Pradesh State Cooperative Act.

(4) As regards the second part of the question as to whether a writ would lie against the stated Cooperative Banks, we hold that it is not appropriate to give a definite answer to this question. For, it would depend on several attending factors. Further, even if the said Banks were held to be not a State within the meaning of Article 12, the High Court in exercise of powers under Article 226 of the Constitution of India, can certainly issue a writ or order in the nature of writ even against any person or Authority, if the fact situation of the case so warrants. In other words, writ can lie even against a Corporative Society. Whether the same should be issued by the High Court would depend on the facts of each case."

5. Now, coming back to this case it may be observed that the learned counsel for the respondents have candidly conceded that it would be difficult for them to support the proposition that the Jogindra Central Co operative Bank Ltd is a State within the meaning of Article 12 of the Constitution of India in view of the exposition of law laid down by Full Bench judgment of this court in Vikram Chauhan's (supra), but then after placing reliance on second part of the question framed in Vikram Chauhan's case (supra) would contend that a writ would still lie against the respondent bank under Article 226 of the Constitution whereby this court can certainly issue a writ, order or direction against any person or authority if the fact situation of the case so warrants.

6. Before we consider the aforesaid issue any further, we may take note of the fact that the learned Single Judge, after taking into consideration the objects of the bank, concluded that it was acting as a public authority and had public duty to perform and the obligation is also of a public nature. It was held in the following manner:

> "Accordingly, the factor No.5 of Ajay Hasia's judgment is also fulfilled and the respondent-bank can be termed as an agency/instrumentality of the Government. It is also clear from the objects of the Bank as enumerated in paras supra that it is acting as public authority and has a public duty to perform and the obligation is also of public nature."
>
> Bye law-4 deals with the objects of the bank which are re-produced in entirety as under:
>
> "4. Objects. –
>
> The objects for which the Bank is established are as follows:-
>
> a) to promote the economic interest of the members of the Bank in accordance with the co- operative principles and to facilitate the operations of the Co-operative Societies registered under the Act;
>
> b) to serve as balancing centre and clearing house for Co-operative Societies in its area of operation;
>
> c) to organize the provision of credit for agriculturists, artisans, labourers and others in its area of operation, to function generally as an integrated district organization for the provision of agriculture, marketing, production, supply and processing, credit to agriculturists, artisans, labourers and others and their societies to develop co-operative credit and to ensure efficient performance of the functions relating there to through the Co-operative Societies in the area of operation;
>
> d) to make loans and advances and grant overdrafts and cash credit limits to,-
>
> (i) member of societies and individuals members; and

(ii) a person other than a member with prior permission of the Board; subject to the loan making policy specified by the Bank.

e) to collect bills, drafts, cheques and other negotiable instruments on behalf of members and non members and to provide them remittance facilities also;

f) to buy and sell securities for the investment of its surplus funds and to act as an agent for buyers and sellers of securities of the Government of India or of the State Government, Treasury Bills or other securities as specified in clauses (a), (b), (c) and (d) of Section 20 of Indian Trust Act, 1882 and to transfer, endorse, pledge such securities or shares and other assets of the Bank for raising funds or to lodge them as collateral security for money borrowed by the bank;

g) to undertake exchange business by drawings, accepting endorsing, negotiating, selling or otherwise dealing in bills of exchange, or other negotiable instruments with or without security;

h) to receive money in current, savings, fixed or other accounts and to raise or borrow from time to time such sums or money as may be required for the purpose of Bank to such extent and upon such conditions as the Board may think fit;

i) to open its branches, pay offices, extension counters, etc. in the area of operation of the bank with the prior approval of Registrar;

j) to create and maintain funds for the benefit of its staff members or ex-staff members and their dependants;

k) to act as a Banking Agent for the Government of Himachal Pradesh, Public Bodies, corporations or for any bank or bankers in the area of operation on such terms and conditions as mutually agreed upon between the bank and other party subject to the provision of the Act, if any;

l) to advise societies in the matters of principles and practices of banking and inspect them as and when necessary for the purpose;

m) to facilitate the operations of any society;

n) to act as a custodian of the Reserve Fund of societies;

o) to undertake liquidation work of affiliated societies indebted to the bank on conditions laid down by the Registrar and agreed upon by the Board with a view to facilitate recoveries from the affiliated societies;

p) to subscribe to the Share capital of the Cooperative societies, Rural Banks and other Cooperative institutions as

and when necessary subject to the provisions of section 19 of the Banking Regulation Act 1949 (as applicable to the co-operative societies.);

q) to acquire, construct, maintain, alter building or work necessary or convenient for the purpose of the Bank and to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, or turn to account or otherwise deal with all or any part of the property;

r) to obtain refinance from Reserve Bank of India (RBI), National Bank for Agriculture and Rural Development (NABARD), Small Industries Development Band of India (SIDBI), Industrial Development Bank of India (IDBI), Himachal Pradesh State Co-operative Bank Limited; (HPSCB) and other agencies for the promotion of the business of the Bank;

s) to invest the funds of the Bank as per its Bye laws;

t) to implement various schemes for the Development of affiliated Co-operative Societies such as providing guarantee for the deposits held by them and any other scheme of the State Government approved by the Registrar;

u) to do any other form of business which the Banking Regulation Act or State Government, the Registrar, National Bank for Agriculture and Rural Development may specify as a form of business in which it is lawful for the Bank to engage;

v) to provide to its constituents facility of safe deposit and lockers; and

w) to manage sell and realise any property which may come into the possession of the Bank in satisfaction or part satisfaction of any of its claims; and

x) to acquire and hold and generally deal with any property or any right, title or interest in any such property which may form the security or part of the security for any loan or advance or which may be connected with any such security; and

y) to carry on and transact every kind of guarantee and indemnity business; and

z) to do in general all such things as are incidental or conducive to the promotion or advancement of business of the Bank;

7. The learned Single Judge formulated the following points for consideration:

1. Whether the respondent Bank i.e. Jogindra Central Cooperative Bank Ltd is an agency/instrumentality of the State Government?.

2. Whether the Jogindra Central Co operative Bank falls within the scope of expression 'any person' or 'authority' under Article 226(1) of the Constitution of India or not?

3. Whether the petition is maintainable against the orders passed by the functionaries of the State under the provisions of Himachal Pradesh Co operative Societies Act, 1968 and Rules framed thereunder?.

8. Point No.1 was answered by holding the respondent Bank to be an authority/instrumentality of the State and the State within the meaning of article 12 of the Constitution of India and thus amenable to the writ jurisdiction of this court. In view of the concession now given by respondents with respect to point No.1, we are primarily concerned with question No.2 which reads thus:

"Whether the Jogindra Central Co operative Bank falls within the scope of expression 'any person' or 'authority' under Article 226(1) of the Constitution of India or not?"

9. This point was answered in the following manner:

"Point No.2:

The Hon'ble Supreme Court has held in Ahri Anadi MuktaSadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Others v. V.R. Rudani and Others, AIR 1989 SC 1607 that the term "authority" used in Article 226 (1), in the context, must receive a liberal meaning unlike the term in Article 12. Their Lordships of the Hon'ble Supreme Court have held as under:-

"The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, professor De Smith states : "To be

> enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. P.540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

In the above cited judgment their Lordships have held that the form of the body concerned is not very much relevant and what is relevant is the nature of the duties imposed on the body.

It is evident from the observations made here-in-above that the respondent-Bank is discharging the public duties. The State Government exercises a deep and pervasive control over the functioning of the Bank share capital. In view of the duties discharged by the respondent-Bank it can safely be held that the respondent-Bank is an "authority" within the meaning of Article 226(1) of the Constitution of India.

Now the Court has to consider the meaning of expression" person" given in the context of Article 226 (1) of the Constitution of India. The expression "person" has been defined by the Himachal Pradesh General Clauses Act, 1968 under Section 2(35), which reads thus:

> "2 (35), "person" shall include any company or association or body of individuals whether incorporated or not;"
>
> Their Lordships of the Hon'ble Supreme Court in (1999) 1 SCC 741 (supra) have held that "person" under Section 2(42) of the General Clauses Act shall include any company or association or body of individuals, whether incorporated or not. Their Lordships have further held that when the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. The language employed in Section 2(42) of the General Clauses Act and of the Section 2(35) of the Himachal Pradesh General Clauses Act, 1968 is para-materia. Their Lordships have held in U.P. State Cooperative Land Development Bank Ltd. versus Chandra Bhan Dubey and Others as under:
>
> "In view of the fact that control of the State Government on the appellant is all-pervasive and the employees had statutory protection and therefore the appellant being an

authority or even instrumentality of the State, would be amenable to writ jurisdiction of the High Court under Article 226 of the Constitution, it may not be necessary to examine any further the question if Article 226 makes a divide between public law and private law. Prima facie from the language of Article 226, there does not appear to exist such a divide. To understand the explicit language of the article, it is not necessary for us to rely on the decision of the English courts as rightly cautioned by the earlier Benches of this Court. It does appear to us that Article 226 while empowering the High Court for issue of orders or directions to any authority or person, does not make any such difference between public functions and private functions. It is not necessary for us in this case to go into this question as to what is the nature, scope and amplitude of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. They are certainly founded on the English system of jurisprudence. Article 226 of the Constitution also speaks of directions and orders which can be issued to any person or authority including, in appropriate cases, any Government. Under clause (1) of Article 367, unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the legislature of the Dominion of India.“ Person” under Section 2(42) of the General Clauses Act shall include any company or association or body of individuals, whether incorporated or not. The Constitution is not a statute. It is a fountainhead of all the statutes. When the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. When any citizen or person is wronged, the High Court will step in to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a cooperative society or association of body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under Part III of the Constitution of any other right which the law validly made might confer upon him. But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. The High Court does not interfere when an equally efficacious alternative remedy is available or when there is an established procedure to remedy a wrong or enforce a

> right. A party may not be allowed to bypass the normal channel of civil and criminal litigation. The High Court does not act like a proverbial "bull in a china shop" in the exercise of its jurisdiction under Article 226."

It is evident from the language employed in Section 10 that the respondent-Bank is a body corporate having perpetual succession and a common seal, and with power to hold property, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purpose for which it is constituted. The State Government is also a member of the Society as per Section 17 of the Act read with Bye-law 6. The State Government had contributed about 50% share capital as per the balance sheets reproduced herein-above. The respondent-Bank will fall within the expression "person" for the purpose of Article 226 (1) of the Constitution of India on the basis of clause 2(35) of the Himachal Pradesh General Clauses Act, 1968 and also being a body corporate under Section 10 of the H.P. State Co-operative Societies Act, 1968.

In view of the law laid down by the Hon'ble Supreme Court in AIR 1989 SC 1607 and (1999) 1 SCC 741 the Central Co-operative Bank Ltd. falls within the expression "any person" or "authority" under Article 226 (1) of the Constitution of India and is amenable to the writ jurisdiction of this Court though registered under the H.P. Co-operative Societies Act, 1968.

The matter requires to be considered from another angle by comparing Article 12 of the Constitution of India vis-à-vis Article 226 (1) of the Constitution of India. Article 12 comes into play only when a person is seeking enforcement of his fundamental rights. The fundamental rights can be enforced against the bodies which are mentioned in Article 12 of the Constitution of India alone. The expression "authority" mentioned in Article 226 (1) is required to be interpreted differently from the expression 'other authorities' in Article 12 of the constitution of India. The High Court under Article 226 (1) of the Constitution of India can issue writs for the enforcement of fundamental rights as well as for any other purpose. The expression "authority" and "any person" as mentioned in Article 226 (1) has to be interpreted liberally. The High Court has the jurisdiction to issue writs to any authority or a person which is discharging public duties akin to Governmental functions."

10. Relying upon the Bye laws and the aforesaid observations of the learned Single Judge, respondents would contend that in terms of the observations contained in paras 12 to 14 of the Full Bench judgment in Vikram Chauhan's case, writ petition would be maintainable against the bank as it was performing public duty and function. Here, it would be apt to collect quote paras 12 to 14 of the observations made by the Hon'ble Full Bench, upon which heavy reliance has been placed by the respondents:

> 12. That takes us to the second part of the question formulated by the Division Bench, as to whether a writ would lie against the State Cooperative Banks? This

question, essentially, touches upon the scope of power of the High Courts to issue certain writs as predicated in Article 226 of the Constitution of India. This is completely independent issue. In a given case, in spite of the opinion recorded by the Court that the respondent concerned in a writ petition, filed under Article 226 of the Constitution of India, is not a State within the meaning of Article 12 of the Constitution of India. Even then, the High Court can exercise jurisdiction over such respondent in view of the expansive width of Article 226 of the Constitution of India. It is well established position that the power of the High Courts under Article 226 is as wide as the amplitude of the language used therein, which can affect any person – even a private individual – and be available for any other purpose –even one for which another remedy may exist (RohtasIndustries Ltd. and another vs. Rohtas Industries Staff Union and others)15. In the case of Engineering Mazdoor Sabha and another vs. Hind Cycles Ltd.16, the Court opined that even if the Arbitrator appointed under Section 10-A is not a Tribunal for the purpose of Article 136 of the Constitution in a proper case, a writ may lie against his Award under Article 226 of the Constitution. In the case of Praga Tools Corporation vs. C.A. Imanual and others, the Apex Court held that it was not necessary that the person or the Authority on whom the statutory duty is imposed need be a public official or an official body. That a mandamus can be issued even to an official or a Society to compel him to carry out the terms of the statute under or by which the Society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings Further, a mandamus would lie against a Company constituted by a statute for the purposes of fulfilling public responsibilities. In the same decision, the Apex Court examined the amplitude of the term “Authority” used in Article 226 of the Constitution. The Court opined that it must receive liberal meaning unlike the term in Article 12 of the Constitution. It went to observe that the words “any person or authority” used in Article 226 cannot be confined only to statutory authorities and instrumentalities of the State. It may cover any other person or body performing public duty irrespective of the form of the body concerned. It is emphasized that what is relevant for exercising power is the nature of the duty imposed on the body which must be a positive obligation owned by the person or Authority. Depending on that finding, the Court may invoke its authority to issue writ of mandamus. In the case of Life Insurance Corporation of India vs. Escorts Ltd. And others the Constitution Bench opined that the question must be “decided in each case” with reference to particular action,

the activity in which the State or the instrumentality of the State is enacted when performing the action, the public law or private law, character of the Constitution and most of the other relevant circumstances. In a given case, it may be possible to issue writ of mandamus for enforcement of public duty which need not necessarily to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract, as noted by Professor de Smith, which exposition has found favour with the Apex Court.

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

14. Counsel appearing for the parties invited our attention to several other decisions. However, we do not intend to dilate on all those authorities any further, except to mention the same. Counsel appearing for the Kangra Bank had relied on two Judges Bench decision in the case of Zorastrian Cooperative Housing Society Ltd. And another vs. District Registrar, Cooperative Societies (Urban and others)20, which took the view that a Cooperative Society cannot be treated as State unless it fulfills the tests spelt out in Ajay Hasia's case by the Constitution Bench of the Apex Court, followed in the case of Praga Tools (supra). Reference was also made to the seven Judges Bench of the Apex Court in the case of Pradeep Kumar Biswas vs. Indian

Institutes of Chemical Biology and others21 and another decision in the case of Bhadra Shahakari S.K. Niyamita vs. Chitradurga Mazdoor Sangh and others22, which deals with the question as to whether the appellant, Cooperative Society can be treated as State within the meaning of Article 12 of the Constitution. The learned Senior counsel for the H.P. Cooperative Society invited our attention to the decision of two Judges Bench of the Apex Court in General Manager, Kishan Sahkari Chini Mills Ltd. Sultanpur, UP vs. Satrughan Nishad and others23, to contend that even if it is a case of nominated Directors of Society that does not presuppose that the State has perennial control over the Society. Reliance is also placed on the another decision of the Apex Court in the case of Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust vs. V.R. Rudani and others24 and in case of Zee Telefilms Ltd. and another vs. Union of India and others."

11. The observations contained in paragraphs 12 to 14 in Vikram Chauhan's case have already been considered in detail by this bench in CWP No. 6709 of 2013 titled Sanjeev Kumar & ors Vs. State of HP & ors decided on 4.8.2014, and it was held:

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

12. Admittedly, the Bank in question is a co operative Society registered under the H.P.Co operative Societies Act and Rules under which three types of societies have been contemplated:

> "2(xx) 'secondary society' is a society of which at least one member is a Co op. society.;
>
> (xxi) 'primary society' means a society which does not enroll societies as its member'
>
> (xxii) 'apex society' means a secondary society the area of operation of which extends to the whole of the territory of Himachal Pradesh, or even beyond."

13. Indisputably, the H.P. State Co operative Bank is the only apex Co operative society which like the bank in question is conducting banking business. The second largest co-operative Bank is the Kangra Central Co operative Bank which like the respondent Bank, it is only a secondary society. It is also not disputed that it has been conclusively held not only by the Hon'ble Full Bench of this court, but even by the Hon'ble Supreme Court that writ against both the aforesaid banks is not maintainable. Therefore, while determining the question involved in the present case, these facts will have to be borne- in-mind.

14. A body is said to be performing public functions when it seeks to achieve some collective benefit for the person or a section of public and is accepted by the public or that section of public as having authority to do so, a body is, therefore, said to be exercise public functions when it intervenes or participates in social or economic affairs in the public interest. The Hon'ble Supreme Court in **Binny Ltd Vs. Sadavisan 2005 (6) SCC 657**, while considering the right of an employee of a private company to enforce his contract or service by noting power of judicial review of the High Court under Article 226 of the Constitution observed as under:

> "11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is

difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:

"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government."

After considering various decisions, the Hon'ble Supreme Court further held as under:

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities

to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page-682,

"1317. A public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

15. In **Jatya Pal Singh Vs. Union of India**, the Hon'ble Supreme Court has considered in detail as to what would be the public functions and has categorically held that a body would be said to be performing public functions when it seeks to achieve some collective benefit for the public or a section of the public as would be clear from the following:

"48. Dr.K.S. Chauhan had also relied on the United Kingdom Human Rights Act, 1998 (Meaning of Public Function) Bill which sets out the factors to be taken in account of determining whether a particular function is a public function or the purpose of sub section (3) (b) of Section 6 of the aforesaid Act. Section1 enumerates the following factors which may be taken into account for determining he question as to whether a function is a function of public nature.

"1. (a) the extent to which the State has assumed responsibility for the function in question;

(b) The role and responsibility of the State in relation to the subject matter in question

(c) the nature and extent of the public interest in the function in question.

(d) the nature and extent of any statutory power or duty in relation to the function in question.

(e) the extent to which the State, directly or indirectly, regulates, supervises or inspects the performance of the function in question.

(f) the extent to which the State makes payment for the function in question.

(g) Whether the function involves or may involve the

use of statutory coercive powers.

(h) the extent of the risk that improper performance of the function might violate an individual's convention right.

For the avoidance of doubt, the purposes of Section 6(3) (b) of the Human Rights Act, 1998, as per the said Bill a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expenses, irrespective of:

"2.(a) the legal status of the person who performs the function, or

(b) Whether the person performs the function by reason of a contractual or other agreement or arrangement."

"49.In our opinion, the functions performed by VSNL/TCL examined on the touchstone of the aforesaid factors cannot be declared to be the performance of a public function. The State has divested its control by transferring the functions performed by OCS prior to 1986 on VSNL/TCL."

"50. Dr. Chauhan had also relied on Binny Ltd whereby this Court reiterated the observations made by this Court in Dwarka Nath V ITO. It was observed that (Binny Ltd case, SCC pp. 665-66, para 11)

"11.....It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest."

"51. This Court also quoted with approval Commentary on Judicial Review of Administrative Action (5th Edn) by de Smith, Woolf and Jowell. In Chapter 3 Para 0.24 therein it has been stated as follows: (Binny Ltd case, SCC p.666, para 11)

> "A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. . Bodies therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest.
>
> Public functions need not be exclusive domain of the State. Charities, self regularity organizations and other nominally private institutions (such as Universities, the Stock Exchange, Lloyd's of London, Churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognize the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted. Non governmental bodies such as these are just as capable of abusing their powers as is Government."

"52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so.

"53. In the present case, as noticed earlier, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance is no different from the activities of a bookshop selling books. It would be no different from any other amenity which facilitates the dissemination of information or data through any medium. We are unable to appreciate the submission of the learned counsel for the appellants that the activities of TCL are in aid of enforcing the fundamental rights under Article 19(1) (a) of the Constitution. The recipients of the service of the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information.

"54. The function performed by VSNL/TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by this Court that private education service is the nature of sovereign function which is required to be

performed by the Union of India. Right to education is a fundamental right for children up to the age of 14 as provided in Article 21-A. Therefore, reliance placed by the learned counsel for the appellants on the judgment of this Court in Andi Mukta would be of no avail. In any event, in the aforesaid case, this Court was concerned with the non payment of salary to the teachers by Andi Mukta Trust. In those circumstances, it was held that the Trust is duty bound to make payment and, therefore, a writ in the nature of mandamus was issued."

16. Now, we proceed to determine as to whether the respondent bank is discharging any public duties closely related to the governmental function. In our considered view, the duties and functions of the respondent bank can best be compared with the H.P. State Co operative Bank Ltd since, as observed earlier, both are Co operative societies and at the same time are also conducting banking business. The H.P. State Cooperative Bank Ltd has framed its Bye-laws and Bye-law No.4 deals with the objects of the Bank and is reproduced in entirety as under:

"4. Objects. –

The objects for which the Bank is established are as follows:-

a) to promote the economic interest of the members of the Bank in accordance with the co- operative principles and to facilitate the operations of the Co-operative Societies registered under the Act;

b) to serve as balancing centre and clearing house for Co-operative Societies in the State of Himachal Pradesh registered under the Act.

c) to organize the provision of credit for agriculturists in the State of Himachal Pradesh, to function generally as an integrated State organization for the provision of agriculture, marketing, and processing credit to agriculturist and their societies to develop Co operative credit and to ensure efficient performance of the functions relating there to through the Central Co-operative Bank and other Co operative Societies in the State.

d) to make loans and advances to and pen overdrafts and cash credit accounts for the members of the society with or without security.

(e) To lend money or grant overdraft or open cash credits for all persons against the security of:

(i) Gold and Silver, either is bars or ornaments

(ii) Agricultural or Industrial produce.

(iii) Licenced warehouse receipts, life insurance policies, salary bills or Government servants, Trustee securities as defined under Section 20 of the Indian Trust Act and such other securities as may be approved by the Registrar/Reserve Bank of India from time to time.

Provided that the financial accommodation against the above mentioned securities shall be allowed subject to such condition as the Registrar may prescribe from time to time.

Provided that loans and advances may also be granted to the depositors against the security of their deposits without their being enrolled as members of the Bank.

Provided further that subject to prior approval of the Registrar, the loans and advances under this bye-laws may also be made without security.

f) to collect bills, drafts, cheques and other negotiable instruments on behalf of members and non members and to provide them remittance facilities also;

g) to buy and sell securities for the investment of its surplus funds and to act as an Agent for buyers and sellers of securities of the Government of India or of the State Government, Treasury Bills, or other securities as specified in clauses (a), (b), (c) and (d) of Section 20 of Indian Trust Act, and to transfer, endorse, pledge such securities or shares and other assets of the Bank for raising funds or to lodge them as collateral security for money borrowed by the bank;

h) to undertake exchange business by drawings, accepting endorsing, negotiating, selling or otherwise dealing in bills of exchange, or other negotiable instruments with or without security;

i) to receive money in current, savings, fixed or other accounts and to raise or borrow from time to time, such of money as may be required for the purpose of Bank to such an extent and upon such conditions as the Board may think fit;

j) to open its branches/offices , in the Sate or outside the State within the previous sanction of the Registrar;

k)To carry on and manage the affairs of a society, the committee of which has been suspended or superseded under the Act and rules framed there under.

l) To start and maintain funds calculated to benefit its staff members or ex-staff members and their dependents;

m) to act as a Banking Agent for the Government of Himachal Pradesh, Public Bodies, corporations or for any

bank or bankers in the State on such terms and conditions as mutually agreed upon between the bank and other party with the sanction of the Registrar;

n) to advice Banks and Societies in the matter of principles and practice of Banking and inspect them as and when necessary for the purpose;

o) (i) to receive from constituents for safe custody and/or

realization of interest Govt. paper; shares, debentures and deposit receipts and valuables title deeds, insurance policies etc. with or without any fees.

(ii) to provide to its constituents facility of safe deposit lockers.

p) to act as a custodian of the Reserve Fund of Central Co operative Bank and Societies.

(q) to undertake liquidation work of affiliated societies indebted to the bank on conditions laid down by the Registrar and agreed upon by the Board with a view to facilitate recoveries from the affiliated societies;

r) to take over the Central Co operative Banks with their Branches or any other Banking institutions functioning in the State as a going concern or otherwise on such terms and conditions as may be deemed proper and agreed upon between the Bank and the party subject to the approval of the Government/Registrar;

s) to subscribe to the Share Capital of the Cooperative societies, Central Cooperative Banks and other Cooperative institutions if and when necessary subject to the provisions of section 19 of the Banking Regulation Act.

t) to acquire, construct, maintain, alter building or work necessary or convenient for the purpose of the Bank and to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, or turn to account or otherwise deal with or any part of the property;

u) to establish, promote and maintain the cadre of key personal for the benefit of affiliated Central Co operative Banks and the Co operative Societies.

v) to engage in any form of business which the State Govt. may specify and to do in general all such things as are incidental or conducive to the promotion or advancement of business of the bank.

17. Now in case the objects of the H.P. State Co operative Bank are compared with the objects of the respondent bank, as set out in detail in para-6 supra, it would be seen that the objects of both these

Banks are virtually paramateria. If that be so, then the next question which would arise for consideration is as to whether the H.P. State Co operative Bank based upon its objects is discharging public functions. This question is no longer resintegra and has been considered in detail by a Division Bench of this Court in **C.K. Malhotra Vs. H.P. State Coop Bank and others 1993 (2) Sim.L.C 243** and this court repelled the argument in the following manner:

> "87. The 5th test, namely, functions of the society being of public importance and closely related to the Government function. In international Airport Authority's case (supra) the expression 'Government function' has been pointed out to be vague and of indefinite description. In a welfare State like ours, it is difficult to demarcate between Governmental and non governmental function and it is also equally difficult to say with precision as to what is function of public importance and what is not. For the two Banks, as per their respective bye laws, the main objects are to promote the economic interests of the members of the Bank in accordance with co operative principles and to facilitate the operations of the Co operative Societies registered under the Act. The others are to serve as balancing centre and clearing house for Co operative Societies to organize the provisions of credit for agriculturists in the State, to function generally as an integrated organization for providing agricultural, marketing and processing credit to agriculturists and other societies, to develop co operative credit, to make loans and advances etc. to the member of the societies, to lend money and grant over drafts, to do the other normal banking functions to act as banking agent for the Government of Himachal Pradesh/Public bodies, Corporations etc. to advise banks and Societies in the matters of principles and practices of banking and numerous other objects mainly connected with normal banking business and also to engage in any other form of business that the State Government may specify.
>
> "88. Considering these objects of the two banks, generally what can be noticed is that the main objects are for conducting the normal banking transactions particularly in relation to Co operative societies and also to Co operative Societies and also to act as banking agent for the government. The entire function has to be with the sole aim and object for promoting the economic interest of the members of the bank in accordance with the co operative principles and to facilitate the banking operations of the Co operative societies registered under the Act."
>
> "92. The aims and objects of the three Societies and the nature of business being carried on cannot be termed as

> functions impregnated with government character or tied or entwined with government, thus, it is not possible to say that the three societies satisfied the 5th test enunciated by the Supreme Court."

18. It would thus be seen that while considering the same objects, similar functions and similar Bye-laws, learned Division Bench of this court had clearly opined that the nature of business being carried out by it could not be termed as functions impregnated with government character or tied or entwined with government and it did not satisfy the 5th test enunciated in Ajay Hasia's case (supra).

19. This judgment was a binding precedent not only on the Single Judge but is also binding upon this Bench. We need not delve on the issue of binding precedents any further as the same has been repeatedly concluded by various Constitution Bench judgments of the Hon'ble Supreme Court. Reference in this regard can conveniently be made to the Constitution Bench decision in **Central Board of Dawoodi Bohra Community Vs. State of Maharashtra (2005) 2 SCC 673**, wherein after considering the law laid down by the various Constitution Benches, the legal position was summed up in the following terms:

> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.
>
> (2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.
>
> (3) The above rules are subject to two exceptions : (i) The above said rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the

previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra).

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

20. The Hon'ble Supreme Court drew a distinction between a body which is created by a statute and a body which after coming into existence is government in accordance with the provisions of the statute and held that the societies and the bodies falling under the latter could not be termed to be statutory bodies, but only corporates. It also took note of the fact that merely because a private body is acquired in public interest it did not mean that the party whose property was acquired was performing or discharging any function or duty of public character though it would be so for the acquiring authority. The Hon'ble Supreme Court further took note of the celebrated decision in **S.S. Rana Vs. Registrar, Co-operative Societies** and held that the State had no say in the functions of the society and all matters regarding membership, acquisition of shares and all other matters were governed by the Bye laws under the Act. The relevant findings of the Hon'ble Supreme Court are as follows:

"Co-operative Societies and Article 12 of the Constitution:

13. We may first examine, whether the Co-operative Societies, with which we are concerned, will fall within the expression "State" within the meaning of Article 12 of the Constitution of India and, hence subject to all constitutional limitations as enshrined in Part III of the Constitution. This Court in U.P. State Co-operative Land Development Bank Limited v. Chandra Bhan Dubey and others (1999) 1 SCC 741, while dealing with the question of the maintainability of the writ petition against the U.P. State Cooperative Development Bank Limited held the same as an instrumentality of the State and an authority mentioned in Article 12 of the Constitution. On facts, the Court noticed that the control of the State Government on

the Bank is all pervasive and that the affairs of the Bank are controlled by the State Government though it is functioning as a co-operative society, it is an extended arm of the State and thus an instrumentality of the State or authority as mentioned under Article 12 of the Constitution. In All India Sainik Schools employees' Association v. Defence Minister-cum- Chairman Board of Governors, Sainik Schools Society, New Delhi and others (1989) Supplement 1 SCC 205, this Court held that the Sainik School society is "State" within the meaning of Article 12 of the Constitution after having found that the entire funding is by the State Government and by the Central Government and the overall control vests in the governmental authority and the main object of the society is to run schools and prepare students for the purpose feeding the National Defence Academy."'

14. This Court in Executive Committee of Vaish Degree College, Shamli and Others v. Lakshmi Narain and Others (1976) 2 SCC 58, while dealing with the status of the Executive Committee of a Degree College registered under the Co-operative Societies Act, held as follows:

> "10.....It seems to us that before an institution can be a statutory body it must be created by or under the statute and owe its existence to a statute. This must be the primary thing which has got to be established. Here a distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution. There have been a number of institutions which though not created by or under any statute have adopted certain statutory provisions, but that by itself is not, in our opinion, sufficient to clothe the institution with a statutory character....."

15. We can, therefore, draw a clear distinction between a body which is created by a Statute and a body which, after having come into existence, is governed in accordance with the provisions of a Statute. Societies, with which we are concerned, fall under the later category that is governed by the Societies Act and are not statutory bodies, but only body corporate within the meaning of Section 9 of the Kerala Co-operative Societies Act having perpetual succession and common seal and hence have the power to hold property, enter into contract, institute and defend suites and other legal proceedings and to do all things necessary for the purpose, for which it was constituted. Section 27 of the Societies Act categorically states that the

final authority of a society vests in the general body of its members and every society is managed by the managing committee constituted in terms of the bye-laws as provided under Section 28 of the Societies Act. Final authority so far as such types of Societies are concerned, as Statute says, is the general body and not the Registrar of Cooperative Societies or State Government.

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

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

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

provisions of the Himachal Pradesh Co-operative Societies Act, 1968. After examining various provisions of the H.P. Co-operative Societies Act this Court held as follows:

> "9. It is not in dispute that the Society has not been constituted under an Act. Its functions like any other cooperative society are mainly regulated in terms of the provisions of the Act, except as provided in the bye-laws of the Society. The State has no say in the functions of the Society. Membership, acquisition of shares and all other matters are governed by the bye-laws framed under the Act. The terms and conditions of an officer of the cooperative society, indisputably, are governed by the Rules. Rule 56, to which reference has been made by Mr Vijay Kumar, does not contain any provision in terms whereof any legal right as such is conferred upon an officer of the Society.
>
> 10. It has not been shown before us that the State exercises any direct or indirect control over the affairs of the Society for deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one Director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority Directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely, (1) How was the Society created? (2) Whether it enjoys any monopoly character? (3) Do the functions of the Society partake to statutory functions or public functions? and (4) Can it be characterized as public authority?
>
> 11. Respondent 2, the Society does not answer any of the aforementioned tests. In the case of a non-statutory society, the control thereover would mean that the same satisfies the tests laid down by this Court in Ajay Hasia v. Khalid Mujib Sehravardi. [See Zoroastrian Coop. Housing Society Ltd. v. Distt. Registrar, Coop. Societies (Urban).]
>
> 12. It is well settled that general regulations under an Act, like the Companies Act or the Cooperative Societies Act, would not render the activities of a company or a society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the

society and the State or statutory authorities would have nothing to do with its day-to-day functions."

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

21. Article 226 of the Constitution states that:

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, or for the enforcement of any part of the rights conferred by Para-III and for any other purposes.

(2) The power conferred by clause (1) to issue directions, order or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without-

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks form the date on which it is received or from the date on which the coy of such application is so furnished, whichever is later, or

where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not to disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated."

The language of Article 226 is no doubt very wide when it states that a writ can be issued 'to any person or authority' on an enforcement of any rights conferred by part-III and for any other purpose. However, the aforesaid language in Article 226 cannot be interpreted and understood literally. We cannot apply the literal rule of interpretation while interpreting this Article or else it would follow that a writ can even be issued to any private person or to settle even private disputes.

22. Undoubtedly, individuals and private bodies and in certain cases societies and companies registered under the statutes do not fall within the inclusive definition of State under Article 12 of the Constitution. However, persons and legal entities created under various laws have been brought within the expansive definition by judicial interpretation. It is no more resintegra that the body can be termed to be an instrumentality or agency of the State while performing public functions and discharging public duties irrespective of its birth by non-legislative action as the existence of such entity, be statutory or non-statutory is irrelevant because it is only the nature of the activity which becomes a determinative factor to bring it within the purview of instrumentality or authority under Article 226 of the Constitution of India.

23. From the above discussion judged by any yardstick, the functions to be performed by the respondent bank are, in no manner, governmental functions so as to bring them within the compass of public duty or public functions to enable us to compel the respondent bank to yield to the jurisdiction of this court under Article 226 or for that matter to enable the court to assume jurisdiction over the respondent bank.

24. In view of the aforesaid clear exposition of law, not only by this Court but also by the Hon'ble Apex Court, we have no other option but to hold that no writ petition against Jogindra Central Co op Bank Ltd would be maintainable where the writ is directed and relief claimed is only against the Jogindra Central Co operative Bank Ltd. Therefore, appeals are allowed accordingly and the judgment passed by learned Single Judge taking contrary view is set aside.

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

Meena Kumari ...Petitioner.

Vs.

Union of India & others ...Respondents.

CWP No. 1764 of 2012-G
Decided on: 17.09.2014

Constitution of India, 1950- Article 226- Power to interfere with the executive decision- petitioner filed a writ petition questioning the funding to Mahila Mandal Programmes- State filing a reply that the Mahila Mandal scheme was withdrawn as the schemes was being implemented through other programmes- held, that the Court cannot interfere in the executive decision, unless there is arbitrariness-when the decision making process is not questioned but the decision arrived at by the authority is questioned the writ, petition is not maintainable.

(Para- 7 to 13)

Cases referred:

Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399

Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616

Mrs. Asha Sharma Vs. Chandigarh Administration and others, reported in 2011 AIR SCW 5636

Bhubaneswar Development Authority and another Vs. Adikanda Biswal and others, reported in (2012) 11 SCC 731

For the petitioner: Mr. Bipin C. Negi, Advocate.

For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 and 3.

Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondent No. 2.

Mr. Rajesh Verma, Advocate, vice Mr. Narender Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Petitioner has called in question Annexures P-7 and P-8, whereby funding to the Mahila Mandal Programmes stands withdrawn, on the grounds taken in the writ petition.

2. The respondents have filed separate replies.

3. Respondents No. 1 and 3 in their reply have stated that the respondents have made a conscious decision after taking into consideration all the schemes in operation and were of the view that this scheme is to be discontinued and accordingly, it is discontinued. It is apt to reproduce paras 4 and 5 of the reply on merits filed by respondents No. 1 and 3 herein:

> "4. That in reply to the contents of para 6 & 7 of the petition it 8is submitted that Rajiv Gandhi National Creche scheme and ICDS (Integrated Child Development scheme) are two different scheme/Programmes being run through Central Social Welfare Board and State Govt. respectively. Both these programmes cater different beneficiaries however respondents take very care to avoid any overlapping of any programme.
>
> 5. That in reply to the contents of para 8 & 9 of the respondent board in order to avoid overlapping took conscious decision to freeze funds on account of remuneration under Mahila Mandal Scheme at that level in the year 1998. The scheme for the benefits of children in the age group of 0-6 are being run under ICDS and Rajiv Gandhi Creche programmes."

4. Respondent No. 2 has also filed separate reply. It is apt to reproduce para 3 of the preliminary submissions herein:

> "3. That it is pertinent to mention here that in Govt. sector State Govt. is running Anganwadi Centres under centrally sponsored scheme of Integrated Child Development Scheme, under which services like non-formal pre school education, immunization, health and nutrition education, health check up and referral services etc are provided to the children and women. At present more than 18000 Anganwadi Centres are being run in the State. It is submitted that through Anganwadi Centres besides services like non-formal pre school education, immunization, health and nutrition education, health check up and referral services counseling services to the mothers of the newly born children and to newly wedded couples and pregnant and nursing mothers re also provided by Anganwadi Workers and this programme has become flagship programme for women and children. Due to universalisation of Integrated Child Development Scheme in the State other similar programmes for women and children like Balwadi, Creche, Mahila

> Mandal and family and Child Welfare Projects programmes have become redundant."

5. Respondent No. 4, in its reply, has stated that respondents have made a conscious decision. It is apt to reproduce para 6 of the reply on merits filed by respondent No. 4 herein:

> "6. That the contents of para 10 of the petition are admitted to the extent that the Central Social Welfare Board has decided to discontinue the Mahila Mandal Scheme however owing to the reason that these schemes are being implemented through other schemes. It is incorrect that NGOs were asked only not to induct fresh staff. It is submitted that the respondent board has decided to discontinue the scheme w.e.f. 1-4-2012."

6. The moot question is – whether the Writ Court can interfere with the decision made by the Executive or any Authority?

7. It is beaten law of land that the Writ Court has no jurisdiction to interfere in the executive functions unless case for judicial review is carved out.

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

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

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

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

> "10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent

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

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

> "19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

12. This Court in the cases titled as **Nand Lal & another Vs. State of H.P. & others,** being **CWP No. 621 of 2014; Sher Singh Vs. State of H. P. & others,** being **CWP No. 7115 of 2013 and Gurbachan Vs. State of H.P. & others,** being **CWP No. 4625 of 2012** has also laid down the same proposition of law.

13. Applying the test to the instant case, the petitioner has not questioned the decision-making process but has questioned the decision arrived at by the authorities.

14. Having said so, this petition merits dismissal. Accordingly, the petition is dismissed alongwith all pending applications.

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

Prem Singh & Anr. ...Plaintiffs/Appellants.
Vs.
State of H.P. ...Defendant/Respondent.

RSA No.307 of 2003.
Reserved on: 10.09.2014.
Decided on: 17.09.2014.

Specific Relief Act, 1963- Section 34- Plaintiff was allotted nautor land – he deposited Rs. 16,350/- as Nazarana- plaintiff broke up the land and made it cultivable- however, the allotment was cancelled by Financial Commissioner- Trial Court found that the allotment was made during the ban period- suit was dismissed but state was directed to refund the Nazarana- Appellate Court dismissed the appeal but set aside the order refunding Nazrana- held, that the payment of Nazarana was a consideration for the grant and when the grant was cancelled, the plaintiff is entitled for the refund of the amount- therefore, appeal partly accepted and defendant directed to refund the Nazarana along with interest. (Para-7)

For the Appellants: Mr. K.D. Sood, Sr. Advocate with Mr. Arjun K. Lall, Advocate.
For the Respondent: Mr.Ravinder Thakur, Addl.A.G. with Mr.Tarun Pathak and Mr.Vivek Attri, Dy.A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment and decree, rendered on 2.6.2003, in Civil Appeal No.117 of 2000, by the learned District Judge, Bilaspur, H.P., whereby, the learned First Appellate Court dismissed the appeal, preferred by the plaintiffs /appellants, affirming the judgment and decree, rendered by the trial Court, on 31.8.2000.

2. Brief facts of the case are that the predecessor-in-interest of the appellants, namely, Budhu (the original plaintiff), instituted a suit for declaration with consequential relief of permanent injunction against the defendant/respondent, on the allegations that he had been owner in possession of land, comprised in Khata/Khatauni No.47/51 min, Khasra Nos.322/304/1, measuring 7-2 bighas, situated in revenue estate Kothi, Pargna Rattanpur, Tehsil Sadar, District Bilaspur. It is averred that the plaintiff had applied for allotment of the suit land in his favour by way of exchange to the State. The application of the plaintiff had been considered and allowed vide order dated 19.3.1990 passed by the Deputy Commissioner. The plaintiff had given his land measuring 7-2 bighas of

revenue estate, Majher to the State. The plaintiff had deposited a sum of Rs.16,350/- as Nazrana for getting the suit land in exchange. After allotment of the suit land in his favour by way of exchange, the plaintiff had broken-up and cleared for cultivating the suit land. The plaintiff had spent a sum of Rs.25,000/- on the development of the suit land. The Financial Commissioner, H.P. vide order dated 16.8.1995, unauthorizedly and illegally, had cancelled the allotment of the suit land in favour of the plaintiff. The order dated 16.8.1995 of Financial Commissioner was wrong, illegal and liable to be set aside. The defendant/State was sought to be restrained from interfering with the ownership and possession of the plaintiff of the suit land by issuance of a decree of perpetual injunction. With these allegations, the plaintiff had instituted the suit in the learned trial Court on 8.2.1996.

3. The defendant/respondent contested the suit by filing written statement wherein the State/defendant had taken the preliminary objections inter alia maintainability, cause of action, jurisdiction and improper valuation of the suit. On merits, the defendant/respondent had denied the ownership and possession of the plaintiff of the suit land. It is averred that the plaintiff had applied for exchange of the suit land in his favour with his land measuring 7-2 bighas of revenue estate, Majher. The Deputy Commissioner vide order dated 19.3.1990 had allowed the exchange. The proprietors had instituted a revision against the order dated 19.3.1990 before the Financial Commissioner. The Financial Commissioner vide order dated 16.8.1995 had set aside the order dated 19.3.1990, passed by the Deputy Commissioner. The plaintiff was stated to have manipulated the exchange of the suit land in his favour by dubious means. The plaintiff has been averred by the defendant not entitled to any relief much less to the discretionary relief of permanent injunction.

4. The plaintiffs/appellants did not choose to file the replication to the written statement of the defendant/respondent. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is owner in possession of the suit land? OPP

2. Whether the order of Deputy Commissioner dated 19.3.1990 is legal and valid, as alleged? OPP

3. Whether the order of Financial Commissioner dated 16.8.1995 is illegal against law. If so, its effect? OPP

4. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP

5. Whether the suit of the plaintiff is not maintainable in the present form? OPD.

6. Whether the plaintiff has no cause of action to file the present suit? OPD

7. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD

8. Whether this Court has no jurisdiction to entertain and decide the present suit? OPD

9. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant, entitling him only to Nazrana of Rs.16,350/- with interest from the date of deposit and till its realization, as well as cost made by him the development of the suit land after the proper assessment by the competent authority. In appeal, preferred before the learned first Appellate Court, against the judgment and decree of the learned trial Court, by the plaintiff/appellant, the learned first Appellate Court 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 12.3.2003, this Court, admitted the appeal instituted by the defendant/appellant, against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether the modification of the judgment of the trial Court by District Judge disallowing the interest on Rs.16,350/- without filing of Cross appeal or Cross Objections is sustainable in law?

2. Whether the exchange could be cancelled without refund of the Nazarana and interest and the return of the land given in exchange without having the exchange invoked by filing a suit?

Substantial questions of Law No. 1 and 2.

7. The learned counsel for the plaintiffs/appellants does not contest the tenability of the concurrent findings, recorded by both the learned Courts, of the grant of the suit land by way of Nautor under Ext.P-8 to the plaintiff being legally fallible, as such, liable to be set aside, it being made in favour of the plaintiffs/appellants, at a time when a ban against the allotment of land by way of Nautor to the landless persons was in existence. His address before this Court is confined to the fact of the learned trial Court in its judgment and decree while dismissing the suit of the plaintiff having held him entitled to a Nazrana of Rs.16,350/- with interest from the date of its deposit until its realization. He contends that when the said relief, as afforded in favour of the plaintiff, remained un-assailed at the instance of the defendant-respondent by filing a cross appeal before the learned first Appellate

Court, hence, it was legally unwarranted for the learned first Appellate Court to modify the relief, aforesaid, as accorded by the learned trial Court in favour of the plaintiff-appellant, inasmuch, as, it, while affirming the verdict of the learned trial Court, of the plaintiff-appellant being entitled to a sum of Rs.16,350/-, to omit to afford in his favour the benefit of or relief of interest on the amount, aforesaid, from the date of its deposit till its realization. The reason, as afforded by the learned First Appellate Court, in denying to the plaintiff-appellant the relief of interest on the amount of Rs.16,350/- is of the plaintiff-appellant enjoying the usufruct of the said land since it is grant in his favour till the rendition of judgments and decrees against him by both the Courts below. The amount of Rs.16,350/- deposited as Nazrana by the plaintiff-appellant with the defendant-respondent, on the grant of Nautor land in his favour being set aside, was uncontrovertedly as well as undisputedly, in the absence of evidence portraying that it was unrefundable to him, was refundable to him, as it constituted the consideration or the *quid pro quo* for the grant, besides, it also constituted the ingrained/inherent fact, that on cancellation of the grant of Nautor land in favour of plaintiff-appellant, the plaintiff-appellant was entitled to its refund. The reason, as afforded by the learned first Appellate Court of interest accrued on the amount aforesaid, being deniable to the plaintiff-appellant on the score of his having used the usufruct of the land, is untenable, inasmuch, as, (a) there is no demonstrable condition in the grant of the suit land as Nautor made in favour of the plaintiff-appellant of his being disentitled to the interest accrued on the amount aforesaid, in case, for violation of the conditions of the grant or for any other reason the grant of suit land by way of Nautor land is cancelled; (b) want of any apparent and palpable condition in the grant of the suit land by way of Nautor to the plaintiff-appellant that on his taking to utilize the usufruct of the suit land even when it is cancelled would render him to be disentitled to the interest accrued on the amount of Rs.16,350/- deposited as Nazrana or as a *quid pro quo* for the allotment of the suit land to him by way of Nautor. Consequently, in the absence of the aforesaid material on record, it was wholly untenable for the First Appellate Court to disallow the relief of interest on the amount of Rs.16,350/- which had been rather aptly and tenably decreed in favour of the plaintiff-appellant by the learned trial Court. Moreso, when the defendant-respondent had not filed any cross-appeal or cross-objections before the First Appellate Court assailing the relief as afforded aforesaid by the learned trial Court in favour of the plaintiff- appellant.

8. This Court accepts the submission of the learned counsel for the plaintiffs and directs that the appeal be allowed to the extent that the relief, as afforded in favour of the plaintiffs/appellants by the learned trial Court, be accorded to the plaintiffs/appellants. Accordingly both the substantial questions of law are answered in favour of the plaintiffs/appellants and against the defendant/respondent. No costs.

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

Roshan Lal ...Petitioner.

Vs.

State of H.P. ...Respondent.

Cr.Revision No.109 of 2007
Reserved on: 10.09.2014.
Decided on: 17.09.2014.

Indian Penal Code, 1860- Sections 279 and 304-A- Accused driving the vehicle in a rash and negligent manner and causing death of one person- he was convicted by trial court and conviction was upheld by Appellate Court- held, that the testimony of the eye-witness was duly corroborated by site plan which showed the skid marks to the extent of 29 feet- skid marks proved that the vehicle was being driven at an excessive speed- therefore, the order passed by Trial Court was based upon the reasons and could not be interfered with. (Para-10)

For the petitioner: Mr.Rakesh Dhaulta, Advocate.

For respondent: Mr.Ravinder Singh Thakur, Addl.A.G. with Mr.Tarun Pathak and Mr.Vivek Singh Attri, Dy.A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant revision is directed against the judgment, rendered on 10.8.2007, by the learned Sessions Judge, Kullu, H.P., in Criminal Appeal No.10 of 2006, affirming the findings, recorded by learned Judicial Magistrate, 1st Class, Manali, District Kullu, in Cr.Case No.20-1/2004/42-II of 2004, whereby, the petitioner has been convicted and sentenced as follows:-

Sr.No.	Offence	Sentence imposed.
1.	279 IPC	to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.500/- and in default of payment of fine to further undergo simple imprisonment for a period of 15 days;
2.	304-A IPC	to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.1000/- and in default of payment of fine to further

		undergo simple imprisonment for a period of one month;
3.	187 of the Motor Vehicles Act	to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.500/- and in default of payment of fine, to further undergo simple imprisonment for a period of 15 days.

All the sentences imposed were to run concurrently.

2. The facts, in brief, are that on the evening of 29.11.2003, at about 7.30 p.m., near PWD Office, Manali, the accused, while driving a bus, bearing registration No.HP-34A-2825 on a public road, knocked down a scooter, bearing registration No.HP-34-5234, which resulted in causing death of its occupant Norbu Lama. The accused instead of helping the injured fled away from the spot. A telephonic message was received in the police and after recording Rapat No.Ext.PW-5/E, the police rushed to the spot, where statement of complainant under Section 154 Cr.P.C., comprised in Ext.PW-1/A was recorded, on the basis of which F.I.R. Ext.PW-3/A has come to be registered. The matter was investigated by PW-5 (ASI Bhagat Ram) who prepared spot map, comprised in Ext.PW-5/A, taken into possession the scooter, along with its documents, vide seizure memo Ext.PW-1/B as well as the offended bus vide seizure memo Ext.PW-1/C. Other documents of the bus were also taken into possession vide seizure memos Exts.PW-5/B and PW-5/C. The investigating officer got the vehicles mechanically examined. Mechanical reports are comprised in Ext.PW-2/A and Ext.PW-2/B. He has also obtained inquest report Ext.PW-5/D, post mortem report Ext.PA and photographs Ext.P-1 to P-7, negatives thereof Ext.P-8 to P-15. Statements of witnesses were recorded under Section 161 Cr.P.C. On completion of investigation, challan was presented against the accused to face trial for the offences punishable under Sections 279, 337, 338, 304-A IPC.

3. Notice of accusation was put to the accused for his having committed offence punishable under Sections 279, 337, 338, 304-A IPC, by the learned trial Court, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 5 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused was given an opportunity to adduce evidence, in, defence, and he examined one witness in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the petitioner/revisionist. In appeal, preferred by the revisionist/petitioner before the learned

Sessions Judge against the judgment of conviction rendered by the learned trial Court, the learned Sessions Judge dismissed the appeal.

6. The petitioner/revisionist is aggrieved by the judgment of conviction recorded by the learned Courts below. The learned counsel for the petitioner has concertedly and vigorously contended that the findings of conviction recorded by the learned Courts below are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the respondent-State has with considerable force and vigour contended that the findings of conviction recorded by the learned Courts below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. Learned counsel on either side have been heard at length and entire record has been rummaged with proper care and caution.

9. The counsel for the revisionist, before this Court, would succeed only in the event of his having persuaded this Court that appreciation of the evidence by the learned Courts below being ridden with vice of perversity as well as absurdity or also interference with the impugned judgment, rendered by the learned Sessions Judge, Kullu, would be warranted by this Court in case, it is displayed that both the Courts below have omitted to appreciate the entire evidence on record or had omitted to appreciate the evidence in a wholesome manner.

10. The learned Sessions Judge, while returning findings of conviction against the accused, had relied upon the testimonies of an eye witness, who is also the complainant, as the victim was unfit at the apposite stage to record his statement. The victim of the accident succumbed to the injuries, sustained by him in the accident. Sangnu Lama, the complainant, as well as the eye witness to the occurrence, has unequivocally rendered a vivid ocular account of the fateful accident, which occurred on 29.11.2003. He has communicated in his deposition of the revisionist/accused driving at an excessive speed a bus bearing registration No.HP-34A-2825 near PWD Office, Manali, in the evening, sequelling its collision with a scooter bearing registration No.HP-34A-5234 on which the deceased was atop, resulting in his falling on the road, as also his sustaining injuries from which blood started oozing out. His deposition comprised in his examination-in-chief, has during his ordeal of his cross-examination remained unshred both qua the fact of his presence at the site of occurrence and also qua the account qua the occurrence, as rendered by him in his examination-in-chief. In the face of his deposition, in his examination-in-chief, having remained unshred and unscathed, constitutes it to be a valuable piece of evidence, as also it then enjoys probative sinew and sanctity. Reliance on it, as placed by the learned Sessions Judge, while recording findings of conviction

against the accused, was not misplaced. Moreso, when the site plan, comprised in Ext.PW-5/A, marks the fact of the road at the site of accident being 28 feet wide and after application of brakes skid marks of the tyres have been depicted in it to have traveled up to a distance of 29 feet, too, corroborates the ocular account qua the negligence of the revisionist in sequelling the accident as deposed by complainant Sangnu Lama. Besides when it portrays the factum of the accused-revisionist driving the vehicle at an excessive speed, hence, being negligent, as also his having in wanton disregard of the cannon of his being enjoined to obey the rules of due care and caution, driving it on the inappropriate side of the road, negates the effect, if any, as tenably concluded by the learned Sessions Judge of the deceased, while not possessing a driving licence, hence, his being negligent and the accident being in sequel to his negligence.

11. The learned counsel for the revisionist has emphasized upon the factum of the learned Sessions Judge having dispelled the gravity of or the probative worth of the deposition of DW-1 portraying the factum of deceased being negligent in driving his scooter. However, in the learned Sessions Judge having pronounced upon the inefficacy of the deposition of DW-1, inasmuch, as, his having deposed qua the accident which occurred on 29.11.2002, whereas, the accident occurred, as a matter of fact, on 29.11.2003, is, a weighty and grave reason for dispelling the testimony of DW-1. Consequently, the contention of the learned counsel for the revisionist that the testimony of DW-1 has been untenably discarded, carries no weight or force. Moreso, it appears that he has rendered a concocted and a sham account of the occurrence, inasmuch, as, in case he was an eye-witness to the occurrence as also in case he intended to project the innocence of the accused, he, at the initial stage, rather, ought to have endeavoured to concert to record his statement under Section 161 Cr.P.C. before the Investigating Officer. His having omitted to do so, constrains this Court to conclude that, hence, he was a sham witness, who rendered a prevaricated account of the occurrence, which as tenably done by both the Courts below, was discardable. Hence, there is no merit in this petition, which is accordingly dismissed. The judgments, rendered by the Courts below, are maintained and affirmed. No costs.

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

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

Vs.

Gulsher Mohd. ...Respondent.

Cr.Appeal No.328 of 2008

Reserved on: 06/09/2014.

Date of Decision : 17.09.2014.

N.D.P.S. Act, 1985- Section 20- Accused found in possession of 500 grams of charas- however, he was acquitted by Trial Court on the ground that independent witnesses were not examined and one witness had turned hostile- held, that the testimonies of the police officials corroborated each other and there were no contradictions in their testimonies and in these circumstances, non-examination of independent witness was not material- when the hostile witness had admitted his signature on the seizure memo, his testimony could not be used for doubting the prosecution version- hence, the acquittal by Trial Court was unjustified- accused convicted. (Para-19)

N.D.P.S. Act, 1985- Link evidence- there was discrepancy in the weight of the sample as found at the spot and weight of the same as analyzed in the laboratory- held, that when the seal impressions were tallied and were not found broken, minor discrepancies in the weight of the sample is not sufficient to make the prosecution case suspect. (Para-20)

For the Appellant: Mr.Ramesh Thakur, Asstt.Advocate General.
For the respondent: Mr.Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgement of acquittal, rendered on 10.3.2008, by the learned Sessions Judge, Sirmaur District at Nahan, H.P., in Sessions trial No.07-ST/7 of 2005, whereby the respondent/accused has been acquitted for his having committed offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act').

2. The prosecution story, in brief, is that on 21.2.2004, at about 4:00 p.m., Incharge CIA Inspector N.S.Rathour (PW-11), along with HC Mujahir Khan, Constables Shamim Akhtar (PW-1), Hussain Singh (PW-4) and Kamal Khan (PW-9), was present at Miserwala, Tehsil Paonta Sahib in connection with detection of Excise and Narcotics cases when a secret information was received by PW-11 that accused Gulsher Mohammad has been dealing in narcotic drugs illegally at his Sweet Shop and used to sell Charas in small quantity to the customers, which he used to keep in the Sweets counter inside his shop. The reasons of belief comprised in Ext.PW-4/A, reduced into writing and were sent to SDPO, Paonta Sahib through Constable Hussan Singh. Accordingly, a raiding party was formed in which PW-11 had joined Ashish Kumar (PW-2) and Yusuf Ali being independent witnesses, besides the other police officials, named herein-above. The police party accordingly arrived at the Sweet Shop of accused, where the accused was found present in his shop. Thereafter, the accused was informed by PW-11 about the secret information, so received. The option of the accused, to be searched

either by a Gazetted Officer or by a Magistrate, too, was recorded, for which the accused agreed to be searched by the Police Officer. The consent memo comprised in Ext.PW-1/A, in that regard, was reduced into writing. The policemen and independent witnesses also gave their search to the accused and nothing incriminating was recovered from them. Thereafter, the memos were prepared. The search of the shop of the accused was then conducted in presence of the witnesses, on which a polythene packet was recovered from the lower shelf of the sweet counter. On opening the said packet, it was found containing Charas in the shape of sticks. The Charas was weighed and was found to be 500 grams. The police also got it photographed and out of the Charas, so recovered, two samples of 25 grams each were drawn separately, which, along with the bulk part of the Charas, were taken into possession after being duly sealed with seal impression 'T'. The seal, after use, was handed over to witness Yusuf Ali. The recovery memo comprised in Ext.PW-1/F was prepared accordingly. The FSL (NCB) forms were also filled in on the spot. Ruqua comprised in Ext.PW-11/A was sent through Constable Kamal Khan to the Police Station for registration of the case and on the basis of which FIR Ext.PW-8/B was registered. The case property was taken to Police Station, Paonta Sahib and was handed over to SHO along with NCB Form and specimen seal, who re-sealed the parcels with seal impression 'H' and issued certificate comprised in Ext.PW-8/C. The sample Charas was sent to CTL, Kandaghat with specimen seal and NCB Form vide RC No.26/2004. The special report Ext.PW-7/A was also sent to SDPO, Paonta Sahib. The police also prepared the site plan comprised in Ext.PW-11/B. Thereafter, on receipt of Chemical Examiner's report Ext.PW-8/D and on completion of investigation by the police in the matter, the challan was presented in the Court of learned Judicial Magistrate 1st Class, Court No.1, Paonta Sahib, under Section 20 of the NDPS Act, who vide order dated 1.3.2005, committed the case to the Court of learned Sessions Judge, Sirmaur.

3. Accused was charged for his having committed offence punishable under Section 18 of the NDPS Act, by the learned trial Court, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused was given an opportunity to adduce evidence, in, defence, and he chose not to adduce any evidence in defence.

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

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

gross-mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

9. The first witness, who, stepped into the witness box to prove the prosecution case, is, Shamim Akhtar (PW-1). He in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, this witness concedes that the shop of accused is on the National Highway which leads from Paonta to Nahan and there is a chowk near the shop and the said national Highway is being used for traffic during the day as well as night time. He feigns ignorance if 4-5 servants were working in the shop of the accused. He denies the fact that NCB Forms were not filled in on the spot and special report was not prepared on the spot nor the same was sent to Dy.S.P. Paonta Sahib. He also denied that he was not associated by Inspector Narbir during the investigation of this case nor any recovery of contraband (Charas) was made in his presence.

10. PW-2 (Ashish Kumar) since he, during his examination-in-chief, having not supported the prosecution version, he was declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, he was cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from his cross-examination. In his cross-examination, PW-2 did not remember if copy of Ext.PW-1/F was handed over to the accused and he had signed the same in token of having received the copy. He denies the fact that at the time of search, seizure proceedings and weighment of Charas, photographs were taken by the photographer when the Charas was weiged, however, he deposes that the photographs were taken at Majra Chowki. He concedes to the fact that the seal on parcels was neither affixed in his presence nor it was handed over to some one.

11. PW-3 (Rajinder Kumar) deposes that he was associated by the police in the investigation on 21.2.2004 and was called at Missarwala, however, he feigns ignorance that he did not know the name of Shopkeeper. He further deposes that the shop was of halwai. Photographs comprised in Ext.P-1 to P-4 have been deposed to be seen by this witness and were deposed to be the same which were taken at the shop, when weighment of Charas was made. In his cross-examination, he admits that the search, seizure and sealing proceedings were neither

made in his presence nor the seal was handed over to any witness in his presence.

12. PW-4 (Constable Hussan Singh) has proved the information (grounds of belief) which was reduced to writing and he was directed to take the information to SDPO, Paonta Sahib and he took the information to SDPO, Paonta Sahib, the copy of the same is deposed to be comprised in Ext.PW-4/A. He further deposes that the information was given to SDPO, Paonta Sahib and Ext.PW-4/A bears his endorsement. During his cross-examination, this witness admits that it took one hour to reach Missarwala and he was not aware about the secret information received by the Investigating Officer, however, when grounds of belief were recorded, he was briefed about the information.

13. PW-5 (HHC Surat Singh) deposes that on 23.2.2004, HC Raj Kumar, In-charge Malkhana, Paonta Sahib, vide RC No.26/04 handed over him sample of Charas duly sealed in for depositing at CTL, Kandaghat and deposited the sample along with necessary papers the same day and after his return, the receipt was handed over to HC Raj Kumar. During his cross-examination, this witness concedes that neither he was handed over any sample nor he deposited the same at CTL, Kandaghat.

14. PW-6 (HC Raj Kumar) deposes that on 23.2.2004, he sent one sample along with specimen seals and FSL Forms to CTL, Kandaghat through HHC Surat Singh, who deposited them the same day and the receipt was handed over to him. He proceeds to depose that the sample and necessary papers were handed over to HHC Surat Singh vide RC No.26/2004. He has also proved the Malkhana Register and Road Certificate Register. During his cross-examination, he deposes that he did not remember the time when the case property was deposited in the malkhana by Inspector Khajana Ram.

15. PW-7 (Dy.S.P. BS Thakur) deposes that on 21.2.2004, reasons of belief were received in his office at 5.00 p.m. which are Ext.PW-4/A and bearing his signatures. He further deposes that on 22.2.2004, at about 10:45 a.m., a special report comprised in Ext.PW-7/A was received in his office and the same is deposed be bearing his endorsement. He continues to depose that the special report was received in Dak and reasons of belief were brought by a Constable. During his cross-examination, he denies to the suggestion, put to him, that Ext.PW-4/A was not sent by the Investigating Officer through Constable to him and the same was not received by him.

16. PW-8 is Inspector/SHO Khajana Ram, who, in his deposition, has deposed a version, which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, this witness denied the suggestion, put to him, that the Investigating Officer did not deposit the samples with him nor they were bearing the seal impression 'T'. He denies the suggestion put to him that he did not hand over the case property to HC Raj Kumar for depositing the same in the Malkhana.

17. PW-9 is Constable Kamal Khan, who, in his deposition, has deposed a version, which is also in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, this witness deposes that PW Ashish Kumar and Yusuf Ali were called by HC Mujahid Khan. After receipt of secret information, it took 15 minutes to record the grounds of belief and the raiding party was formed near the bridge.

18. PW-10 (Constable Suresh Kumar) deposes that on 21.2.2004, a rapat was recorded in Roznamcha about the departure of Inspector CIA, along with Mujahid Khan, HC Shamim Akhtar and C.Kamal Khan and C.Hussan Singh. In his cross-examination, he denies the suggestion, put to him, that on 21.2.2004, Mujahid Khan, Shamim Akhtar, Kamal Khan had not gone for patrolling.

19. PW-11 is the statement of Inspector Narveer Singh Rathore, who, in his deposition, has deposed a version, which is also in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, this witness deposes that a special report was prepared at the Police Station. He denies the suggestion that except special report, no other report was sent to SDPO, however, he stated that the grounds of belief had already been sent by him to the SDPO. He concedes the fact that if the report is not addressed, it cannot be ascertained to whom it was addressed. Ext.PW-4/A was not scribed by him, however, the same is deposed to be dictated by him to the police personnel, present in the team.

20. The prosecution witnesses have deposed in tandem and harmony with each other qua each of the links in the chain of circumstances which connect the accused in the commission of alleged offence, hence, consequently when the testimonies of prosecution witnesses are bereft of any inter-se or intra-se contradictions, in sequel, implicit reliance ought to have been placed on the testimonies of the official witnesses by the learned trial Court. In aftermath, when this Court concludes that the testimonies of the official witnesses, while being shorn of any inter-se or intra-se contradictions, hence, rendered their testimonies to be constituting a credible piece of evidence qua the offence alleged against the accused, it was unwarranted and legally insagacious or unwise for the learned trial Court to have emphasized upon the factum of PW-2 having turned hostile and the other witnesses having not come to be examined on behalf of the prosecution. For reiteration, when the testimonies of the official witnesses constituted inspiring as well as a credible piece of evidence qua the offence alleged against the accused, any insistence made by the learned trial Court upon the non-examination of other independent witness was wholly unnecessary. It may have been necessary in case the prosecution evidence was denuded of its efficacy as well as truth given the existence of inter-se or intra-se contradictions in the testimonies of official witnesses, whereas, when it was not, insistence upon the examination of the other independent witness was uncalled for. Moreso, for the selfsame reason of the testimonies of the official witnesses inspiring confidence rendered

insignificant even the factum of one of the independent witnesses PW-2 having turned hostile. Besides, pre-eminently, the reason for so concluding, is grooved in the preponderant factum of his having not denied the existence of his signatures on the memos, obviously then given the fact that he has omitted to depose in his respective testimony that he appended his signatures thereon under compulsion or duress. As a sequel, then he is bound by the recitals recorded therein. As a concomitant then his having reneged from the recitals recorded in the memo is of no consequence, as it comprises oral evidence in derogation to or in detraction to the recorded contents qua search, seizure and recovery comprised in Ext.PW-1/F, which oral evidence in detraction from or in derogation to the scribed contents admitted to be signatured by the aforesaid PW, is barred or interdicted by Section 91 and 92 of the Indian Evidence Act. As a corollary then, it has to be emphatically concluded that his turning hostile is of no consequence and ought not to have prevailed upon the learned trial Court to on the said anvil conclude that the prosecution case is permeated with doubt, more so when a reading of the testimonies of the official witnesses omits to convey existence of any inter-se or intra-se contradictions in their respective testimonies, as such, when theirs testimonies are both credible or inspiring, theirs being ousted from appreciation or theirs being discarded, was unwarranted.

21. The ensuing conclusion, which invincibly flows is that the learned trial Court in recording findings of acquittal in favour of the accused on the score, aforesaid, has committed a legal mis-demeanor, inasmuch, as, of having both mis-appraised the probative value of the deposition of the official witnesses as well as not appreciated the import of the non-examination of one independent witness and also the import of the other independent witness (PW-2) having turned hostile, in, a proper legal perspective, in entwinement and in conjunction with the entirety of the prosecution evidence portraying proof of each of the links in the chain of prosecution evidence.

22. Another major and preeminent reason, which untenably prevailed upon the learned trial Court to record findings of acquittal in favour of the accused/respondent was of samples of Charas weighing 25 grams each having been drawn up from the bulk, yet, with the report of the Chemical Analyst, comprised in Ext.PW-2/A, divulging the fact of the weight of the samples of Charas, sent to it for analysis, hence, being deficient in weight vis-à-vis its weight at the stage contemporaneous to its extraction from the bulk, at the site of occurrence, constrained it to conclude that, hence, the opinion rendered by the Chemical Analyst, comprised in Ext.PW-8/D was on the stuff / item of contraband, other than recovered at the site of occurrence. Also, then, a conclusion that the consummate link, comprised in the report of the Chemical Analyst existing in Ext.PW-2/B did not forcefully connect the accused/respondent in the commission of the offence, was drawn. However, the said deficiency was minimal as well as negligible, rather it is attributable to desiccation or evaporation. Moreover, when it has been cogently and forcefully displayed by the report of the Chemical Analyst

that the seal impression existing on NCB Form and on the sample parcel on comparison revealed theirs tallying with each other, in sequel, when, hence, the sample parcels, as extracted from the bulk at the site of occurrence, at the apposite stage, remained intact and un-tampered with qua which, too, proof comprised in apposite suggestions, projected to the Investigating Officer, during his cross-examination, has remained un-earthed, prods this Court to conclude that the rendition of opinion by the Chemical Analyst comprised in Ext.PW-2/D, was on the sample of Charas extracted from the bulk at the site of occurrence at the apposite stage. Therefore, this Court is driven to derive a conclusion that the opinion rendered by the Chemical Analyst comprised in Ext.PW-8/D was on the very same parcel, as extracted from the bulk at the apposite stage, at the site of occurrence. As a natural corollary then, the consummate link in the chain of circumstances, remains convincingly established. For the reasons afforded herein-above, the learned trial Court having committed a legal mis-demeneour in not mis-appreciating the material pieces of evidence and as such necessitates interference by this Court. Consequently, the appeal, preferred by the State, is allowed and the judgment, rendered on 10.3.2008, by the learned Sessions Judge, Sirmaur District at Nahan, H.P., is set aside and the accused is convicted for his having committed an offence under Section 20 of the NDPS Act.

23. To be heard on quantum of sentence on 26.9.2014, on which date, the convict be produced before this Court.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. & HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Dr. Shikha Sood ...Petitioner.

Vs.

State of H.P. & another ...Respondents.

CWP No. 3025 of 2014 a/w Anr.
Reserved on: 11.09.2014
Decided on: 18.09.2014

H.P. Medical Education Service Rules, 1999- Constitution of India, 1950- Article 226- Petitioners obtained the post graduate degree in the year 1997 and 2005- they completed senior residency/ registrarship in the years 2001 and 2010- petitioners claiming that they are entitled to the selection by promotion from the date of attaining qualification – respondent contended that petitioners are entitled to promotion on the basis of merit-cum-seniority- held, that as per Rule 11 promotion to the post of Assistant Teacher is to be made by selection from those officers who are possessing the post graduate degree and having three years teaching experience- petitioner should not only be eligible but must fall within zone of consideration to get promotion- further held, that

acquisition of the degree does not entitle a person to claim seniority from the day of acquisition of qualification. (Para-9 to 18)

Cases referred:

Union of India & Ors. Vs. B.S. Darjee & Anr., reported in 2011 AIR SCW 6336

R.B. Desai and another Vs. S.K. Khanolker and others, reported in (1999) 7 Supreme Court Cases 54

Dr. Purshotam Kumar Kaundal Vs. State of H.P. and Ors., reported in 2014 AIR SCW 1262

Indian Airlines Ltd. and others Vs. S. Gopalakrishnan, reported in (2001) 2 Supreme Court Cases 362

Shailendra Dania and others Vs. S.P. Dubey and others, reported in (2007) 5 Supreme Court Cases 535

V.K. Naswa Vs. Home Secretary, Union of India and others, reported in (2012) 2 Supreme Court Cases 542

For the petitioner: Mr. Lokender Paul Thakur, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The writ petitioners in both the writ petitions have sought the following reliefs amongst others, on the grounds taken in the respective writ petitions:

> "(i) That a writ in the nature of mandamus may be issued directing the respondents to reckon the seniority for promotion to the post of Assistant Professor (Super Specialty) from the date a person acquires the qualification as provided in clause 11 of the HP Medical Education Service Rules, 1999 as amended vide notification dated 28/06/2008.
>
> (ii) That further a writ in the nature of mandamus may be issued directing the respondents to make promotions to the post of Assistant Professor (Super Specialty) by considering the person by maintaining an order from the date of their attaining the essential qualifications meaning thereby that the person who has attained essential qualification i.e. having a post graduation degree and has attained three years required teaching experience, first he should be

considered prior to the persons who have attained this qualification on a later date and by further directing the respondents not to consider the seniority of the person as Medical Officer only for making such promotions."

2. The identical question of law, rather, interpretation of Clause 11 of H.P. Medical Education Service Rules, 1999 (hereinafter referred to as "the Rules"), as amended vide notification, dated 28th June, 2008, is involved in both the writ petitions, we deem it proper to dispose of both these writ petitions by this common judgment.

3. The writ petitioners in CWP No. 2450 and 3025 of 2014 have completed MBBS in the years 1991 and 1997, came to be appointed in the years 1993 and 1998, have obtained Post Graduate degree in the years 1997 and 2005 in different disciplines, i.e. MD/MS in Obstetrics & Gynaecology and MD in Radio Diagnosis, completed senior residency/ registrarship in the years 2001 and 2010, respectively, and entitled for their selection by promotion to the post of Assistant Professor (Super Specialty) from the date(s) they have attained the essential qualification, i.e. the Post Graduate degree. Further, it is averred that they have also attained three years' teaching experience, which is also required.

4. Precisely, the case of the writ petitioners is that they have obtained the Post Graduate degree earlier in point of time, thus, are entitled to selection by promotion to the post of Assistant Professor (Super Specialty) from the said dates and the candidates, who have obtained the Post Graduate degree thereafter, are to be selected/promoted thereafter.

5. Respondents No. 1 and 2 have resisted the writ petitions by filing separate replies, but on similar grounds. It is contended that the post of Assistant Professor is a selection post, is to be filled up on merit-cum-seniority basis and not on the basis of seniority alone. The seniority is to be determined as per the Recruitment and Promotion Rules, 1999 (hereinafter referred to as "the R&P Rules") occupying the field. The seniority is not to be determined from the date of obtaining the Post Graduate degree. While making selection by promotion, ACRs of the candidates are to be taken into consideration by the Departmental Promotion Committee read with their assessment and the place in the seniority list. The Rules nowhere provide that an officer, who has obtained the Post Graduate degree at the relevant point of time is to be appointed from that date.

6. Respondent No. 3 in CWP No. 2450 of 2014 has resisted the writ petition on the ground that he is senior to the writ petitioner, was appointed on 2nd September, 1992 and is figuring at serial No. 788 in the seniority list of Medical Officers, dated 5th March, 2001, whereas the writ **petitioner is figuring at serial No. 1050.**

7. Respondent No. 4 in CWP No. 2450 of 2014 has also resisted the writ petition on the ground that he is senior to the writ petitioner as he was appointed on 28th February, 1991, was regularized on 14th January, 1993 and is figuring at serial No. 266 whereas the writ petitioner is figuring at serial No. 489 in the seniority list of Medical Offices of H.P. Health and Family Welfare Department, as it stood on 1st July, 2008.

8. Further, it is contended that the writ petitioner has not challenged the seniority list and now cannot make a claim for change of seniority list and try to unsettle the position, which has been settled long back. It is also contended that the post of Assistant Professor is a selection post, is to be filled up by promotion from amongst the members of H.P. Civil Medical Service (General Wing), having recognized Post Graduate degree and at least three years' teaching experience in the concerned specialty after Post Graduation. The cases of the writ petitioners were not considered by the concerned Authorities for the reason that they were not falling within the zone of consideration for promotion.

9. It is apt to reproduce Rule 11 of the Rules, as amended vide notification, dated 28th June, 2008, herein:

> "**Sr. No. 11. -** By appointment (by selection) from amongst the members of H.P. Civil Medical Service (General Wing) having Post Graduate degree and Post Doctoral degree or its equivalent qualifications in the concerned super specialty and possess at least three years teaching experience as Lecturers/ Registrar / Demonstrator / Tutor / Senior Resident / Chief Resident in the concerned specialty after doing Post graduation in the concerned specialty failing which by direct recruitment or on contract basis."

10. While going through Rule 11 (supra), it is crystal clear that promotion to the post of Assistant Professor is to be made by selection from those officers, who are possessing Post Graduate degree and having three years' teaching experience. The Rule nowhere mandates that the date of obtaining the Post Graduate degree is the relevant factor for determining the eligibility. The consideration zone is of all those officers as per seniority position read with the fact that they possess Post Graduate degree and three years' teaching experience.

11. The Apex Court in a case titled as **Union of India & Ors. Vs. B.S. Darjee & Anr., reported in 2011 AIR SCW 6336,** held that for consideration for promotion, a person must not only be eligible but must fall within zone of consideration. It is apt to reproduce para 7 of the judgment herein:

> "7. We, therefore, find that although the respondent no.1 was eligible for consideration for promotion to the post of Head Constable having completed ten years of service as Constable, he could not be

> considered for promotion in the years 1998, 1999 and 2000 on account of his lower position in the seniority list of Constables and Lance Naiks, who had been rationalized as Constables, were considered for promotion because they had been placed above respondent no.1 in the seniority list. The High Court has by impugned order directed consideration of the respondent No.1 for promotion to the post of Head Constable during the years 1998, 1999 and 2000 because it took the view that not only Lance Naiks but also Constables who have put in ten years' service were eligible to be considered for promotion to the post of Head Constable. The High Court has failed to appreciate that, for consideration for promotion, a Constable must not only be eligible, but also must come within the zone of consideration and as per the circulars dated 21.01.1998, 07.01.1999 and 08.01.2000 (Annexures P5, P6 and P7 to the Special Leave Petition), the respondent No. 1, though eligible, did not come within the zone of consideration for promotion to the post of Head Constable. The High Court was, therefore, not right in issuing a direction in the impugned order to the appellants to consider respondent no.1 for promotion in the post of Head Constable for the years 1998, 1999 and 2000. (We may mention here that the respondent No.1 has been considered, in the meanwhile, and has been promoted as Head Constable in the year 2000)."

12. Respondent No. 4 in CWP No. 2450 of 2014 was senior, having both qualifications, was falling in the zone of consideration, was considered for promotion to the post of Assistant Professor by the Departmental Promotion Committee.

13. It is not the case of the writ petitioners that the official respondents/Departmental Promotion Committee has taken into consideration those persons, who were not having the requisite qualifications.

14. Thus, the argument of the learned counsel for the writ petitioners that the date of obtaining the Post Graduate degree is crucial, is not correct.

15. The Rules, which were occupying the field at the relevant point of time and are manning the field, are to be taken into consideration.

16. The Apex Court in a case titled as **R.B. Desai and another Vs. S.K. Khanolker and others, reported in (1999) 7 Supreme Court Cases 54,** discussed the issue and held that earlier acquisition of eligibility does not give any such priority to the candidates unless Rules

specifically provide the same . It is apt to reproduce paras 9 and 10 of the judgment herein:

> "9. We are unable to agree with this reasoning of the High Court. As noticed above, promotion to the post of AFOs is made from the post of RFOs to the extent of 75% of the vacancies. There is no dispute that both the appellants and the first respondent belong to the cadre of RFOs. The only difference between them being that the appellants were promotees in the said cadre while the first respondent was a direct recruit. It is an accepted principle in service jurisprudence that once persons from difference sources enter a common cadre, their seniority will have to be counted from the date of their continuous officiation in the cadre to which they are appointed. On facts, there is no dispute that the appellants entered the RFO's cadre on a date anterior to that of the first respondent, therefore, in the cadre of RFOs, the appellant are senior to the first respondent. However, to be considered for promotion, the rule required RFOs to acquire the eligibility as provided therein. Therefore, the question for consideration is : can the acquisition of an earlier eligibility give an advantage to the first respondent as against the appellants when an avenue for promotion opens in the cadre of ACFs even though at that point of time the appellants had also acquired the required eligibility? We are of the opinion that if at the time of consideration for promotion the candidates concerned have acquired the eligibility, then unless the rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. The rule under consideration does not give any such priority to the candidates acquiring earlier eligibility and, in our opinion, rightly so. In service law, seniority has its own weightage and unless and until the rules specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same.
>
> 10. The High Court has relief upon the language of Note 1 of the rule to come to the conclusion that the persons with earlier date of eligibility have a weightage over others solely on the basis that the note required the list of eligibility to be maintained on the basis of the date of acquisition of such eligibility, hence eligibility has preference over seniority. Our reading of the said note does not persuade us to give any such preference. If the rule did contemplate

> such advantage, it would have stated so in specific terms. We also do not see any special objective in giving preference to the date of eligibility as against seniority. Eligibility, of course, has a relevant object but date of acquisition of eligibility, when both competing persons have the eligibility at the time of consideration cannot, in our opinion, make any difference."

17. The Apex Court in a latest judgment rendered in a case titled as **Dr. Purshotam Kumar Kaundal Vs. State of H.P. and Ors., reported in 2014 AIR SCW 1262,** held that the eligibility criterion only requires a recognized Post Graduate degree and those persons are to be taken into consideration who are possessing the said Post Graduate degree. The Apex Court has nowhere held that the date from which the degree is obtained is the date of determining the eligibility. Had that been the intention of the Legislature, then they would have differently provided the criteria accordingly.

18. The Apex Court in the cases titled as **Indian Airlines Ltd. and others Vs. S. Gopalakrishnan, reported in (2001) 2 Supreme Court Cases 362; Shailendra Dania and others Vs. S.P. Dubey and others, reported in (2007) 5 Supreme Court Cases 535;** and **V.K. Naswa Vs. Home Secretary, Union of India and others, reported in (2012) 2 Supreme Court Cases 542,** has laid down the same principle. It is apt to reproduce paras 9, 11, 16 and 18 of the judgment rendered by the Apex Court in **V.K. Naswa's case (supra)** herein:

> "9. In *Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364: AIR 1989 SC 1899,* this Court while dealing with a case like this at hand observed: (SCC p. 374, para 19)
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> "19. ..... While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. *The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonise qua any matter which under the Constitution lies within the sphere of legislature or executive."(emphasis added)*
>
> 10. .....
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> 11. Similarly in *Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society Ltd., (1999) Supp (1) SCC 323,* this Court held that the court cannot fix a period of limitation, if not fixed by the legislature, as "the courts can admittedly interpret the law and do not make laws". The court cannot interpret the statutory provision in such a manner

> "which would amount to legislation intentionally left over by the legislature".
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> 12. .....
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> 13. .....
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> 14. .....
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> 15. .....
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> 16. In *State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586,* this Court held that issuing any such direction may amount to amendment of law which falls exclusively within the domain of the executive/legislature and the court cannot amend the law.
>
> 17. .....
>
> 18. Thus, it is crystal clear that the court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the court can legislate, nor has it any competence to issue directions to the legislature to enact the law in a particular manner."

19. The writ petitioners have not questioned the seniority list, which was published long back and has attained finality. While considering the in-service candidates for promotion on merit-cum-seniority basis against a selection post, those candidates are to be taken into consideration who fall in the zone of consideration as per seniority list read with the requisite qualification.

20. Admittedly, private respondent No. 4 was having the requisite qualification and was falling in the zone of consideration. The writ petitioners in both the writ petitions are not falling in the zone of consideration because they are much juniors and can be considered at the time when they will fall in the zone of consideration.

21. It is also apt to mention herein that even the writ petitioners have not questioned the seniority list in the writ petitions.

22. The writ petitioners have also not questioned Rule 11 of the Rules (supra).

23. This Court cannot issue writ of mandamus commanding the respondents to reckon the seniority for promotion to the post of Assistant Professor (Super Specialty) from the date when a candidate acquires qualifications. This is the job and prerogative of the official respondents and not of this Court. This Court has only interpreted the Rules and as per the Rules, as discussed hereinabove, that a candidate, at the time of falling in the zone of consideration, must have Post Graduate degree alongwith three years teaching experience.

24. Having said so, both the writ petitions deserve dismissal. Accordingly, both the writ petitions are dismissed alongwith all pending applications, if any. Interim directions, if any, are also vacated.

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

Govind Singh ...Appellant.
Vs.
State of H.P. ...Respondent.

Criminal Appeal No.226 of 2009
Reserved on : 19.8.2014
Date of Decision : 18.09.2014

N.D.P.S. Act, 1985- Section 20 (C) - Accused saw the police party and tried to run away – accused was apprehended and was found in possession of 3 kgs of charas- testimonies of the police officials corroborating each other- there was no independent witness at the spot- therefore, prosecution case cannot be doubted due to non-examination of the independent witness- testimonies of the police official cannot be doubted on the basis that they are police officials-conviction upheld.

(Para-16)

Cases referred:

Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Tika Ram Vs. State of Madhya Pradesh, (2007) 15 SCC 760

Girja Prasad Vs. State of M.P., (2007) 7 SCC 625)

Aher Raja Khima Vs. State of Saurashtra, AIR 1956

Tahir Vs. State (Delhi), (1996) 3 SCC 338,

For the Appellant : Mr. Anoop Chitkara, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Additional Advocate General, Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellants-convict Govind Singh, hereinafter referred to as the accused, has assailed the judgment dated 27.7.2009/28.7.2009, passed by Special Judge, Mandi, Himachal Pradesh, in Sessions Trial No.1 of 2009, titled as *State of Himachal Pradesh v. Govind Singh*, whereby he stands convicted of the offence punishable under the provisions of Section 20(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo imprisonment for a period of ten years and pay fine

of Rs.1,00,000/- and in default thereof to further undergo imprisonment for a period of one year.

2. It is the case of prosecution that on 25.10.2008, Police Party, headed by Satya Parkash (PW-11), was on patrol duty near Aut, Thallaut and Larji Dam side. Satya Parkash was accompanied by Constable Hari Singh (Pw-1), Duni Chand (not examined) and Constable Inder Dev (PW-7). Police party saw the accused, carrying a bag on his shoulder, coming from Shihli side. Seeing the police party, he became perplexed and tried to flee away. On suspicion, he was apprehended and disclosed his name as Govind Singh. The bag was searched and one polythene packet containing Charas was recovered. By associating police officials present on the spot, contraband substance was weighed and found to be 3 kgs. Satya Parkash (PW-11) drew two samples, each weighing 25 grams, and sealed them with four seal impressions of seal 'N'. Parcels were marked as A-1 and A-2. Bulk parcel was sealed separately with the very same seal impression, bearing six seals. The contraband substance was seized. NCB form (Ex. PW-11/A) was filled up in triplicate. Rukka (Ex. PW-11/B) was sent through Constable Inder Dev (PW-7) to Police Station, Aut, on the basis of which FIR No.148/08, dated 25.10.2008 (Ex.PW-2/A) was recorded by SHO Amar Nath (PW-2). Case file was taken back to the spot. Accused was arrested. Special report (Ex. PW-5/A) was also sent to the concerned Higher Authorities. With the completion of necessary investigation, Satya Parkash handed over the case property to SHO Amar Nath, who resealed the samples as also the bulk parcel with his seal impression 'Y' (four and six seals). Thereafter, case property was entrusted to MHC Dina Nath (PW-6), who deposited the same in the Malkhana and made entry in the Malkhana Register (Ex.PW-6/A). Bhup Singh (PW-3) took one sample for analysis to the Forensic Science Laboratory (FSL), Junga. Report (Ex. PW-9/A) was obtained by the police, which confirmed the contraband substance to be Charas. With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took up the following defence:

> "I was working as domestic servant at the house of H.C. Satya Parkash and did not make payment of wages of six months to me. On demand to make payments of wages, he has implicated me in a false case."

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of an offence punishable under

the provisions of Section 20(C) of the NDPS Act and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. Assailing the judgment, Mr. Anoop Chitkara, learned counsel for the accused, has invited our attention to the testimonies of the prosecution witnesses. According to the learned counsel, prosecution case stands rendered doubtful, on account of following three circumstances: (i) Non-association of independent witnesses by the police party; (ii) sample was not made homogeneous; and (iii) defence of the accused stands probablized.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that in the instant case testimonies of prosecution witnesses fully inspire confidence. There are neither any contradictions nor any improbabilities, variations, discrepancies, rendering the prosecution case to be doubtful in any manner.

8. The fact that police officials were on patrol duty on the relevant date, time and spot stands proved not only by Hari Singh (PW-1), but also Inder Dev (PW-7) and Satya Parkash (PW-11). No independent witness was associated by the police.

9. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

10. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

11. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can

form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

[See: ***Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another,*** **(2012) 4 SCC 722;** ***Tika Ram Vs. State of Madhya Pradesh,*** **(2007) 15 SCC 760;** ***Girja Prasad Vs. State of M.P.,*** **(2007) 7 SCC 625); and** ***Aher Raja Khima Vs. State of Saurashtra,*** **AIR 1956].**

12. Apex Court in ***Tahir Vs. State (Delhi),*** **(1996) 3 SCC 338**, dealing with a similar question, held as under:-

> "6. … .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

13. In view of the aforesaid statement of law, when examined, even with circumspection, the testimonies of police officials present on the spot, who conducted the search and seizure operations, to be inspiring in confidence.

14. Satya Parkash (PW-11) has categorically deposed that when police party reached Larji Dam side, they saw the accused who was carrying a bag on his shoulder. Seeing the police party, accused got perplexed and tried to flee away, but however, on suspicion was apprehended. The bag was searched in the presence of Constables Duni Chand (not examined) and Hari Singh (PW-1). From the bag, one polythene envelope was recovered. It contained Charas in the shape of sticks and balls. The same was weighed with the weights and scale, contained in the IO Kit, and was found to be of 3 kgs. Two samples of 25 grams each were separated and marked as A-1 and A-2. They were sealed with seal impression 'N', four in number. Remaining bulk Charas was put inside the polythene envelope, which was put in the bag, which was sealed with the very same seal impression, bearing six seals.

Specimen seal (Ex. PW-1/A) was handed over to Constable Hari Singh (PW-1). NCB form (Ex. PW-11/A) was filled up in triplicate. Contraband substance was seized vide recovery memo (Ex.PW-1/B), which was signed by Constable Hari Singh and Duni Chand. Rukka (Ex. PW-11/B) was taken through Constable Inder Dev, on the basis of which FIR (Ex. PW-2/A) was registered. Accused was served grounds of arrest and was arrested vide Memo (Ex. PW-1/C). This witness also handed over the case property to the SHO. Also, Special Report (Ex. PW-5/A) was sent through Constable Amit Barwal (PW-4) to the Office of Additional Superintendent of Police. In Court, he has identified the bulk sealed parcel (Ex. P-2), envelope/bag (Ex. P-4 & P-5).

15. We find that extensive cross-examination of this witness has not rendered his original version to be shaky or uninspiring in confidence in any manner. In fact, his version stands fully corroborated by Hari Singh (PW-1), who has further explained that weights and scales were carried by the I.O. in his Kit. Also, Inder Dev (PW-7) has supported the version of recovery of Charas from the conscious possession of the accused.

16. No doubt, these police officials stand extensively cross-examined and an endeavour was made to establish that independent witnesses could have been associated, but then from the unrebutted testimony of Satya Parkash (PW-11), we find that all proceedings took place on the spot, where no independent person was otherwise available. Accused who was trying to flee away, was apprehended and on suspicion his bag was searched. It was a case of chance recovery. Police was carrying I.O. Kit containing all material and as such proceedings were conducted on the spot in the early hours of 25.10.2008. As such, non-association of independent witnesses in the given facts and circumstances, particularly when testimony of police officials, even when examined with circumspection, fully inspires confidence, cannot be said to be fatal. It cannot be said that witnesses have deposed falsely or their credit stands impeached, rendering their testimonies to be unworthy of credence or the witnesses to be unreliable or untrustworthy. Thus, non-association of independent witnesses stands reasonably explained.

17. It be also observed that prosecution case stands fully established even by link evidence. Satya Parkash entrusted the case property to SHO Amar Nath (PW-2), who in turn affixed his seal and handed over the same to MHC Dina Nath (PW-6). Conjoint reading of testimonies of these witnesses would only reveal that the case property was received, sealed and safely kept in the Malkhana. That seal 'Y' was affixed by SHO Amar Nath also stands proved on record. Malkhana Register (Ex. PW-6/A) and the Road Certificate (Ex. PW-3/A) stand proved on record. There is proper entry of the contraband substance and other case property recorded therein. Report of the FSL (Ex.PW-9/A) is also on record, certifying the contraband substance to be Charas. Bhup Singh (PW-3), who took the sample for chemical examination, has also deposed that as long as the sample remained with him, the same

remained intact. Case property was also produced in the Court and the seals were found to be intact.

18. On the basis of Rukka (Ex. PW-11/B), FIR (Ex.PW-2/A) was registered by SHO Amar Nath. We also find that Satya Parkash sent information of the recovery of the contraband substance to the superior officer, which fact stands proved through the testimony of Amit Barwal (PW-4) and Lachhman Dass (PW-5).

19. Case of the prosecution is that Charas was recovered from one polythene packet. It was in the shape of sticks and balls. No doubt, Satya Parkash (PW-11) does state that he made the sample homogeneous, but then it is not the case of prosecution either that Charas was recovered from more than one packet. Samples were drawn from the Charas so recovered, which was in the shape of sticks and balls. Hence, this fact alone would not render the prosecution case to be fatal. Report of the FSL clearly reveals that the sealed sample was opened, weighed and tested. Also there is not much variation in the weight of the sample. In any case, no prejudice can be said to have been caused to the accused.

20. Defence taken by the accused cannot be said to have been probablized at all. Satya Parkash categorically denies the suggestion so put to him in this regard. Noticeably, accused has not led any evidence to even prima facie show that he was engaged as a domestic servant in the house of the Investigating Officer. As such, the plea only merits rejection.

21. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

22. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. & HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

H.P. State Electricity Board Ltd. & Anr. ...Applicants/appellants.

Vs.

Baldev Verma ...Respondent.

CMP(M) No.1097 of 2014.
Decided on: 18.09.2014.

Limitation Act, 1963- Section 5- Writ Petition was decided on 26.12.2012- LPA was filed against the writ after delay of one year, two months and seventy days- the appellants sought condonation of delay on the ground that they had no knowledge regarding the decision of the case- however, no date of the knowledge of the decision was given- held, that the Law of limitation binds everybody and when no satisfactory reason was given for the condonation of delay, the delay could not be condoned. (Para- 2 to 7)

Cases referred:

Office of the Chief Post Master General & Ors. Vs. Living Media India Ltd. & Anr., AIR 2012 SC 1506

Union of India & Ors. Vs. Nripen Sarma, AIR 2011 SC 1237

Balwant Singh (dead) Vs. Jagdish Singh & Ors., AIR 2010 SC 3043

PERUMON BHAGVATHY DEVASWOM, PERINADU VILLAGE Vs. BHARGAVI AMMA (DEAD) BY LRS & ORS, (2008) AIR SCW 6025

For the Appellants: Mr.Satyen Vaidya, Advocate.
For the Respondent: Mr.Surender Saklani, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of this application, the applicants have sought condonation of delay of 1 year, 2 months and 17 days, which has crept-in, in filing the appeal, on the grounds taken in the memo of application.

2. We have gone through the application. The application is vague. The applicants have given reason for not filing the appeal in paragraph 2 of the application and paragraphs No.1, 3 and 4 contain routine averments. It is apt to reproduce paragraph 2 of the application hereunder:

"2. That it is the respectful submission of the Applicants/Appellants herein that they could not file the L.P.A. within the period of limitation in as much as the Board has not received the certified copy of the judgment rather have no knowledge regarding the decision of this case, the knowledge was acquired only on receipt of copy of Execution Petition No.4057 of 2013. Besides, the Applicants/Appellants have to exhaust a long channel to reach as a final conclusion."

3. The Writ Petition, i.e. CWP No.4217 of 2011, titled Baldev Verma vs. Himachal Pradesh State Electricity Board Ltd. and anr., came to be decided as far back as on 26th December, 2012. The applicants have not disclosed the date of knowledge i.e. the date of receipt of the copy of the judgment, in the entire application.

4. We may refer to the decision of the Apex Court in **Office of the Chief Post Master General & Ors. Vs. Living Media India Ltd. & Anr., AIR 2012 SC 1506,** wherein it was observed that the law of limitation binds everybody, including the Government Departments and the claim on account of inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies having become available. It is profitable to reproduce paragraphs 12 and 13 of the said decision hereunder:

> "12. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.
>
> 13. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay.

Accordingly, the appeals are liable to be dismissed on the ground of delay."

5. The Apex Court in **Union of India & Ors. Vs. Nripen Sarma, AIR 2011 SC 1237,** while dismissing the appeal, filed by the Union of India, on the ground of delay, observed in paragraphs No.4, 6 and 7, as under:

> "4. We have also gone through the condonation of delay application which was filed in the High Court. In our considered view, the High Court was fully justified in dismissing the appeal on the ground of delay because no sufficient cause was shown for condoning the delay.
>
> Xxxxxxxxx xxxxxxxxxxxx
>
> 6. The Union of India ought to have been careful particularly in filing this Civil Appeal because the Division Bench, by the impugned order, has dismissed the appeal before it on the ground of delay. It is a matter of deep anguish and distress that majority of the matters filed by the Union of India are hopelessly barred by limitation and no satisfactory explanations exist for condoning inordinate delay in filing those cases.
>
> 7. On consideration of the totality of the facts and circumstances, we are constrained to dismiss this appeal on the ground of delay. However, in the larger interest, we are keeping the question of law open."

6. It has also been held by the Apex Court in **Balwant Singh (dead) Vs. Jagdish Singh & Ors., AIR 2010 SC 3043,** that the applications for condonation of delay cannot be allowed as a matter of right and in a routine manner. It is profitable to reproduce paragraph 16 of the said decision hereunder:

> "16. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equi-benches of this

Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."

7. The Apex Court has laid down similar principles in **PERUMON BHAGVATHY DEVASWOM, PERINADU VILLAGE Vs. BHARGAVI AMMA (DEAD) BY LRS & ORS, (2008) AIR SCW 6025,** which has been referred to in paragraph 15 of its judgment by the Apex Court in Balwant Singh's case (supra).

8. Having said so, no case is made out for condonation of delay. Therefore, the application is dismissed. Consequently, the Letters Patent Appeal is dismissed as time barred, alongwith pending CMPs, if any.

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

Dilbag Singh .....Appellant.

Vs.

Rakesh Kumari and others ...Respondents.

FAO (MVA) No. 31 of 2007.
Judgment reserved on 12.9.2014
Date of decision: 19.09. 2014.

Motor Vehicle Act, 1988- Section 166- MACT holding that the owner is liable to satisfy the award to the extent of 70% while insurer was liable to satisfy the award to the extent of 30% on the ground that the registration certificate of the vehicle was transferred in the name of the 'D' and it was not in the name of the owner- held, that the transfer of the vehicle will not absolve the insurance company from its liability- Insurance Company is liable to pay whole of the amount. (Para-15 to 21)

Cases referred:

G. Govindan Vs. New India Assurance Company Ltd. and others, reported in AIR 1999 SC 1398

Rikhi Ram and another Vs. Smt. Sukhrania and others, reported in AIR 2003 SC 1446

United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and others, reported in (2006) 4 SCC 404

For the appellant: Mr.Jagdish Thakur, Advocate.

For the respondents: Mr.Rakesh Chandel, Advocate, for respondent No. 1.
Mr. Rajinder Sharma, Advocate, for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 4.
Mr. G.D. Sharma, Advocate, for respondent No. 5.
Nemo for respondents No. 3 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The claimant has invoked the jurisdiction of this Court, by the medium of this appeal, under Section 173 of the Motor Vehicles Act, hereinafter referred to as "the Act" for short, for setting aside the award dated 30.10.2006, passed by the Motor Accidents Claims Tribunal, Una, H.P, for short "The Tribunal" in MAC Petition No. 34 of 2004 titled Rakesh Kumari versus Jugal Kishore and others, whereby compensation to the tune of Rs.1,08,200/- came to be awarded in favour of the claimant/respondent No. 1 herein, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The Tribunal, after examining the claim petition, held that tanker No. HP-20-5935 and bus No. HP-20-A-2619 have caused the accident in which the claimant-respondent No. 1 herein sustained injuries. The insurer of tanker, i.e., the New India Assurance Co. was saddled with 70% liability and insurer of Bus, i.e. United India Insurance Co. was exonerated from the liability thereby directing Dilbag Singh owner-cum- driver of bus No. HP-20-A-2619 to satisfy the impugned award to the extent of 30%.

3. The claimant, owner, driver and insured of the offending tanker, insurer of bus No. HP-20-A-2619 and Balbir Singh owner of bus have not questioned the impugned award on any ground, thus it attained finality so far as it relates to them.

4. The only dispute in this appeal is whether the Tribunal has rightly directed the owner-cum-driver of the bus to satisfy the award to the extent of 30%. Thus, I deem it proper not to discuss issues No.1, 4,5 to 10. Accordingly, findings returned on the said issues are upheld.

5. In view of the dispute raised in this appeal, issue Nos. 2, 3 and 11 are required to be determined.

Brief Facts:

6. Rakesh Kumari claimant filed claim petition being victim of a vehicular accident which was caused by the drivers of two offending vehicles, i.e., bus No. HP-20-A-2619 and tanker No.HP-20-5935, by driving the aforesaid vehicles in a rash and negligent manner on

18.5.2004 at village Jalgran in Una Tehsil, District Una, H.P. in which the claimant had sustained injuries. The claimant had claimed compensation to the tune of Rs.5,25,000/-, as per break-ups given in the claim petition.

7. The claim petition was contested and resisted by all the respondents and following issues came to be framed by the Tribunal:

(i). Whether petitioner Rakesh Kumar sustained injuries in a motor accident caused by rash and negligent driving of two vehicles (i) bus (No.HP-20-A-2619) and a tanker (No.HP-20-5935), by Dilbag Singh (respondent No.4) and Naranjan Singh (respondent No.2), respectively, on May 18,2004. OPP.

(ii) If the above issue 1 is proved, to what extent did each of the two drivers contribute to the accident. OPP

(iii) Whether the petitioner is entitled to compensation, if so, to what amount and from whom. OPP

(iv) Whether the real owner of the bus in question was Balbir Singh and petition is bad on account of his non-joinder. OPR 2.

(v) Whether the driver of the tanker was not having a valid and effective driving lilcence at the time of accident. OPR 3.

(vi) Whether the tanker in question was insured with respondent No. 3. OPP

(vii) Whether the tanker was being plied in violation of the terms and conditions of the Insurance Policy. OPR 3.

(viii) Whether the petitioner was herself a tortfeasor. if so, to what effect. OPR 5.

(ix) Whether the petition is bad for misjoinder of parties. OPR 5.

(x) Whether the driver of the bus (No. HP-20-A-2619) was not holding a valid and effective driving licence at the time of the accident. OPR 5.

(xi) Whether the bus in question was being driven in violation of the terms and conditions of the insurance policy. OPR 5.

(xii) Relief.

8. The claimant has examined Rajinder Puri, C.M.O, Dr. V.K. Raizada, H.C. Rajinder Kumar and claimant herself appeared in the witness-box.

9. Dilbag Singh owner of the bus and driver of tanker Niranjan Singh also appeared in the witness-box and got recorded their statements.

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the accident was outcome of rash and negligent driving of both the drivers and issue No. 1 came to be decided in favour of the claimant and against respondents No. 2 and 4.

11. The Tribunal, after determining the claim petition held the claimant entitled to Rs.1,08,200/- as compensation which is not in dispute and also held that the tanker was insured and owner has not committed any willful breach. The driver was having a valid and effective driving llicence and directed the insurer of the tanker, i.e., the New India Assurance Company to satisfy the award to the extent of 70%.

12. The learned counsel for the insurer stated that the insurance company has satisfied the impugned award to the extent of 70%.

13. The Tribunal held that the owner of the bus has committed willful breach and saddled the owner Dilbag Singh with the liability to the extent of 30%.

14. The learned counsel for the appellant argued that the Tribunal has fallen in error in holding that the owner has committed willful breach.

15. The appellant is admittedly owner of the bus and factum of insurance is not disputed. The only dispute is that the insurance policy was in the name of the registered owner and not in the name of Dilbag Singh, i.e., transferee of the vehicle who has been directed to satisfy the impugned award to the above extent. The Tribunal has fallen in error in deciding the said issue.

16. It is apt to reproduce Section 157 of the Act as under:

> **"157. Transfer of certificate of insurance.**
>
> (1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.
>
> [Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]
>
> (2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for

making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

17. While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the claim.

18. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan Vs. New India Assurance Company Ltd. and others, reported in AIR 1999 SC 1398.** It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.

11. .....

12. .....

13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.

14. .....

15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the

> Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."

19. The Apex Court in case titled as **Rikhi Ram and another Vs. Smt. Sukhrania and others, reported in AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, supra, herein:-

> "5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.
>
> 6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.
>
> 7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

20. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and others, reported in (2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

> "12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of

transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

21. This Court in **FAO No. 7 of 2007** titled as **Ashok Kumar & another versus Smt. Kamla Devi & others** decided on 05.09.2014, has also laid down the same principles.

22. Thus, the issues are decided accordingly and the impugned award is modified. The United India Assurance Company is saddled with 30% liability and is directed to deposit, the amount in the Registry of this Court, within six weeks from today. On deposit, the same be released in favour of the claimant. If the appellant has deposited any amount, the same be released in favour of the appellant through payee's account cheque.

23. The impugned award is modified, as indicated above. The appeal is accordingly allowed. Send down the record, forthwith.

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

Himachal Road Transport Corporation ...Appellant
Vs.
Parveen Kumari and others ...Respondents.

FAO No.369 of 2012
Reserved on : 12.09.2014
Pronounced on: 19.09. 2014.

Motor Vehicle Act, 1988- Section 166- Deceased died in the accident- deceased was earning Rs. 16,478/- per month- Tribunal had allowed 30%addition by way of future prospects- he was aged 40 years- Tribunal had applied the multiplier of 14- held, that there is no infirmity in the award passed by Tribunal. (Para-11)

Cases referred:

Sarla Verma (Smt.) and others Vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others Vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant: Mr.Vikrant Thakur, Advocate.
For the Respondents: Mr.Rajesh Mandhotra, Advocate, for respondents No.1 and 2.
Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Appellant-Himachal Road Transport Corporation has thrown challenge to the award, dated 7th March, 2012, passed by Motor Accident Claims Tribunal-III, Kangra, Himachal Pradesh, (hereinafter referred to as the Tribunal), whereby Claim Petition No.158-D/09/2010, titled as Parveen Kumari and Anr. Vs. Himachal Road Transport Corporation and Anr., came to be determined by awarding compensation to the tune of Rs.24,58,032/-, with interest at the rate of 7.5% per annum from the date of filing of the Claim Petition till its realization, in favour of the claimants (respondents No.1 and 2 herein) and the appellant/owner was saddled with the liability, (for short, the impugned award).

2. Facts of the case, in brief, are that claimants, being the unfortunate widow and daughter of deceased Jagdeep Malhotra, who became victim of a vehicular accident, caused by Kuldeep Chand, driver, while driving the offending HRTC bus bearing registration No.HP-53-2642, rashly and negligently from Mandi to Pathankot, have filed the claim petition for grant of compensation, as per the break-ups given in the claim petition. The offending bus hit the motor cycle bearing No.HP-39B-0111, at Shahpur, on which the deceased was traveling, who sustained injuries and succumbed to the same. FIR No.51/2009 was registered at Police Station, Shahpur. It was averred that the deceased was serving as Lance Head Constable in Himachal Pradesh Police and was earning Rs.16,478/- per month as salary.

3. Respondents resisted the Claim Petition by filing separate replies.

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

1. Whether the deceased Jagdeep has died in an accident with the offending vehicle bus bearing registration No. HP-53-2642 as a result of rash and negligent driving by respondent No.2 driver of the offending vehicle on 12-4-2009 at Shahpur, Distt. Kangra, H.P. and thereby the petitioners being dependent of the deceased are entitled for compensation, if so the extent, and liability thereof, as alleged? OPP.

2. Whether the petition is not maintainable, as alleged? OPR

3. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR

4. Whether the petitioners are estopped by their own act, conduct and acquiescence to file the present petition, as alleged? OPR

5. Relief.

5. The claimants have examined five witnesses in all, in support of their claim, while respondents examined three witnesses, including the driver of the offending vehicle who stepped into the witness box as RW-1.

6. The Tribunal, after scanning the pleadings and the evidence, held that the driver Kuldeep Chand had driven the offending bus rashly and negligently. I have examined the record. There is ample evidence on the file to the effect that the driver, namely, Kuldeep Chand, had driven the offending Bus rashly and negligently and hit the motor cycle on which the deceased was traveling, as a result of which, the deceased sustained injuries and succumbed to the same. Thus, the findings returned by the Tribunal on issue No.1 are upheld.

7. It was for the appellant and the driver to prove how the Claim Petition was not maintainable, failed to do so. Admittedly, the claimants, being the victims of vehicular accident, filed the Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), and therefore, the same was maintainable. Thus, issue No.2 was rightly decided by the Tribunal.

8. The Driver or the owner had to plead and prove that the petition was hit by non-joinder of parties. I wonder why issue No.3 was framed. However, the driver and the owner have not led any evidence to prove this issue. Thus, the findings recorded by the Tribunal on issue No.3 are also upheld.

9. The owner and the driver have pleaded that the claimants are caught by law of estoppel, act, conduct and acquiescence. It is not known how such a plea was taken. However, there is no evidence on the file to the effect that how the victims of a vehicular accident can be restrained from claiming compensation under the Act, which is a social legislation and under which, compensation is to be granted without

succumbing to the niceties of law and procedural wrangles and tangles. Having said so, issue No.4 came to be rightly decided by the Tribunal.

10. Claimants have examined HHC Rakesh Kumar as PW-2 to prove the salary certificate of the deceased. The Tribunal, after examining the evidence led by the claimants, held that the deceased was earning Rs.16,470/-. The Tribunal also allowed 30% addition by way of future prospects, and after making deductions, keeping in view the dictum of the Apex Court in **Sarla Verma (Smt.) and others Vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others Vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** held that the claimants have lost source of dependency to the tune of Rs.14,274/- per month.

11. The deceased, as per the record and pleadings i.e. paragraph 3 of the Claim Petition, was 40 years of age at the time of the accident and the Tribunal has rightly taken his age as 40 years and has applied multiplier '14', which is just and appropriate in view of Schedule 2 appended with the Act, read with the judgments (supra). The Tribunal has also rightly awarded Rs.10,000/- and Rs.50,000/- under the heads funeral charges and loss of love and affection, respectively, cannot be said to be excessive in any way.

12. Having said so, the appeal merits to be dismissed and the same is dismissed accordingly. Consequently, the impugned award is upheld. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award.

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

FAO (MVA) No. 68 of 2007 &
FAO No. 69 of 2007
Date of decision: 19.09. 2014.

FAO No. 68 of 2007.

National Insurance Co. Ltd. ...Appellant.
Vs.
Smt. Hima Devi and others ...Respondents.

FAO No. 69 of 2007.

Kesari Lal ...Appellant.
Vs.
Smt. Hima Devi and others ...Respondents.

Motor Vehicle Act, 1988- Section 166- MACT held that the Insurance Company is liable to satisfy the award- an appeal was preferred by the Insurance company- held, that the Insurance Company had failed to

prove on record that there was a breach of terms and conditions of the policy- Insurance policy covered the driver and, therefore, the Insurance Company is liable to pay the amount of compensation. (Para-10 & 11)

For the appellant: Mr.Ashwani K. Sharma, Advocate in FAO No.68/07 & Ms. Leena Guleria in FAO No.69/07.

For the respondents: Mr.Rajesh Mandhotra, Advocate, for respondent No.1.(both appeals)
Ms. Leena Guleria, Advocate, for respondent No. 2 in FAO No.68/07 and Mr. Ashwani K. Sharma, for respondent No. 2 in FAO NO.69/07.
Respondent No. 3 ex parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral).

The insurer has filed the appeal being FAO No. 68 of 2007, against the award dated 11.1.2006, passed by the learned Motor Accident Claims Tribunal-II Mandi, H.P. in Claim Petition No. 15 of 2001 titled Smt. Hima Devi vs. Sh. Kesari Lal & others, for short "the impugned award", on the ground that the Tribunal has fallen in error in asking the insurer to satisfy the award.

2. The owner has filed the appeal being FAO No. 69 of 2007, on the ground that the Tribunal has fallen in error in granting the right of recovery to the insurer.

3. The claimant has not questioned the impugned award on any ground, thus the impugned award attained finality, so far as it relates to the claimant.

4. The owner/insured has also not questioned the impugned award on any other ground, except saddling the liability and right of recovery.

Brief facts.

5. It is averred that the deceased was travelling as a labourer in a tractor bearing registration No.HP-31-3175, which met with an accident and so many persons sustained injuries, including deceased, namely, Thakur Singh who succumbed to the injuries. FIR No. 47 of 1999, dated 27.4.1999 came to be registered in police station Karsog. The claimant being mother of the deceased had filed claim petition before the Tribunal for grant of compensation to the tune of Rs.5 lacs, as per the break-ups given in the claim petition.

6. The insurer and insured resisted the claim petition and following issues came to be framed by the Tribunal.

(i) Whether the deceased son of petitioner Hima Devi died in accident took place on 27.4.1999 at about 11 a.m. at village Hiundi when he met with accident of tractor bearing No. HP-31-3175 owned by respondent No. 1 and driven by respondent No.2 in a rash and negligent manner? OPP.

(ii) If Issue No. 1 is proved in affirmative and whether the petitioner is entitled to compensation, if so, to what extent and from whom? OPP.

(iii) Whether the petition is bad for non-joinder and mis-joinder? OPR-1

(iv) Whether the driver of the vehicle, who was driving at the time of accident was not having effective driving licence and the vehicle was being driven in contravention of the insurance policy? OPR-3.

(v) Relief.

7. The parties have led evidence.

8. The Tribunal, after scanning the evidence held that the claimant is entitled to compensation to the tune of Rs. 2,40,400/- with 7 ½ % interest from the date of filing the claim petition till its realization.

9. There is no dispute viz-a-viz issues No. 1 and 3. Thus, the findings returned by the Tribunal on these issues are upheld. Findings on issues No. 2 and 4 are in dispute so far as the same relate to the saddling of the liability and right of recovery.

10. The clamant has led evidence that driver, namely Ramesh Chand had driven the tractor aforesaid rashly and negligently and caused the accident which is not in dispute, thus, findings on issue No. 1 are upheld. Respondent No.1-owner has failed to prove that claim petition was bad for mis-joinder and non-joinder of necessary parties. Even otherwise, the mother being victim of a vehicular accident, filed claim petition and was maintainable in terms of police report and in terms of Section 158 (6) of the Motor Vehicles Act,1988. Accordingly findings on issue No. 3 are upheld.

11. The compensation granted by the Tribunal cannot be said to be inadequate or excessive in any way. The insurance policy is on the file. The Tractor was insured and risk of the driver was covered. Even otherwise, tractor cannot carry passengers. The Tribunal has rightly scanned the evidence and document Ext. RA at page 45 of the record, which do disclose that risk of third party and driver was covered and risk of labourer was not covered. Thus, the findings on issues No. 2 and 4 are accordingly upheld.

12. Having said so, the impugned award is upheld and the appeal is dismissed. Send down the record, forthwith.

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

National Insurance Co. Ltd. .....Appellant.
Vs.
Sh. Jyoti Ram and anr. ...Respondents.

FAOs (MVA) No. 80 of 2007 a/w Ors.
Date of decision: 19.09.2014.

Motor Vehicle Act, 1988- Section 140- Appeal against interim award- held, that interim award can be granted on the basis of prima facie case and there is no necessity to go into the merit- the Insurance Company had failed to establish that the interim award was bad and there was no prima facie evidence of the accident- Appeal dismissed. (Para- 2 to 6)

Cases referred:
Shivaji Dayanu Patil and another Vs. Smt. Vatschala Uttam More (1991) ACC 306 (SC)
National Insurance Co. Ltd. Vs. Nasib Chand, (2011) 3 ACC page 411

For the appellant:	Mr.Sandeep Sharma, Sr. Advocate, with Mr. Ajeet Sharma, Advocate.
For the respondents:	Mr.Surinder Saklani, Advocate, for respondents No. 1 to 3. Mr. T.S. Chauhan, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral).

These three appeals are outcome of a common interim award dated 2.1.2007, for short "the impugned award" passed by the learned Motor Accident Claims Tribunal Mandi, H.P. , hereinafter referred to as "the Tribunal", for short, in three different claim petitions, in terms of Section 140 of the Motor Vehicles Act, 1988, for short "the Act" on the principle of no fault liability.

2. It is beaten law of the land that interim award passed under Section 140 of the Act is appealable but cannot be questioned on flimsy grounds. Section 140 of the Act mandates that the interim award can be granted on the basis of prima facie proof to the effect that the accident is outcome of rash and negligent driving of the driver of a motor vehicle, the vehicle is insured and the victim has sustained permanent disability or has succumbed to the injury.

3. The apex Court in a case reported in (**1991) ACC 306** (**SC)** titled **Shivaji Dayanu Patil and another Vs. Smt. Vatschala Uttam More** laid down the guidelines how to grant interim relief/ award, in terms of Section 140 of the Act.

4. I, as a Judge of Jammu and Kashmir High Court, while dealing with the case reported in (**2011) 3 ACC page 411** titled **National Insurance Co. Ltd. Vs. Nasib Chand**, laid down the guidelines for grant of interim award. It is apt to reproduce paras 3, 6, 18 & 19 of the said judgment herein.

> "3. The crux of the matter is whether the defence projected and taken by the appellant-insurer in terms of Section 149 of the Act can be pressed into service at the time of determination of application under Section 140 of the Act for grant of interim award on no fault liability. The answer is negative for the following reasons.
>
> 6. Claims under Section 140 of the Act cannot be defeated on the ground that the owner has committed the breach or the insurer has a defence in terms of Section 149 of the Act, which requires determination after leading evidence.
>
> 18. In terms of section 140, 141, 158(6) and 166(4) read with the Rules (supra), the Claims Tribunal is required to satisfy itself while determining the petition under section 140 of the Act in respect of the following points.
>
> i. The accident has arisen out of the use of motor vehicle;
>
> ii. The said accident resulted in death or permanent disablement;
>
> iii. The claim is made against the owner and insurer of the motor vehicle involved in the accident.
>
> 19. The Claims Tribunal after examining the FIR and the disability certificate came to the conclusion that claimant-respondent no.1 has prima facie established all the ingredients which are required for determination of the petition under section 140 of the Act on no fault liability. The appellant-insurer has not denied the factum of insurance. Thus it is admitted that the vehicle was insured at the relevant point of time. The Tribunal has strictly followed the procedure contained in sections 140 and 141 of the Act read with the Rules (supra)."

5. The apex Court in a latest judgment reported in **2012 AIR SCW,** page 10, titled **National Insurance Company Ltd. vs Sinitha and Ors**, has discussed the mandate of Sections 140 and 163-A of the Act and principles of "no fault liability" and held that claimant is not to establish fault or wrongful act, negligent act or fault of the offending vehicle.

6. I have gone through the impugned award, which is speaking one, needs no interference.

7. Having said so, no interference is required. The appeals are dismissed. Send down the records.

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

Oriental Insurance Company. ...Appellant

Vs.

Lekh Raj and Ors. ...Respondents**.**

FAO No.58 of 2007
Reserved on: 12.9.2014
Pronounced on: 19.09.2014.

Motor Vehicle Act,1988- Section 166- Deceased died in the motor vehicle accident- no evidence was led to prove that the driver did not have any valid driving licence or that the owner had committed any willful breach of terms and conditions of the insurance policy- no evidence was led to prove that the deceased was travelling as a gratuitous passenger- driver did not deny the averments that the deceased was employed as a labourer for loading or unloading luggage- held, that the Insurance Company is liable to indemnify the insured.
(Para- 9 and 10)

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Pushpinder Singh, Proxy Counsel, for respondents No.1 and 2.
Nemo for respondent No.3.
Mr.Naveen K. Bhardwaj, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Subject matter of this appeal is the award, dated 29th December, 2006, made by the Motor Accident Claims Tribunal, Chamba, (hereinafter referred to as the Tribunal), in Claim Petition No.71 of 2005, titled Lekh Raj and anr. Vs. Reena Thakur and others, whereby compensation to the tune of Rs.2,66,000/-, with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

2. The insurer, feeling aggrieved and dissatisfied, has questioned the impugned award on various grounds taken in the memo of appeal.

Brief facts:

3. Kiran Kumar became victim of the vehicular accident, which was caused by the driver, namely, Pankaj Kumar, while driving the vehicle bearing registration No.HP-48-1277, rashly and negligent on 15th October, 2005 at 8.30 a.m., at Mai-ka-Bag, Chamba Town, sustained injuries and succumbed to the same. The claimants, being the parents of the deceased, sought compensation to the tune of Rs.7.00 lacs as per the break-ups given in the claim petition. It was averred by the claimants that the deceased was a labourer, earning Rs.5,000/- per month by performing the job of loading and unloading, of 24 years of age at the time of accident and they, being dependant on the deceased, lost source of dependency.

4. The owner, the driver and the insurer resisted the Claim Petition by filing replies.

5. On the pleadings of the parties, the following issues were settled by the Tribunal:

1. Whether on 15.10.2005 at 8.30 AM at Mai-Ka-Bag, Chamba town, Shri Kiran Kumar son of petitioners had died in a vehicular mishap due to rash and negligent driving of respondent No.2 Pankaj Kumar as alleged? OPP

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

3. Whether the petition is not maintainable in the present form? OPR

4. Whether the petitioners have no cause of action to file the petition? OPR 1 & 2

5. Whether the petitioners are estopped from filing the petition due to the wrong acts of the deceased as alleged? OPR 1 & 2

6. Whether the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident as alleged? OPR 3

7. Whether the offending vehicle was being plied in contravention of the conditions of the Insurance Policy as alleged? OPR 3

8. Whether the deceased was a gratuitous passenger hence insurance company is not liable to pay any compensation as alleged? OPR 3

9. Relief.

6. In order to prove their case, the claimants examined three witnesses, the driver and the owner examined one witness, while the insurer led no evidence.

7. The Tribunal after scanning the evidence held that the claimants have proved, by leading oral as well as documentary evidence, that the driver was driving the offending vehicle rashly and negligently and caused the accident, in which deceased Kiran Kumar sustained injuries and succumbed to the same. Thus, the findings returned on issue No.1 are upheld.

8. To prove issues No.3, 4 and 5, the respondents have led no evidence. Thus, the Tribunal has rightly decided these issues against the respondents and accordingly, the findings returned by the Tribunal on these issues are upheld.

9. Onus to prove issues No.6 and 7 was on the insurer. The insurer has not led any evidence to prove that the driver was not having a valid driving licence. The insurer has also failed to lead any evidence to the effect that the owner had committed any willful breach and the vehicle was being driven in violation of the route permit or the terms contained in the insurance policy. Thus, the Tribunal has rightly decided Issues No.6 and 7 against the insurer.

10. As far as issue No.8 is concerned, the insurer had to prove that the deceased was traveling in the offending vehicle as gratuitous passenger, had not led any evidence to that effect. The claimants have specifically averred in paragraphs 10 and 24 of the Claim Petition that the deceased was engaged by the owner and the driver as a labourer for loading and unloading the goods. The driver and the owner have not denied the said factum. The insurer has not denied the averments contained in paragraph 24 of the Claim Petition specifically. However, in reply to the averments contained in paragraph 10, it was pleaded that the deceased was traveling in the offending vehicle as gratuitous passenger, but failed to prove the same.

11. The insurer in the memo of appeal has taken a U-turn by pleading that the deceased was himself responsible for causing the accident, was a tortfeasor and the accident was the outcome of his misadventure in trying the hands on the wheels without any knowledge of driving a vehicle, which plea was never taken by the insurer before the Tribunal. Thus, the ground taken in the appeal is an afterthought. Therefore, the findings returned by the Tribunal are liable to be upheld and the same are upheld.

12. So far as issue No.2 is concerned, the Tribunal, after making guess work, assessed the monthly income of the deceased at Rs.2,000/- and after deducting 50% towards his personal expenses, held that the claimants lost source of dependency to the tune of Rs.1,000/- per month. The Tribunal has rightly made the assessment. Thus, the findings returned by the Tribunal are also upheld.

13. Having said so, the appeal merits to be dismissed, the same is dismissed accordingly and the impugned award is upheld. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award.

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

Oriental Insurance Company .....Appellant
Vs.
Smt. Veena Devi & others ...Respondents

FAO (MVA) No. 273 of 2011 a/w Ors.
Reserved on : 12.09.2014
Decided on : 19.09.2014

Motor Vehicle Act, 1988- Sections 149 and 166- Insurance Company pleading that Tempo Trax was not a passenger vehicle but it was a private vehicle and it did not cover the risk to the passengers- the claimants pleaded that they were travelling in the vehicle as passengers - route permit showed that the vehicle was not a passenger vehicle and it had no permission to carry the passengers- Insurance policy also discloses that vehicle was meant for private use and not for carrying the passengers-held, that the insured had committed breach of terms and conditions of the policy and the insurance company is not liable to pay the amount.

(Para- 15 to 17)

Cases referred:

New India Assurance Co. Ltd., Vs. Annakutty and others, reported in AIR 1993 Kerala 299

Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy & others, reported in AIR 2003 SC 1009

M/s National Insurance Co. Ltd. Vs. Baljit Kaur and others, reported in AIR 2004 SC 1340

Manager, National Insurance Co. Ltd. Vs. Saju P. Paul and another reported in 2013 AIR SCW 609

National Insurance Co. Ltd. Vs. Swaroopa & others, reported in 2006 AIR SCW 3227

New India Assurance Co. Ltd. Vs. Vedwati & others reported in 2007, AIR SCW 1505

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

Sarla Verma (Smt.) and others Vs. Delhi Transport Corporation and another, reported in AIR 2009 SC 3104

Reshma Kumari & others Vs. Madan Mohan and another, reported in 2013 AIR (SCW) 3120

For the appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For the respondents: Mr. Rajiv Rai, Advocate, for respondent No. 1. Mr. Jagdish Thakur, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

All these appeals are outcome of a motor vehicular accident, involving vehicle-Tempo Trax bearing registration No.HP-33/T-9832, thus I deem it proper to club all these appeals and determine by this common judgment.

Brief facts:

2. Smt. Veena Devi and Smt. Sita Devi, while traveling in Tempo Trax, bearing registration No. HP-33/T-9832, as passengers, met with an accident, which was caused by driver, namely, Shri Sanjeev Kumar, while driving the said vehicle, rashly and negligently, on 22nd October, 2006, at 7.30 a.m., at Tihri in Kot-Dhar, Police Station Talai, District Bilaspur, H.P.; sustained injuries; shifted to Community Health Centre, Barsar, District Hamirpur, H.P.; referred to Indira Gandhi Medical College and Associated Hospital, Shimla and remained admitted there from 22nd October, 2006 to 18th November, 2006.

3. Smt. Veena Devi filed MAC Petition No. 68 of 2007, titled as Veena Devi Vs**.** Shri Rajesh Kumar & others, for grant of compensation to the tune of Rs.5,00,000/, before the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, hereinafter referred to as "the Tribunal", as per the break-ups given in the claim petition. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs.4,91,500/- with interest at the rate of 7.5% per annum in favour of the claimant and against the owner-insured, namely, Rajesh Kumar and the driver, however, the insurer-Oriental Insurance Company was directed to satisfy the awarded amount, at the first instance, with right of recovery, hereinafter referred to as "impugned award-I".

4. Smt. Sita Devi filed MAC Petition No. 69 of 2007 before the Tribunal for grant of compensation to the tune of Rs.5,00,000/-; the Tribunal awarded compensation to the tune of Rs.3,25,670/- with interest at the rate of 7.5% per annum in favour of the claimant and saddled the owner and driver with liability, however, the insurer-Oriental Insurance Company was directed to satisfy the awarded amount, at the first instance, with right of recovery, hereinafter referred to as "impugned award-II".

5. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

6. The Tribunal, on the pleadings of the parties, framed common issues in both the petitions. It is apt to reproduce the issues framed in MAC Petition No. 68 of 2007:

> *1. Whether the petitioner had sustained injuries on account of rash and negligent driving of Jeep (Tempo Trax No. HP-33-T-9832 being driven by Shri Sanjiv Kumar, respondent no. 2 on 22.10.2006 at about 7.30 p.m., near Tihri in Kot Dhar, District Bilaspur, H.P.? ….OPP*
>
> *2. If issue No. 1 supra is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? ….OPP*
>
> *3. Whether the vehicle in question was being driven by an unauthorized person who had no valid and effective driving licence to drive such class of vehicle, at the relevant time? …OPR-3*
>
> *4. Whether the petitioner was traveling in the offending vehicle as gratuitous passenger at the relevant time which is in contravention of the terms and conditions of the insurance policy? …OPR-3*
>
> *5. Whether the offending vehicle was driven without proper documents, at the relevant time? …OPR-3*
>
> *6. Relief."*

7. The insurer-Oriental Insurance Company has questioned both the impugned awards, by the medium of FAOs No. 273 of 2011 and 274 of 2011, on the ground that the Tribunal has fallen in error in saddling it with liability as the owner-insured has committed willful breach of the terms and conditions of the Insurance Policy read with the mandate of Section 149 of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act".

8. The owner-insured and the driver have also questioned both the impugned awards, by the medium of FAOs No. 302 of 2011 and 307 of 2011, on the ground that the insurer-Insurance Company was required to prove the contents of the Insurance Policy and to plead and prove how the owner-insured has committed willful breach, which it failed to do so.

9. Claimant Veena Devi has not questioned impugned award-I, on any count, thus it has attained finality so far as it relates to her.

10. In FAO No. 357 of 2011, claimant Sita Devi has questioned impugned award-II, on the ground of adequacy of compensation.

Issue No. 1.

11. The factum of rash and negligent driving by the driver, occurrence of the accident and sustaining injuries by the injured-

claimants are not in dispute. Thus, the findings returned by the Tribunal on this issue in both the petitions are upheld.

Issue No. 3.

12. The insurer has not led any evidence to prove that the offending vehicle was being driven by a person who was not authorized to do so. There is ample evidence on record to the effect that the driver was having a valid and effective driving licence to drive the offending vehicle. Thus, the findings returned by the Tribunal on this issue in both the petitions are also upheld.

Issue No. 5.

13. The insurer has also failed to prove that the offending vehicle was being driven without proper documents. Thus, the findings returned by the Tribunal on this issue in both the petitions are also upheld.

Issues No. 2 & 4.

14. Now coming to issues No. 2 & 4, which are inter-linked, the insurer-Insurance Company has specifically pleaded in its reply that Tempo Trax was not a passenger vehicle, but it was a private vehicle and was insured as per the terms and conditions contained in the Route Permit, Ext. RW-2/B read with the Act. The Insurance Policy is not covering the risk of the passengers.

15. The claimants in the claim petitions have pleaded that they were traveling in the offending vehicle as passengers. While going though the Route Permit, Ext. RW-2/B and the other documents on the record, one comes to an inescapable conclusion that the offending vehicle was not a passenger vehicle and no permission was granted to carry passengers.

16. The learned Counsel for the owner-insured and the driver failed to indicate or prove that the offending vehicle was a passenger vehicle and was having insurance policy or route permit as passenger vehicle.

17. Copy of Insurance Policy, Ext. R-X is on the files, which do disclose that the vehicle in question was meant for private persons and not for the passengers.

18. The definition of word "passenger" is given in ***Black's Law Dictionary*** as under:-

> "In general, a person who gives compensation to another for transportation. Shapiro v. Bookspan, 155 Cal.App. 2d, 353, 318, P.2d 123, 126. The word passenger has however various meanings, depending upon the circumstances under which and the context in which the word is used; sometimes it is construed in a restricted legal sense as referring to one who is being carried by another for hire; on other occasions, the word is interpreted as meaning

any occupant of a vehicle other than the person operating it. American Mercury Ins. Co. v. Bifulco, 74 N.J. Super, 191, 181 A.2d, 20, 22.

The essential elements of "passenger" as opposed to "guest" under guest statute are that driver must receive some benefit sufficiently real, tangible, and substantial to serve as the inducing cause of the transportation so as to completely overshadow mere hospitality or friendship; it may be easier to find compensation where the trip has commercial or business flavor. Friedhoff v. Engberg, 82 S.D. 522, 149 N.W. 2d 759, 761, 762, 763.

A person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance, or at the point of departure of that means of conveyance."

19. In the ***New Oxford Dictionary,*** the word "passenger" is defined as under:

"A traveller on a public or private conveyance other than the driver, pilot or crew.

• A member of a team or group who does far less effective work than the other members."

20. In ***Webster"s Enclyclopedic Unabridged Dictionary,*** the definition of ward "passenger" is given as under:

"1.a person who is traveling in an automobile, bus, train, airplane, or other conveyance, esp. one who is not the driver, pilot, or the like.

2. a wayfarer, traveler."

21. The Kerala High Court in a case titled as **New India Assurance Co. Ltd., Vs. Annakutty and others,** reported in **AIR 1993 Kerala 299,** has defined the "word" passenger. It is apt to reproduce paras-13 & 14 of the judgment *(supra*) herein:-

"13. We are of the view that the import of the word 'passenger', occurring in S. 95(2) of the Motor Vehicles Act, has been unduly qualified or cut down and the wider meaning applicable to the said word in common parlance or found in the dictionaries has not been given effect to in the said decision. In the Concise Oxford Dictionary 1990 Edition at page 869, the meaning of the word 'passenger' is stated thus:

"a traveller in or on a public or private conveyance other than the driver, pilot, crew etc."

For the word 'traveller', the meaning is given thus, at page 1300:

"A person who travels or is traveling"

The meaning of the word 'travel' is given thus at page 1300:

"Go from one place to another, make a journey, esp. of some length or abroad."

It is a matter of common knowledge that all passenger vehicles carry persons even beyond the seating or standing capacity allowed by the Rules for the particular vehicle. Such persons do travel in the bus; they perform journey from place to place. Can this common import and understanding of the word be ignored, by giving an unduly restricted meaning to the word 'passenger' as a person who is provided with seating accommodation or whose travel is permitted by standing capacity, permitted for the vehicles under the Rules? In our considered view, the import of the word 'passenger' cannot be restricted by reference to the Motor Vehicles Rules, by which the seating accommodation is provided or standing in the vehicle is specifically permitted. The dictionary meaning is of wide import and we can look into the dictionary meaning of the term, in the absence of any definition in the Act for understanding the meaning to be given to a particular word Commissioner of Income-tax v. Benoy Kumar Sahas Roy, AIR 1957 SC 768 at 772 para 10. It is a salutary principle of statutory construction that in construting the words in a section, the first task is to give the words therein their plain and ordinary meaning and then to see whether the context or some principle of construction requires that some qualified meaning should be placed on those words. Gardiner v. Admiralty Commissioner, 1964 (2) All ER 93 at 97 (HL). The import of words cannot be cut down by arbitrary addition or retrenchment in language. With great respect to the learned Judge, who rendered the decision in Subramani's case (1990 (1) ACJ 37) and National Insurance Co.'s case 1990(2) ACJ 821, we are unable to hold that the word 'passenger' occurring in S. 95(2) of the Motor Vehicles Act, should be limited to the case of a person who travels in the vehicle either by remaining seated in the seating accommodation provided or by standing in vehicles where travel by standing is specially permitted. We are of the view that any person who performs the journey in the bus will be passenger. He will continue to be a passenger even at the time of alighting from the bus, if his physical contact with the bus still remains. We are of the view that the ordinary connotation of the word 'passenger' cannot be restricted or limited to only those persons who travel in the vehicle either by remaining seated in the seating accommodation provided or by standing in vehicles where

travel by standing is specially permitted. We concur with the view stated in Venkataswami Motor Service's case 1989 (1) ACJ 371 ; (1989 All LJ 868) para 20.

14. In Pandit Ram Saroop's case 1988 ACJ 500, as a learned single Judge of the Delhi High Court was faced with a different situation. There, a person boarded the bus at 'G' stop and the destination point was 'O'. The bus did not stop at the point 'O'. If it had stopped there, the person could have got down. What happened was, the bus went ahead without stopping at the point 'O" preventing the person from getting down at the point of destination. The bus went much ahead and when the person was trying to get down, the bus started and its rear wheels ran over him and killed him. The learned single Judge held that the character of the deceased as a passenger came to an end at the bus stop 'O', for which destination he had obtained the ticket. We are of the view that though this decision held that the deceased was not a passenger at the time of the accident, by a different reasoning, it cannot be said that the deceased was not performing a journey at the time when he was trying to get down from the bus and met with the accident. In the light of our reasoning that the word 'passenger' should be given the wide meaning so long as the person is performing the journey, with great respect to the learned Judge, we are unable to accept the decision in Pandit Ram Saroop's case 1988 ACJ 500 as laying down the correct law."

22. The claimants have admitted that they were traveling in the offending vehicle as passengers and not as labourers or owners of goods. The owner-insured has not denied the said fact.

23. The Apex Court in a case titled as **Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy & others,** reported in **AIR 2003 SC 1009** has held that if the passenger is traveling in the goods vehicle and the said vehicle meets with an accident, the insurer is not liable. It is apt to reproduce para-11 of the judgment (supra), herein:

"11. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor."

24. The same principle was laid down by the Apex Court in a case titled as **M/s National Insurance Co. Ltd. Vs. Baljit Kaur and others**, reported in **AIR 2004 SC 1340.** It is apt to reproduce paras 7 & 20 of the aforesaid judgment, herein:-

"7. In the case of New India Assurance Co. Ltd. v. Asha Rani (supra), it was held that the previous decision

in Satpal Singh case, was incorrectly rendered, and that the words "any person" as used in S. 147 of the Motor Vehicles Act, 1988, would not include passengers in the goods vehicle, but would rather be confined to the legislative intent to provide for third party risk. The question in the subsequent judgment in Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy (supra), involved, as in the present case, the liability of the Insurance Company in the event of death caused to a gratuitous passenger travelling in a goods vehicle. The Court held that the Tribunal and the High Court were not justified in placing reliance upon Satpal Singh case (supra), in view of its reversal by Asha Rani (supra), and that, accordingly, the insurer would not be liable to pay compensation to the family of the victim who was travelling in a goods vehicle.

8. .....

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19. .....

20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in S. 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

25. The Apex Court in a case titled as **Manager, National Insurance Co. Ltd. Vs. Saju P. Paul and another** reported in **2013 AIR SCW 609** in para 16 has held as under:-

"In the present case, Section 147 as originally existed in 1988 Act is applicable and, accordingly, the judgment of this Court in Asha Rani (supra) is fully attracted. The High

> Court was clearly in error in reviewing its judgment and order delivered on 09.11.2010 in review petition filed by the claimant by applying Section 147(1) (b)(i). The High Court committed grave error in holding that Section 147(1) (b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person. The High Court also erred in holding that the claimant was travelling in the vehicle in the course of his employment since he was a spare driver in the vehicle although he was not driving the vehicle at the relevant time but he was directed to go to the worksite by his employer. The High Court erroneously assumed that the claimant died in the course of employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle that met with an accident but he was employed as a driver in another vehicle owned by M/s. P.L. Construction Company. The insured (owner of the vehicle) got insurance cover in respect of the subject goods vehicle for driver and cleaner only and not for any other employee. There is no insurance cover for the spare driver in the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose 'spare driver' was not covered under the policy."

26. The Apex Court in a case titled as **National Insurance Co. Ltd. Vs. Swaroopa & others,** reported in **2006 AIR SCW 3227** has also laid down the same principle. It is apt to reproduce para 4 of the judgment *(supra)* herein:

> "Respondent Nos. 1 to 6 are the legal representatives of the deceased who died in an accident on 28th January, 1996 leading to the filing of a claim petition on 9th July, 1996 under the provisions of the Motor Vehicles Act, 1988. By order dated 20th August, 1998, the Motor Accident Claims Tribunal (for short, "the Tribunal") granted compensation both against the appellant-Insurance Company and the owner of the vehicle, Respondent No. 7 herein. The appeal filed in the High Court by the appellant-Insurance Company disputing its liability to pay to the legal representatives of the deceased was dismissed on 27th August, 2002, in view of the law then prevailing as a result of the decision of this Court in New India Assurance Company v. Satpal Singh (2000 (1) SCC 237). The said decision has now been overruled by this Court in New India Assurance Company Limited v. Asha Rani & Ors (2003 (2) SCC 223) wherein it has been held that an Insurance Company will not be liable to pay compensation in respect of a gratuitous passenger being carried in a goods vehicle if the vehicle meets with an accident. In this view, we set

> aside the impugned judgment of the High Court affirming the order of the Tribunal. The claim petition against the appellant shall stand dismissed. We, however, clarify that the amount of compensation, if any, that may have been paid to Respondent Nos. 1 to 6 shall be recoverable by the Insurance Company from the owner of the vehicle, Respondent No. 7, herein and not from the legal representatives of the deceased."

27. In **New India Assurance Co. Ltd. Vs. Vedwati & others** reported in **2007, AIR SCW 1505**, the Apex Court in paras-14 & 15 has held as under:

> "14. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor.
>
> 15. Our view gets support from a recent decision of a three-Judge Bench of this Court in New India Assurance Company Limited v. Asha Rani and Ors. (2002 (8) Supreme 594] in which it has been held that Satpal Singh's case (supra) was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

28. Having glance of the aforesaid decisions, the claimants were traveling in the said vehicle as passengers, but route permit was not for carrying passengers. Thus, the Tribunal has rightly held that the owner-insured has committed willful breach.

29. Learned Counsel for the owner-insured and the driver argued that it was for the insurer to plead and prove the terms and conditions of the insurance policy by leading evidence. The argument of the learned Counsel is devoid of any force because it is the admitted case of the parties that the offending vehicle was Jeep (Tempo Trax), was not a passenger vehicle and was being driven in breach of the terms and conditions of the Insurance Policy. The owner-insured cannot plead and say that the insurance policy has not been proved.

30. It is a beaten law of land that the procedural rules are not applicable strictly, as held by the Apex Court in a case titled as **Dulcina Fernandes and others Vs. Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646.**

31. Having said so, the appeals filed by the owner and the driver, i.e. FAO No. 302/2011 and 307 of 2011, are dismissed.

32. The insurer has to satisfy the impugned awards for the reason that the claimants are the third party and the Tribunal has

rightly directed the insurer to satisfy the impugned awards with right of recovery.

33. Viewed thus, the appeals filed by the Insurance Company, i.e. FAOs No. 273 of 2011 and 274 of 2011 are also dismissed.

34. I have gone through the impugned awards. The Tribunal after taking into consideration the claim petitions, pleadings and the evidence on the files, has rightly assessed the compensation, cannot be said to be excessive, in any way, but is just and appropriate. The Tribunal has given the details how the claimants are entitled to awarded amount.

35. It is apt to reproduce para-20 of the impugned award-II herein:-

> "20. Hence, as per the details given below, the petitioner is entitled for compensation as under:
>
> | | | |
> |---|---|---|
> | i) | Future loss of income | Rs.2,26,800/- |
> | ii) | Attendant Charges | Rs.10,000/- |
> | iii) | Treatment charges | Rs.30,670/- |
> | iv) | Transportation charges | Rs.18,200/- |
> | v) | Pain and sufferings | Rs.40,000/- |
> | | Total: | Rs.3,25,670/- |

36. The assessment made by the Tribunal is as per the mandate of law laid down by the Apex Court in case titled as **Sarla Verma (Smt.) and others Vs**. **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in case titled as **Reshma Kumari & others Vs. Madan Mohan and another,** reported in **2013 AIR (SCW) 3120**.

37. Having said so, the appeal filed by the claimant, i.e. FAO No. 357 of 2011 is also dismissed.

38. All these appeals merit to be dismissed, are dismissed. The impugned awards are upheld.

39. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned awards.

40. Send down the records after placing copy of the judgment on the record.

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

Sh. Rajeev Chauhan .....Appellant
Vs.
Shri Hari Chand Bramta & others ...Respondents

FAO (MVA) No. 343 of 2008 a/w Anr.
Decided on : 19.09.2014

Motor Vehicle Act, 1988- Section 166- Claimant practicing as an Advocate -he was travelling in a vehicle in which sand was being carried for the construction of his house- claimant had not pleaded in the claim petition that he had hired the vehicle for carrying his sand- Insured had also not pleaded that the vehicle was hired by claimant for transporting the sand- held, that the claimant was travelling in the vehicle as a gratuitous passenger- Insurance company is liable to satisfy the award with the right of recovery. (Para- 23 and 25)

Cases referred:

New India Assurance Co. Ltd., Vs. Annakutty and others, reported in AIR 1993 Kerala 299

Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy & others, reported in AIR 2003 SC 1009

M/s National Insurance Co. Ltd. Vs. Baljit Kaur and others, reported in AIR 2004 SC 1340

Manager, National Insurance Co. Ltd. v. Saju P. Paul and another reported in 2013 AIR SCW 609

National Insurance Co. Ltd. Vs. Swaroopa & others, reported in 2006 AIR SCW 3227

New India Assurance Co. Ltd. Vs. Vedwati & others reported in 2007, AIR SCW 1505

For the appellant : Mr. Peeyush Verma, Advocate.
For the respondents: Mr. V.S. Rathore, Advocate, for respondent No. 1.
Respondent No. 2 deleted.
Mr. Suneet Goel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice(oral)

Both these appeals are outcome of a common award, dated 15.03.2008, made by the Motor Accident Claims Tribunal, Shimla (hereinafter referred to as "the Tribunal") in MAC Petition No. 36-S/2 of 2005, titled *Shri Hari Chand Bramta* versus *Shri Rajeev Chauhan &*

others, whereby and whereunder compensation to the tune of Rs.2,69,676/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant and against the insurer-National Insurance Company Limited, with right of recovery from the driver and the insured-owner, hereinafter referred to as "impugned award".

2. The owner-insured has questioned the impugned award by the medium of FAO No. 343 of 2008, on the ground that the Tribunal has fallen in error in saddling him with liability.

3. By the medium of FAO No. 412 of 2008, the insurer-Insurance Company has questioned the impugned award on the ground that the Tribunal has fallen in error in asking it to satisfy the impugned award.

4. The claimant has not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to him.

5. Thus, the only question for determination in these appeals is- whether the Tribunal has rightly directed the insurer-Insurance Company to satisfy the impugned award, at the first instance, with right of recovery.

Brief facts:

6. Claimant Shri Hari Chand Bramta, who is practicing as an Advocate, has filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.8,00,000/-, as per the breaks-up given in the claim petition. It is pleaded in the claim petition that on 27.04.2004, he was traveling in vehicle-Truck bearing registration No. HP-07-5357; was driven by the driver, namely, Sant Ram, rashly and negligently; was carrying sand for construction of his house; met with an accident, at about 1.30 a.m., at Dharkoti on Kuddu-Chhajpur Road, Tehsil Jubbal, District Shimla, sustained injuries; shifted to Civil Hospital Rohroo; referred to Indira Gandhi Medical College, Shimla and remained admitted there from 27.04.2004 to 11.06.2004.

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

8. The Tribunal, on the pleadings of the parties, framed following issues on 17.05.2006:

> 1. Whether the petitioner while traveling in a truck No. HP-07-5357 on 27.4.2004 suffered injuries when truck met with an accident due to rash and negligent driving by respondent No. 2, as alleged? ….OPP
>
> 2. If issue No. 1 is proved, whether petitioner is entitled for compensation, if so, what amount and from whom? ….OPP

3. Whether the petition is not maintainable? …OPR

4. Whether the driver respondent No. 2 at the time of accident was not holding effective and valid driving licence, as alleged? …OPR

5. Whether the vehicle was being plied in violation of statutory documents, as alleged? …OPR-3

6. Whether the petition is collusive between respondents No. 1 & 2? …OPR 1 & 2.

7. Whether the petitioner was a gratuitous passenger in a goods carrier, as alleged?….OPR-3

8. Relief."

9. The claimant examined ASI Prem Singh (PW-2), Dr. Kamaljit Singh (PW-3), Shri Amar Singh (PW-4) and Shri Rajinder (PW-5) and Shri Sant Ram (PW-6). Claimant Shri Hari Chand Bramta also appeared in the witness box as PW-1. He placed on record copy of F.I.R. (Ext. PW-1/A), bills of medicines (Ext. PW-1/1 to PW-1/136), prescription slips, (Ext. PW-1/B to PW-1/D), photocopies of treatment (Ext. PW-3/1 to PW-3/39), discharge slip, (Mark-A), and prescription slips (Mark-B to M). The owner also appeared in the witness box as RW-1/1. The insurer has examined Shri S.S. Jasrota as RW-3/1, in support of its defence. Respondents also placed on record copy of R.C. (Ext. RW-1/A), insurance cover note (Ext. RW-1/B), copy of driving licence (Ext. RW-1/C), letters of Insurance Company (Ext. PW-1/D to Ext. PW-2/E), receipt of sand, (Ext. RX), letter dated 13th July, 2004 (Ext. RY) and copy of Insurance Policy (Ext. RW-3/1-A).

Issue No. 1.

10. The Tribunal, after examining the pleadings and scanning the evidence, held that driver, namely, Sant Ram, has driven the offending vehicle, rashly and negligently, on the fateful day; the claimant who was traveling in the said truck, sustained injuries. The said issue is not in dispute. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issues No. 3 & 4

11. Onus to prove these issues was upon the owner-insured, driver and the insured, which they failed to do so. The findings returned by the Tribunal on these issues are also not in dispute. Accordingly, the findings returned by the Tribunal on these issues are upheld.

Issues No. 2, 5, to 7.

12. Now coming to these issues, which are inter-linked, the claimant in the claim petition has specifically pleaded that he is practicing as an Advocate; was traveling in the offending vehicle in which

sand was being carried for construction of his house. In para-10, he has specifically pleaded that he had boarded the offending vehicle for his native place Sansog at Kuddu, Tehsil and District Shimla. The claimant has not pleaded in the claim petition that he had hired the said vehicle for carrying sand. The insurer-Insurance Company has specifically pleaded in its reply that the claimant was travelling in the offending truck as a gratuitous passenger and the risk was not covered. The insured-owner has not pleaded in his reply that the vehicle was hired by the claimant and met with the accident.

13. In terms of the Insurance Policy on the file, Ext. RW-3/1-A, the risk of passenger is not covered.

14. The definition of word "passenger" is given in ***Black's Law Dictionary*** as under:-

> "In general, a person who gives compensation to another for transportation. Shapiro v. Bookspan, 155 Cal.App. 2d, 353, 318, P.2d 123, 126. The word passenger has however various meanings, depending upon the circumstances under which and the context in which the word is used; sometimes it is construed in a restricted legal sense as referring to one who is being carried by another for hire; on other occasions, the word is interpreted as meaning any occupant of a vehicle other than the person operating it. American Mercury Ins. Co. v. Bifulco, 74 N.J. Super, 191, 181 A.2d, 20, 22.
>
> The essential elements of "passenger" as opposed to "guest" under guest statute are that driver must receive some benefit sufficiently real, tangible, and substantial to serve as the inducing cause of the transportation so as to completely overshadow mere hospitality or friendship; it may be easier to find compensation where the trip has commercial or business flavor. Friedhoff v. Engberg, 82 S.D. 522, 149 N.W. 2d 759, 761, 762, 763.
>
> A person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance, or at the point of departure of that means of conveyance."

15. In the ***New Oxford Dictionary,*** the word "passenger" is defined as under:

> "A traveller on a public or private conveyance other than the driver, pilot or crew.
>
> • A member of a team or group who does far less effective work than the other members."

16. In ***Webster"s Enclyclopedic Unabridged Dictionary,*** the definition of ward "passenger" is given as under:

"1.a person who is traveling in an automobile, bus, train, airplane, or other conveyance, esp. one who is not the driver, pilot, or the like.

2. a wayfarer, traveler."

17. The Kerala High Court in a case titled as **New India Assurance Co. Ltd., Vs. Annakutty and others,** reported in **AIR 1993 Kerala 299,** has defined the "word" passenger. It is apt to reproduce paras-13 & 14 of the judgment *(supra*) herein:-

"13. We are of the view that the import of the word 'passenger', occurring in S. 95(2) of the Motor Vehicles Act, has been unduly qualified or cut down and the wider meaning applicable to the said word in common parlance or found in the dictionaries has not been given effect to in the said decision. In the Concise Oxford Dictionary 1990 Edition at page 869, the meaning of the word 'passenger' is stated thus:

"a traveller in or on a public or private conveyance other than the driver, pilot, crew etc."

For the word 'traveller', the meaning is given thus, at page 1300:

"A person who travels or is traveling"

The meaning of the word 'travel' is given thus at page 1300:

"Go from one place to another, make a journey, esp. of some length or abroad."

It is a matter of common knowledge that all passenger vehicles carry persons even beyond the seating or standing capacity allowed by the Rules for the particular vehicle. Such persons do travel in the bus; they perform journey from place to place. Can this common import and understanding of the word be ignored, by giving an unduly restricted meaning to the word 'passenger' as a person who is provided with seating accommodation or whose travel is permitted by standing capacity, permitted for the vehicles under the Rules? In our considered view, the import of the word 'passenger' cannot be restricted by reference to the Motor Vehicles Rules, by which the seating accommodation is provided or standing in the vehicle is specifically permitted. The dictionary meaning is of wide import and we can look into the dictionary meaning of the term, in the absence of any definition in the Act for understanding the meaning to be given to a particular word Commissioner of Income-tax v. Benoy Kumar Sahas Roy, AIR 1957 SC 768 at 772 para 10. It is a salutary principle of statutory construction that in construting the words in a section, the first task is to give the words therein their plain and

ordinary meaning and then to see whether the context or some principle of construction requires that some qualified meaning should be placed on those words. Gardiner v. Admiralty Commissioner, 1964 (2) All ER 93 at 97 (HL). The import of words cannot be cut down by arbitrary addition or retrenchment in language. With great respect to the learned Judge, who rendered the decision in Subramani's case (1990 (1) ACJ 37) and National Insurance Co.'s case 1990(2) ACJ 821, we are unable to hold that the word 'passenger' occurring in S. 95(2) of the Motor Vehicles Act, should be limited to the case of a person who travels in the vehicle either by remaining seated in the seating accommodation provided or by standing in vehicles where travel by standing is specially permitted. We are of the view that any person who performs the journey in the bus will be passenger. He will continue to be a passenger even at the time of alighting from the bus, if his physical contact with the bus still remains. We are of the view that the ordinary connotation of the word 'passenger' cannot be restricted or limited to only those persons who travel in the vehicle either by remaining seated in the seating accommodation provided or by standing in vehicles where travel by standing is specially permitted. We concur with the view stated in Venkataswami Motor Service's case 1989 (1) ACJ 371 ; (1989 All LJ 868) para 20.

14. In Pandit Ram Saroop's case 1988 ACJ 500, as a learned single Judge of the Delhi High Court was faced with a different situation. There, a person boarded the bus at 'G' stop and the destination point was 'O'. The bus did not stop at the point 'O'. If it had stopped there, the person could have got down. What happened was, the bus went ahead without stopping at the point 'O" preventing the person from getting down at the point of destination. The bus went much ahead and when the person was trying to get down, the bus started and its rear wheels ran over him and killed him. The learned single Judge held that the character of the deceased as a passenger came to an end at the bus stop 'O', for which destination he had obtained the ticket. We are of the view that though this decision held that the deceased was not a passenger at the time of the accident, by a different reasoning, it cannot be said that the deceased was not performing a journey at the time when he was trying to get down from the bus and met with the accident. In the light of our reasoning that the word 'passenger' should be given the wide meaning so long as the person is performing the journey, with great respect to the learned Judge, we are unable to accept the decision in Pandit Ram Saroop's case 1988 ACJ 500 as laying down the correct law."

18. The Apex Court in a case titled as **Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy & others,** reported in **AIR 2003 SC 1009** has held that if the passenger is traveling in the goods vehicle and the said vehicle meets with an accident, the insurer is not liable. It is apt to reproduce para-11 of the judgment (supra), herein:

> "11. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor."

19. The same principle was laid down by the Apex Court in a case titled as **M/s National Insurance Co. Ltd. Vs. Baljit Kaur and others**, reported in **AIR 2004 SC 1340.** It is apt to reproduce paras 7 & 20 of the aforesaid judgment, herein:-

> "7. In the case of New India Assurance Co. Ltd. v. Asha Rani (supra), it was held that the previous decision in Satpal Singh case, was incorrectly rendered, and that the words "any person" as used in S. 147 of the Motor Vehicles Act, 1988, would not include passengers in the goods vehicle, but would rather be confined to the legislative intent to provide for third party risk. The question in the subsequent judgment in Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy (supra), involved, as in the present case, the liability of the Insurance Company in the event of death caused to a gratuitous passenger travelling in a goods vehicle. The Court held that the Tribunal and the High Court were not justified in placing reliance upon Satpal Singh case (supra), in view of its reversal by Asha Rani (supra), and that, accordingly, the insurer would not be liable to pay compensation to the family of the victim who was travelling in a goods vehicle.
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> 20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in S. 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

20. The Apex Court in a case titled as **Manager, National Insurance Co. Ltd. v. Saju P. Paul and another** reported in **2013 AIR SCW 609** in para 16 has held as under:-

> "In the present case, Section 147 as originally existed in 1988 Act is applicable and, accordingly, the judgment of this Court in Asha Rani (supra) is fully attracted. The High Court was clearly in error in reviewing its judgment and order delivered on 09.11.2010 in review petition filed by the claimant by applying Section 147(1) (b)(i). The High Court committed grave error in holding that Section 147(1) (b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person. The High Court also erred in holding that the claimant was travelling in the vehicle in the course of his employment since he was a spare driver in the vehicle although he was not driving the vehicle at the relevant time but he was directed to go to the worksite by his employer. The High Court erroneously assumed that the claimant died in the course of employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle that met with an accident but he was employed as a driver in another vehicle owned by M/s. P.L. Construction Company. The insured (owner of the vehicle) got insurance cover in respect of the subject goods vehicle for driver and cleaner only and not for any other employee. There is no insurance cover for the spare driver in the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose 'spare driver' was not covered under the policy."

21. The Apex Court in a case titled as **National Insurance Co. Ltd. Vs. Swaroopa & others,** reported in **2006 AIR SCW 3227** has also laid down the same principle. It is apt to reproduce para 4 of the judgment *(supra)* herein:

> "Respondent Nos. 1 to 6 are the legal representatives of the deceased who died in an accident on 28th January, 1996 leading to the filing of a claim petition on 9th July, 1996 under the provisions of the Motor Vehicles Act, 1988. By order dated 20th August, 1998, the Motor Accident Claims Tribunal (for short, "the Tribunal") granted compensation both against the appellant-Insurance Company and the owner of the vehicle, Respondent No. 7 herein. The appeal filed in the High Court by the appellant-Insurance Company disputing its liability to pay to the legal representatives of the deceased was dismissed on 27th August, 2002, in view of the law then prevailing as a result of the decision of this Court in New India Assurance Company v. Satpal Singh (2000 (1) SCC 237). The said decision has now been overruled by this Court in New India Assurance Company Limited v. Asha Rani & Ors (2003 (2) SCC 223) wherein it has been held that an Insurance Company will not be liable to pay compensation in respect of a gratuitous passenger being carried in a goods vehicle if the vehicle meets with an accident. In this view, we set aside the impugned judgment of the High Court affirming the order of the Tribunal. The claim petition against the appellant shall stand dismissed. We, however, clarify that the amount of compensation, if any, that may have been paid to Respondent Nos. 1 to 6 shall be recoverable by the Insurance Company from the owner of the vehicle, Respondent No. 7, herein and not from the legal representatives of the deceased."

22. In **New India Assurance Co. Ltd. Vs. Vedwati & others** reported in **2007, AIR SCW 1505**, the Apex Court in paras-14 & 15 has held as under:

> "14. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor.
>
> 15. Our view gets support from a recent decision of a three-Judge Bench of this Court in New India Assurance Company Limited v. Asha Rani and Ors. (2002 (8) Supreme 594] in which it has been held that Satpal Singh's case (supra) was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

23. Having glance of the aforesaid decisions, the claimant was travelling in the said vehicle as gratuitous passenger.

24. Viewed thus, the Tribunal has rightly held that the claimant was travelling in the offending vehicle as a gratuitous passenger.

25. Having said so, the findings returned by the Tribunal on these issues are also upheld and need no inference.

26. The insurer has to satisfy the impugned award, at the first instance, for the reason that the claimant is the third party and the Tribunal has rightly directed the insurer to satisfy the impugned award, with right of recovery.

27. Viewed thus, both the appeals merit to be dismissed, are dismissed as such. The impugned award is upheld.

28. Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

29. Send down the records after placing copy of the judgment on the record.

****

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

Bala Devi .....Petitioner

Vs.

Virender Singh ...Respondent

CMP(M) No. 11976 of 2014

Decided on: 9.9.2014

Limitation Act, 1963- Section 5- Trial Court dissolved the marriage of the parties by decree of divorce dated 09.01.2013- an appeal was preferred against the decree, which was delayed by 181 days- an application for condonation of delay was filed on the ground that petitioner was exploring the possibilities of an out of Court settlement leading to delay- held, that the party seeking condonation of the delay has to show sufficient cause for condonation of delay- day to day delay is required to be explained to succeed in an application for condonation of delay- petitioner had not disclosed any particulars as to when, where and in whose presence or with whose help she had made efforts to reconcile with her husband- no prayer was ever made regarding the settlement of the dispute before trial court- no efforts were made for conciliation during the pendency of the divorce petition before the Trial Court- hence, reason advanced by the petitioner that the delay occurred due to settlement efforts could not be accepted. (Para- 7 to 8)

Cases referred:

P.K. Ramachandran Vs. State of Kerala and others, AIR 1998, Supreme Court, 2276

Union of India Vs. Brij Lal and Prabhu Dayal and others, AIR 1999 Rajasthan, 216

Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 SC, 1353

For the petitioner: Mr. Ashwani Sharma, Advocate.

For the respondent: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj.K. Vashisth, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

Parties to the present lis are husband and wife. They solemnized marriage on 19th October, 2001 as per Hindu Rites and Ceremonies. One female child is born to them out of this wedlock. Respondent-husband was residing in Housing Board Colony at Dharamshala along with his mother and three unmarried sisters at the

time of marriage. Two brothers of the respondent-husband are residing separately. The family arranged the marriage with all enthusiasm, hopes and expectations for long and happy married life to both of them, however, the behavior of the petitioner allegedly became indifferent with the family and intolerable. She started behaving with her husband and other members of his family indifferently. She was working as Anganwari worker at village Lanj Tehsil and District Kangra and left matrimonial house for that place without any information to the respondent. She allegedly started quarreling with old mother of the respondent and also his sisters. She allegedly made complaints against her husband to the police and also the Women Cell. She leveled allegations qua his chastity and made the imputations that he had relations with his sisters and also called him womenizer having relations with other ladies. They both, therefore, started living separately since 2002 i.e. after about one year of marriage. The petitioner and her minor daughter have also been awarded maintenance allowance being paid to them by the respondent. The respondent has also made available her rented accommodation at Dharamshala where she is residing with her daughter.

2. The strained relations between the two led in filing petition under Section 13(1) (ia) of the Hindu Marriage Act for dissolution of marriage by a decree of divorce on the ground of cruelty. Learned District Judge, Kangra at Dharamshala after holding full trial has arrived at a conclusion that the petitioner has treated the respondent with cruelty. Consequently, dissolved the marriage by a decree of divorce dated 09.01.2013, under challenge in the main appeal.

3. The appeal is barred by limitation, as there is delay of 181 days in filing the same. This application has been filed for condonation of delay so occurred in filing the appeal. The only ground on which the delay has been sought to be condoned is that she was bonafidely exploring the possibilities of an outside Court settlement, keeping the decision of filing the appeal in abeyance and it is due to this reason, the delay has occurred in filing the appeal.

4. In reply, the stand taken by the respondent-husband is that after the institution of the litigation and after the decision of the divorce petition, the petitioner never made any endeavour to sort out the dispute amicably. It has, therefore, been submitted that the grounds she raised for condonation of delay are absolutely wrong, false and baseless and not sufficient to constitute “sufficient cause” required to be shown for condonation of delay.

5. Learned counsel representing the petitioner has argued that the decree of divorce passed against the petitioner is not only harsh and oppressive but also contrary to the evidence proved and as such, not legally sustainable. As regards, the delay occurred in filing the main appeal, according to learned counsel, the petitioner instead of filing the appeal against the decree made all possible efforts to settle

the dispute with the respondent amicably. However, when efforts so made by her failed, she decided to file the appeal.

6. Learned counsel for the respondent-husband while repelling the submissions so made has submitted that the application does not disclose any ground warranting the condonation of delay of an inordinate delay of 181 days, as according to him, the petitioner never made any effort to settle the dispute amicably after the decree of divorce passed by learned District Judge and even during the pendency of the petition also. On merits, it is submitted that there is no likelihood of the petitioner to succeed in the appeal as respondent has successfully pleaded and proved the cruel treatment she meted out to him.

7. The present is a case where there is delay of 181 days occurred in filing the appeal against the judgment and decree passed by learned District Judge, Kangra at Dharamshala on 09.01.2013. It is well settled that a party seeking the condonation of delay has to show sufficient cause leading to the delay so occurred. Additionally, in order to succeed in an application under Section 5 of the Limitation Act the day-to-day delay is required to be explained. The Hon'ble Apex Court in **P.K. Ramachandran** versus **State of Kerala and others, AIR 1998, Supreme Court, 2276** has held that the law of limitation may harshly affect a particular party, but it has to be applied with all rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. The High Court of Rajasthan in **Union of India** versus **Brij Lal and Prabhu Dayal and others, AIR 1999 Rajasthan, 216** has also held that a party seeking condonation of delay must place before Court facts constituting 'sufficient cause' failing which the delay cannot be condoned. The Hon'ble Apex Court in **Collector, Land Acquisition, Anantnag and another** versus **Mst. Katiji and others, AIR 1987 SC, 1353** has further held that the expression 'sufficient cause' implied by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner, which subserves the ends of justice.

8. Now adverting to the explanation as set forth in the application qua condonation of delay as occurred in filing the appeal in this case, according to the petitioner, after obtaining the certified copy of judgment and decree on 28th February, 2013, with a view to avoid multiplicity of litigation and also to live in peace and harmony, she made efforts to sort out the matter amicably, however, it is on account of indifferent attitude of her husband, amicable settlement could not be arrived at and that it is for this reason she failed to file the appeal within the period of limitation. As noticed, at the very out set the respondent-husband has denied any such endeavour to resolve the issue amicably ever made by the petitioner after the decision of the divorce petition and even during the pendency thereof also. The stand of the respondent-husband seems to be nearer to the factual position because the petitioner-wife has not disclosed any particulars as to when, where and in whose presence or with the help of whom she

made efforts to re-concile the controversy amicably with her husband, the respondent. Not only this but the trial Court record reveals that no prayer was ever made on her behalf qua amicable settlement of the dispute. As a matter of fact, conciliation was never tried between the parties during the pendency of the divorce petition in the trial Court. True it is that keeping in view the dispute matrimonial, this Court deemed it appropriate to try conciliation on the previous date, however, failed, as the respondent-husband had a grouse against the petitioner that since she started torturing him by leveling false allegations after about six months of the marriage and even complained the matter to the police as well as Women Cell and also the Women Commission, therefore, according to him there was no scope of re-union. The petitioner wife, no doubt, shown her readiness and willingness to join his company, but since the respondent-husband was not prepared to live in her company, the efforts to re-concile the matter so made failed. Any how, it is difficult to believe that the petitioner-wife was prevented from filing the appeal in this Court well within the period of limitation, as she was interested to re-concile the controversy amicably.

9. I have gone through the voluminous record including the evidence produced by the parties on both sides. As a matter of fact, present is a case contested hotly by the parties on both sides. The respondent-husband has examined nine witnesses including his two sisters, neighbours, taxi driver, milkman and also the employees of the bank. The petitioner-wife has also examined six witnesses including herself. The allegations qua chastity of the respondent-husband including his relations with his own sisters are substantiated from the statements of the witnesses the respondent-husband examined. Even his own sisters while in the witness box have also stated that respondent was leveling the allegations that their brother has illicit relations with them. The witnesses have also deposed in so many words qua the quarrelsome nature of the petitioner and her indifferent and intolerable behaviour with the respondent and other members of the family. The petitioner-wife, no doubt, while in the witness box has denied she having leveled allegations against the chastity of her husband or having leveled allegations qua his relations with his own sisters, however, the witnesses she examined neither could deny nor admit such allegations being leveled by the petitioner against her husband, as according to them, it is not known that she was doubting chastity of her husband and leveling allegations that he has illicit relations with his own sisters. Therefore, on appreciation of the evidence available on record, in my opinion, there is no likelihood of the petitioner to succeed in the main appeal even on merit also.

10. Having regard to the given facts and circumstances and also the material available on record, the petitioner has failed to explain the delay of 181 days as occurred in filing the appeal. On the other hand, on the expiry of the period of limitation prescribed for filing the appeal, a valuable right is accrued in favour of the respondent-husband, which cannot be taken away when the petitioner has failed to show sufficient cause warranting the condonation of

delay. The application is, therefore, dismissed. Consequently, the appeal and other application(s), if any, shall also stand dismissed being time barred.

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

Cr. MMO No. 80 of 2014 a/w
Cr.MMO No. 195 of 2014
Date of decision : 11.9.2014

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1. Cr.MMO No. 80 of 2014

Smt. Kesari Devi ...Petitioner/Complainant.
Vs.
Sh. Karam Singh Chandel ...Respondent.

For the petitioner : Mr. G.S. Rathour, Advocate.
For the respondent : Mr. Y.P.Sood, Advocate.

2. Cr.MMO No. 195 of 2014

Sh. Karam Singh Chandel ...Petitioner
Vs.
Smt. Kesari Devi ...Respondent.

Code of Civil Procedure, 1908 -Order 20 Rule 5- **Code of Criminal Procedure**, **1973**- Section 354 -Judgment- Magistrate awarding maintenance @ Rs. 1500/- per month which was reduced by Additional Sessions Judge to Rs.1200/- by saying that Rs.1500/- per month appeared to be on higher side and keeping in view the facts in totality Rs. 1200/- per month was an appropriate maintenance- held, that the Learned Additional Sessions Judge had not given any reason to reduce the maintenance- it is the duty of the judge to disclose the reasons to make it known that there was due application of mind. (Para-9)

Protection of Women from Domestic Violence Act, 2005- Section 12- Husband has a legal duty to maintain his wife and the children- he cannot shun from this duty-maintenance has to be awarded from the date of the application and it can be awarded from the date of the order only in exceptional cases where there is fault of the applicant. (Para-11)

Procedure- Non-mentioning of a provision of law does not invalidate an order. (Para-13)

Cases referred:

Ravi Yashwant Bhoir Vs. District Collector, Raigad and others (2012) 4 SCC 407

P.K. Palanisamy Vs. N. Arumugham and another (2009) 9 SCC 173

For the petitioner : Mr. Y. P. Sood, Advocate.
For the respondent : Mr. G.S. Rathour, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Cr.MMO No. 80 of 2014:

The complainant Kesari Devi has filed the present petition under Section 482 Cr.P.C. read with Section 227 of the Constitution of India praying therein for modification of the order passed by learned Additional Sessions Judge, Shimla whereby he not only reduced the maintenance in her favour from Rs.1500/- to Rs.1200/- per month and instead of granting the same from the date of application, granted the same from the date of the order i.e. 31.8.2013.

2. In an application under Section 12 of the Domestic Violence Act, the complainant alleged herself to be the legally wedded wife of the respondent and out of the said wedlock, two daughters were born. It was further averred that the complainant was an illiterate lady and a traditional background. It is further claimed that the respondent established illicit relations with one Smt. Vidya Devi, but the complainant was forced to remain silent and lateron the respondent got marriage to said Vidya Devi and thereafter started harassing and torturing the complainant to the extent that she was even made to sleep in the cow-shed. Due to such torture, the complainant was forced to leave the matrimonial house. The respondent is stated to be the retired Kanungo and receiving a pension of about Rs.15,000/- per month and was also having orchard and huge landed property out of which he was earning about Rs.25,00,000/- per year. While on the other hand, the complainant was old lady suffering from various ailments and accordingly prayed for interim maintenance of Rs.10,000/-.

3. The respondent contested the claim by denying the marriage and he also denied that the parties had cohabited as husband and wife upto October, 2010. His case was that in the year 1950 the complainant was brought at home by his parents in his absence according to the local custom prevailing in the area at the relevant time and no marriage ceremony took place between them. However, the birth of the two daughters out of cohabitation was not denied. It was alleged that the complainant used to go her parents house every week, after leaving the old parents of the respondent which resulted in the strained relationship between the parties which ultimately culminated into the dissolution of the relationship. Thereafter, the respondent had performed legal and valid marriage with Vidya Devi. Lastly, it was denied that the respondent was earning Rs.25,00,000/- per year and his

monthly pension is Rs.15,000/-. It was submitted that he is receiving a pension of about Rs.7,000/- per month and had no other source of income.

Cr.MMO No. 195 of 2014:

4. The husband, who is the respondent in the original complaint, has preferred this petition praying therein for setting aside the order passed by the learned Magistrate and the judgment passed by the learned Additional Sessions Judge (I), Shimla whereby the maintenance has been granted to the complainant.

5. It is contended that there was a customary divorce between the parties more than 54 years ago and thereafter the petitioner got remarried and therefore, the complainant was not entitled to any maintenance. It is further contended that no order for grant of maintenance could be passed as the respondent had never made any prayer for seeking such relief by filing an appropriate application as required under the law. It was contended that specific provisions under the Protection of Women from Domestic Violence Act, 2005 (for short 'Act') for seeking interim maintenance under Section 23 of the Act. Even the notice of the application for interim maintenance has to be served upon the opposite party as per the rules framed under the Act and since there was no application for grant of interim maintenance preferred by the respondent/complainant, therefore, the order awarding maintenance on this ground alone was required to be set-aside.

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

7. Once the respondent admits the birth of two daughters from the cohabitation between the parties, the only question required to be determined at this stage is regarding legality of the order passed by the learned Additional Sessions Judge in so far as it relates to grant of maintenance. A bare perusal of the order shows that there is virtually no reasoning as to on what basis the learned Additional Sessions Judge reduced the maintenance from Rs.1500/- to Rs.1200/- and at the same time modified the order of the learned Magistrate by directing the payment of maintenance from the date of order instead of from the date of filing of the application.

8. The learned Additional Sessions Judge vide judgment dated 31.8.2013 has modified the order of the learned trial Magistrate by making the following observations:

> *"13.....The applicant's case is that respondent is earning about* Rs.*25,00,000/- from all sources whereas case of the respondent is that he is earning* Rs.*7,000/- per month and he has to look after himself and his family members. In view of the facts and circumstances of the case,* Rs.*1500/- appears to be on the higher and keeping in view the facts in totality* Rs.*1200/- per month is appropriate maintenance as interim relief. Accordingly, the appeal is partly allowed and*

the impugned order dated 15.12.2011 is required to be modified to this extent and my findings on this point is partly in favour of the appellant.

Final Order:

In view of the forgoing discussion and the reasons mentioned, the appeal is partly allowed and the impugned order is modified to the extent that the applicant is entitled for the relief of interim maintenance of Rs.*1200/- from the date of order of this Court. Appeal stands disposed of. Memo of costs be prepared accordingly."*

9. I am afraid that the order passed by the learned Additional Sessions Judge can now withstand judicial scrutiny as it is devoid of any reasons. It is a settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice delivery system, to make it known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind.

10. In ***Ravi Yashwant Bhoir Vs. District Collector, Raigad and others (2012) 4 SCC 407*** wherein the importance of recording of reasons in administrative and judicial matters was set out in the following terms:

"***Recording of reasons:***

38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.

39. In Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors., (1991) 1 SCC 212, this Court has observed as under: (SCC p. 243, para 36)

"36....."Every State action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

40. In L.I.C. of India & Anr. v. Consumer Education and Research Centre & Ors., (1995) 5 SCC 482, this Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "Duty to act fairly" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. A similar view has been reiterated by this Court in Union of India v. M.L. Capoor & Ors., (1973) 2 SCC 836; and Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors., (1993) 2 SCC 279.

41. In State of West Bengal v. Atul Krishna Shaw & Anr., 1991 Supp (1) SC 414, this Court observed that: (SCC p.421, para 7)

"7. .....Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."

42. In S.N. Mukherjee v. Union of India, (1990) 4 SCC 594, it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

43. In Krishna Swami v. Union of India & Ors., (1992) 4 SCC 605, this Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed: (SCC p. 637, para 47)

"47.....Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21."

44. This Court while deciding the issue in Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors., (2010) 13 SCC 336, placing reliance on its various earlier judgments held as under (SCC pp. 345-46, para 27):

"27. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice.

*'3……."The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind.'**

The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

45. In Institute of Chartered Accountants of India v. L.K. Ratna & Ors., (1986) 4 SCC 537, this Court held that on charge of misconduct the authority holding the inquiry must record reasons for reaching its conclusion and record clear findings. The Court further held: (SCC p. 558, para 30)

"30……In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under S. 22 A of the Act. The exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilt of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a "finding". Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the

basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding".

46. The emphasis on recording reason is that if the decision reveals the `inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other words, a speaking out, the inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

11. Even on merits, I find no justifiable reasons whereby the amount of maintenance could have been reduced from Rs.1500/- to Rs.1200/- and that too from the date of the order i.e. 15.12.2011 instead of the date of application. The respondent admittedly is a retired Kanungo and it is not denied by him that he is receiving pension. Therefore, the orders of Rs.1500/- cannot in any case termed to be excessive that too only on the ground that the husband has to "look-after himself and his family members". The impugned order does not even spell out as to who are the other "family members". The husband otherwise cannot shun his liability of maintaining the complainant and two daughters who too are his family members. He not only owes a moral but a legal obligation to maintain them. There is no reason assigned as to why the maintenance has only been allowed from the date of the order. It is only in exceptional circumstances that an order of maintenance can be made from the date of the order that too where the delay or fault is attributable to the complainant. In all other cases, normally accepted practice is that the maintenance is required to be granted/awarded from the date of application.

12. Learned counsel for the respondent would then contend that since there was no separate application claiming maintenance, therefore, the maintenance could not have been granted to the complainant. I cannot agree with such submission. Admittedly, in the application under Section 12 of the Act preferred by the complainant, the complainant had specifically claimed interim maintenance. The mere fact that there were specific provisions contained in the Act and Rules with respect to grant of interim maintenance cannot be a ground for refusal to award interim maintenance especially once when the same is admittedly claimed in the main petition. Only on account of the fact that a separate application for grant of interim maintenance has not been preferred, in my view, cannot be a ground to hold the complainant to be not entitled to the grant of maintenance or hold that the order passed thereupon would be a nullity.

13. It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision of law does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor. It is further well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

14. The aforesaid position of law has been succinctly dealt with by the Hon'ble Supreme Court in ***P.K. Palanisamy vs. N. Arumugham and another (2009) 9 SCC 173*** wherein it has been held as under:

> "26. *A contention has been raised that the applications filed by the appellant herein having regard to the decisions of the Madras High Court could not have been entertained which were filed under Section 148 of the Code.*
>
> *27. Section 148 of the Code is a general provision and Section 149 thereof is special. The first application should have been filed in terms of Section 149 of the code. Once the court granted time for payment of deficit court fee within the period specified therefor, it would have been possible to extend the same by the court in exercise of its power under Section 148 of the Code. Only because a wrong provision was mentioned by the appellant, the same, in our opinion, by itself would not be a ground to hold that the application was not maintainable or that the order passed thereon would be a nullity.It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor.*
>
> *28. In Ram Sunder Ram v. Union of India & Ors. (2007) 13 SCC 255, it was held: (SCC pp. 260-61, para 19)*
>
> *"19.....It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act.*
>
> *'9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law [see N. Mani v. Sangeetha Theatre and Ors. (2004) 12 SCC 278] SCC p. 280, para 9).*

Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the Learned Counsel for the appellant."

29. In N. Mani v. Sangeetha Theatres & Ors. [(2004) 12 SCC 278], it is stated: (SCC p. 280, para 9)

"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

15. In view of foregoing discussion, I find merit in the petition preferred by the complainant being Cr.MMO No. 80 of 2014 and accordingly, the judgment passed by learned Additional Sessions Judge-I, Shimla in Criminal Appeal No. 28-S/10 of 2012 dated 31.8.2013 is set-aside and the order passed by the learned trial Magistrate dated 15.12.2011 is affirmed. Resultantly, Cr.MMO No. 195 of 2014 is dismissed.

16. Before parting, it may be observed that the observations made hereinabove, are solely for the purpose of adjudication of these petitions only and shall have no bearing on the merits of the main case. Both the petitions stand disposed of on above terms, so also the pending applications, if any.

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

State of Himachal Pradesh. ...Appellant.

Vs.

Mehboob Khan. ...Respondent

Criminal Appeal No. 763/2002

Reserved on: 11.9.2014

Decided on: 15.9.2014

NDPS Act, 1985- Section 50- the contraband was recovered from the bag and not from the person of the accused- held that in such case Section 50 was not applicable. (Para-12)

NDPS Act, 1985- Section 20- Accused found in possession of 2.350 Kgs. of charas- case of the prosecution is that the police party was present at

the spot in connection with investigation of a theft case, when the accused was apprehended at 8 A.M.- PW-1 deposed that the accused in theft case was apprehended at 4:00A.M and was sent to police Station before 7:00 A.M- held, that when the accused in a theft case was apprehended at 4:00 A.M and was sent to police station at 7:00 A.M- there was no justification for the police to remain at the spot and this casts a doubt in the genesis of the prosecution version- further, there are contradictions in the testimonies of the police officials- police had only associated the victim in the theft case- other independent witnesses were available but were not associated- the date was over-written- these circumstances, make the prosecution case doubtful. (Para-13)

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

For the Respondent: Mr. Praneet Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

This appeal is instituted against the judgment dated 11.10.2002 rendered by the Sessions Judge, Chamba Division, Chamba in Sessions Trial No. 8 of 2002 whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 30.10.2001 at about 8.00 A.M. at Mahu Nullah bridge within the jurisdiction of Police Station, Killar, accused was found in conscious possession of 2 kgs 350 grams of charas. 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. Statement of accused under Section 313 Cr.P.C. was recorded. He denied the case of the prosecution in entirety. Learned trial Court acquitted the accused. Hence, the present appeal.

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

5. Mr. Praneet Gupta, learned counsel for the accused, has supported the judgment rendered by the trial court.

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

7. PW-1 Devi Saran has deposed that police was present in Mahu Nullah in connection with investigation of theft case. He was also

present. One person was coming from Killar side. He was carrying a bag. On seeing the police party, he got perplexed. He was caught hold of by the police. Police asked the accused what was being carried in the bag. Accused told that there is nothing in the bag. Police searched the bag. Charas was found in the shape of ***Golas*** and ***Batties***. It weighed 2 kgs 350 grams. Two samples of 20 grams each were taken out separately for the purpose of analysis. Thereafter, remaining bulk Charas was sealed in the same manner in which it was recovered. The bag was also sealed alongwith two samples of Charas in separate parcels. He signed all the three parcels. Charas was taken into possession alongwith samples vide memo Ex.PA. The seal after use was given to him. The sample was retained by the police. In his cross-examination, he has deposed that the theft in his house took place on 29.10.2001 in the evening. His suitcase was stolen. It contained golden ornaments and also Rs. 5,000/-. The thief was caught by the police in the morning of 30.10.2001 at Mahu Nullah. He alongwith police remained standing in the Nullah during whole of the night. Name of thief was Roop Lal. When they saw accused coming from Killar side, thief Roop Lal was already with them. The stolen property was recovered. He reported the matter of theft on the night of 29.10.2001 at Police Station, Killar. He requested the police to lay Nakka at Mahu Nullah because that was the only path. They left Killar at about 9.00 P.M. on 29.10.2001 in police vehicle. Accused was found coming from Killar side at about 8.00 A.M. on 30.10.2001. Thief Roop Lal was apprehended by the police at about 4.00 A.M. on the intervening night of 29/30.10.2001. After 4.00 A.M., the police was completing the proceedings of theft case. They were standing on the road besides the bridge. Accused was seen by the police from a distance of about 50 feet. Accused was caught by Head Constable Tilak Singh, Suresh Kumar and Inspector. Thief Roop Lal was coming on foot when the accused was apprehended by the police. Roop Lal was sent to Police Station, Killar before 7.00 A.M. He was sent on foot to the Police Station. He did not know the names of police officials, who took Roop Lal to the Police Station. When the accused was apprehended, there were only four police officials. There was none else except these persons. Thereafter, the accused was taken to the Police Station. Weights and scale were brought by the two police officials. He has also deposed that village Thamoh is located at a distance of less than half KM from Mahu Nullah. Purthi Police Post was at a distance of about 30-35 KMs from Mahu Nullah. Police Station, Killar was located at a distance of 100 meters from the main road. Mahu Nullah was about 1 KM from Police Station, Killar.

8. PW-2 Tilak Singh has also deposed the manner in which accused was apprehended, search was carried and the sealing process was completed on the spot. He took rukka Ex.PE to the Deputy Superintendent of Police, on the basis of which formal FIR Ex.PF was registered. In his cross-examination, he has deposed that on 29.10.2001, accused under section 380 of the Indian Penal Code, was apprehended at about 6 – 6.30 A.M. Accused was seen by him at a distance of 100 meters from the spot. Accused started running away when he saw the

police party. At the time of apprehension of accused, four police officials were present at Mahu Nullah. The weights and scale were brought by Head Constable Suresh Kumar. Mahu Nullah was situated at a distance of 10 minutes walk from Bazaar Killar. Accused was searched by Inspector Bikram Singh.

9. PW-3 R.G. Negi has deposed that on the evening of 30.10.2001, Inspector Bikram Singh produced one bulk parcel of Charas and two sealed samples of charas sealed with seal 'M' for the purpose of resealing the same. He resealed all the three parcels after putting new clothes on the bulk and two sample parcels. Thereafter, he affixed his own seal having impression 'I' on the bulk sealed parcel and two samples parcels. He also retained the sample of seal used by him on a separate cloth. The seal after use was retained by him. In his cross-examination, he has deposed that Mahu Nullah was located on motorable road. It took about five minutes to reach Police Station, Killar from Mahu Nullah by light vehicle. The case property was produced before him at about 4.00 P.M.

10. PW-4 Kuldeep Kumar has deposed that in the evening of 30.10.2001, Inspector Bikram Singh deposited three sealed parcels resealed with seal having impression 'I' alongwith specimen of seal Ex.PB and Ex.PJ. He entered the same in the Malkhana register. On 14.11.2001, one sample was handed over to HHC Tilak Singh vide RC No. 30/2001 for depositing the same in C.T.L. Kandaghat alongwith specimen of seal and docket etc. Tilak Singh after depositing the sealed sample of charas and specimen seal impression returned the RC to him.

11. PW-5 Bikram Singh has deposed the manner in which accused was apprehended on 30.10.2001 at about 8.00 A.M. and search and sampling process was completed on the spot. He prepared rukka. He sent rukka Ex.PE to Police Station to the Supervisory officer. The parcels were resealed by the Deputy Superintendent of Police. In his cross-examination, he has admitted that accused of theft case Roop Lal was apprehended by him at 4.00 A.M. on 30.10.2001 and was produced before the C.J.M. Kullu on 1.11.2001 for transit remand. After obtaining transit remand, he was produced before the Judicial Magistrate, Chamba on 2.11.2001. Rukka was sent by him to Police Station, Killar through Tilak Singh at about 8.15 A.M. They remained at the spot from 29.10.2001 night to 30.10.2001 at about 4.00 P.M.

12. Learned trial court has acquitted the accused for non-compliance of section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Since the contraband was recovered from the bag and not from the person of accused section 50 was not applicable. However, we have gone through the entire evidence to see whether the prosecution has proved its case against the accused.

13. PW-1 Devi Saran has deposed that accused Roop Lal was apprehended at 4.00 A.M. on the intervening night of 29/30.10.2001. Accused Roop Lal was sent to Police Station, Killar before 7.00 A.M. Accused was apprehended at 8.00 A.M. on 30.10.2001. According to

PW-5 Bikram Singh, accused of theft case Roop Lal was apprehended at 4.00 A.M. on 30.10.2001. When accused Roop Lal was apprehended at 4.00 A.M. as per the version of PW-1 Devi Saran and PW-5 Bikram Singh, there was no occasion for the police to remain on the spot till 8.00 A.M. PW-1 Devi Saran, in his cross-examination, has deposed that weight and scales were brought by two police officials. PW-2 Tilak Singh has deposed that weights and scale were brought by Suresh Kumar. PW-7 Prem Lal has deposed that Suresh Kumar had come to his shop at 8.00 A.M. on 30th October. There is variance in the statements of PW-1 Devi Saran, PW-2 Tilak Singh and PW-7 Prem Lal. According to PW-1 Devi Saran two police officials had brought the weight and scales whereas PW-2 Tilak Singh and PW-7 Prem Lal have deposed that Suresh Kumar had gone to bring weights and scale. The fact of the matter is that constable Suresh Kumar has not been examined by the prosecution. PW-1 Devi Saran has lodged FIR under section 380 of the Indian Penal Code on 29.10.2001. The nakka was laid at the instance of PW-1 Devi Saran. He remained with the police throughout night. His valuables were stolen. He was rather victim. He cannot be termed as independent witness. The prosecution has not examined any independent witness other than PW-1 Devi Saran. According to PW-1 Devi Saran, village Thamoh was located at a distance of less than half kilometer from Mahu Nullah. As per statement of PW-2 Tilak Singh, Mahu Nullah was situated at a distance of 10 minutes walk from the main Bazaar. Vehicles used to ply on the road where the accused was allegedly apprehended. The weights and scale were brought from PW-7 Prem Lal on 30th October at 8.00 A.M. Thus, the Bazaar was opened and the independent witnesses were available and despite that independent witnesses were not associated during the investigation of the case. There is also over writing on Ex.PN. "**12.11.2014**" has been erased by applying white fluid and "**30.10.2001**" has been mentioned therein. According to PW-1 Devi Saran, they left Killar at about 9.00 P.M. on 29.10.2001 and thief Roop Lal was apprehended at about 4.00 A.M. on the intervening night of 29/30.10.2001. The police officials remained on the spot between 3.00 P.M. to 4.00 P.M. He was also present. Court question was put to him, to which he replied that the police officials and he did not take tea and eatables etc. between 8.00 A.M. to 4.00 P.M. except water, which was available on the spot. PW-5 Bikram Singh has also deposed that the accused of theft case was arrested at 4.00 A.M. and produced before the Chief Judicial Magistrate, Kullu on 1.11.2001. Accused was arrested at 3.00 P.M. on 30.10.2001. They remained on the spot from 29.10.2001 night to 30.10.2001 at about 4.00 P.M. It is not believable that the police party which has left for Killar on 29.10.2001 at 9.00 P.M. would remain on the spot till 30.10.2001 upto 4.00 P.M. It also casts doubt on the version of the prosecution story. The prosecution has failed to prove that contraband was recovered from the exclusive and conscious possession of the accused.

14. 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.

15. Consequently, the appeal is dismissed.

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

Sanjeev Kumar .....Petitioner

Vs.

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

Cr.MMO No. 190 of 2014

Decided on: 17.09.2014

H.P. Excise Act, 2011- Code of Criminal Procedure, 1973- Section 457- Police had recovered 175 boxes of IMFL during the search of the house of Sanjeev Kumar- no permit was produced by him- he contended that the liquor was being transported from 'Kehar Wine Agency L-1 to L-14 Didwin- the vehicle went out of order at Chowki Kankri- petitioner stored liquor in his house and approached the authorities to obtain fresh authorization regarding transportation of the liquor- held, that there was no evidence regarding the transportation of the liquor to its destination- petitioner could have made an alternative arrangement for transportation of the liquor, but he stored the liquor without any permit and authorization- however, liquor should not be allowed to be stored in the police Station- therefore, liquor was ordered to be sold by way of public auction and sale proceeds were directed to be deposited in the treasury. (Para- 4 to 6)

Case referred:

Sunderbhai Ambalal Desai Vs. State of Gujarat, (2002) 10 Supreme Court Cases 283

For the petitioner: Mr. N.K. Thakur, Senior Advocate with Mr. Rahul Verma, Advocate.

For the respondent: Mr. D.S. Nainta, Mr. Virender Verma and Mr. Rupinder Singh, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

Complaint is that both Courts below without appreciating the given facts and circumstances and material available on record in

its right perspective have refused to release 175 boxes of Indian made foreign liquor, seized by the State CID/Vigilance Unit, Bharari District Shimla during the course of search of the house of Sanjeev Kumar, petitioner herein, on 22nd March, 2014 at 5.30 p.m.

2. Admittedly, search of the house of accused-petitioner Sanjeev Kumar was conducted on an information received by the State CID/Vigilance Unit, Bharari District Shimla on 22nd March, 2014 at 5.30 p.m. 175 boxes of Indian made foreign liquor were recovered by the police from the house. On asking, the accused-petitioner failed to produce any permit and authorization to store the same in his house. The liquor so recovered, therefore, was seized and taken into possession. The same was entrusted to the Station House Officer, Hamipur for safe custody in the Malkhana.

3. The stand of the accused-petitioner to justify the storage of the recovered liquor in the house is that the same while being transported from 'Kehar Wine Agency L-1 to L-14 Didwin, the vehicle went out of order at place namely Chowki Kankri, a place none else but the own village of the accused-petitioner. Instead of making alternative arrangements there and then to transport the liquor to its destination, the accused-petitioner allegedly stored the same in his house situate there and himself allegedly approached the authorities in the Department of Excise and Taxation to obtain fresh authorization qua its transportation to the destination i.e. L-14 Didwin.

4. Both Courts below have rightly appreciated the material available on record qua the vehicle being went out of order. As a matter of fact, no plausible and reasonable explanation to arrive at a conclusion even prima-facie that it so happen while the liquor was being transported to its destination is produced by the accused-petitioner. As already pointed out, the accused-petitioner could have made an alternative arrangement there and then to transport the liquor in question to its destination, because the permit qua its transportation issued by the competent authority was valid up to 21st March, 2014 mid night. There is no explanation as to why such a course has not been resorted to. Surprisingly enough, the vehicle went out of order at village Chowki Kankari, the native place of the accused-petitioner. This also speaks in plenty qua the genuineness and authenticity of the plea so raised. Both Courts below, therefore, have not committed any illegality or irregularity by not releasing the liquor to the accused-petitioner as prima-facie the same was stored without any permit and authorization by him in his house.

5. Learned counsel representing the accused-petitioner has placed reliance on the judgment of the ***Apex Court in Sunderbhai Ambalal Desai versus State of Gujarat, (2002) 10 Supreme Court Cases 283***:

> "19. For articles such as seized liquor also, prompt action should be taken in disposing of it after preparing

necessary panchnama. If sample is required to be taken, sample may be kept properly after sending it to the Chemical Analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing."

6. As per ratio of this judgment the seized articles, particularly liquor in huge quantity should not be allowed to keep/store in the police station indefinitely and for a long time and after taking samples from the recovered liquor and sending the same to Chemical Analyser, no purpose is likely to be served by storing the same in the Police Station. In this case the liquor cannot be released to the accused-petitioner because he failed to produce the permit and authorization issued by the competent authority qua its storage, that too, in his house. The same, however, can be ordered to put to auction by the Incharge, State CID/Vigilance Unit, Bharari District Shimla under the supervision of Supervisory Officer (Deputy Superintendent of Police, Hamirpur) and the Station House Officer, Police Station, Sadar, Hamirpur in the presence of the Assistant Commissioner, Excise and Taxation Department, Hamirpur or his nominee.

7. This petition is, therefore, disposed of with a direction to the Incharge, State CID/Vigilance Unit, Bharari District Shimla under the supervision of Supervisory Officer (Deputy Superintendent of Police, Hamirpur) and the Station House Officer, Police Station, Sadar, Hamirpur in the presence of the Assistant Commissioner, Excise and Taxation Department, Hamirpur or his nominee to dispose of within one month from the date of production of a copy of this judgment, the seized liquor i.e. 175 boxes of Indian made foreign liquor as per the inventory prepared in the present of Assistant Commissioner, Excise and Taxation Department, Hamirpur or his nominee in an open auction to be attended to by the contractors authorized to run liquor vends in District Hamirpur by the Excise and Taxation Department. The sale proceeds be deposited in the trial Court. The liberty is reserved to the accused-petitioner to approach the trial Court for release thereof by filing appropriate application, which shall be considered and decided in accordance with law.

8. The petition stands disposed of accordingly so also, the pending application(s), if any.

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

Balmohan .....Petitioner.
Vs.
Smt. Kunta Devi .....Respondent.

Cr. Revision No. 268 of 2014
Decided on: September 18, 2014

Protection of Women from Domestic Violence Act, 2005- Section 12- The marriage between the parties was solemnized on 28.05.2006- the child was born on 4.6.2007- the husband casted aspersions on the character of the wife-he administered beating to her and maltreated her for not bringing dowry- Held, that the husband was working as tailor, he was also an agriculturist- His income could not be held to be less than Rs. 5,000/- per month- The wife had to leave her matrimonial home due to maltreatment by her husband- The matter was also reported to the Police and she had to go to the Court for custody of her son, therefore, under these circumstances the maintenance of Rs. 1500/- per month and compensation of Rs. 5,000/- cannot be said to be excessive. (Para – 10)

For the petitioner: Mr. Jeevesh Sharma, Advocate.

For the respondent: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Cr.M.P.(M) No. 854 of 2014.

Heard. In view of the grounds taken in the application, which is duly supported by the affidavit and in the interest of justice, the delay in filing the Revision Petition is condoned. The Registry is directed to register the Criminal Revision Petition. The application is disposed of.

Cr. Revision No. 268 of 2014.

2. This Criminal Revision Petition is directed against the judgment dated 10.12.2013, rendered by the learned Sessions Judge, Sirmaur at Nahan, H.P., in Criminal Appeal No. 99-Cr.A/10 of 2011.

3. Key facts, necessary for the adjudication of this Criminal Revision are that the marriage between the petitioner and the respondent was solemnized on 28.5.2006. A male child was born on 4.6.2007. The respondent filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005, against the petitioner. According to the averments contained in the application, the petitioner was casting aspersions at the character of the respondent. She was administered beatings by the petitioner. She was also maltreated for not bringing sufficient dowry. The petitioner was not allowing her to meet with her parents. The application was contested by the petitioner. According to the petitioner, it is the respondent, who has left the matrimonial house without any reason. According to him, the compromise was arrived at between the parties on 28.3.2009, whereby the respondent had undertaken to accompany him. However, she had only lived with him for 2-3 days. The learned Judicial Magistrate (Ist class), Rajgarh, framed the issues and allowed the application preferred by the respondent. The petitioner was restrained from indulging in any act of domestic violence against the respondent. She was held entitled

for maintenance allowance of Rs. 1500/- per month from the date of filing of the application. She was also granted compensation of Rs. 10,000/- on 26.8.2011.

4. The petitioner feeling aggrieved by the order dated 26.8.2011, filed appeal before the learned Sessions Judge, Sirmaur at Nahan. The learned Sessions Judge, Sirmaur at Nahan partly allowed the appeal by reducing the amount of compensation from 10,000/- to Rs. 5000/-. The rest of the order passed by the learned Judicial Magistrate (Ist class), Rajgarh, dated 26.8.2011 was upheld. It is, in these circumstances, the present petition has been filed.

5. Mr. Jeevesh Sharma, has vehemently argued that both the Courts' below have not correctly appreciated the evidence. He also contended that the respondent has contracted second marriage. Lastly, it was contended that the income of his client was very meagre.

6. I have heard Mr. Jeevesh Sharma, Advocate, for the petitioner and gone through the pleadings carefully.

7. The marriage between the parties was solemnized on 28.5.2006. They have been blessed with a son on 4.6.2007. The respondent has appeared as PW-1. According to her, the behavior of the petitioner for two years after the marriage was good. The petitioner was a Tailor. Her sister-in-law started residing with them. Both of them started maltreating her. The petitioner closed the shop and left the respondent at her parents' house. He came to take her back in the month of September and she accompanied him but petitioner and his family members administered beatings to her and she was saved by one Raksha Devi and Kiran. They were called to the Police Station. The petitioner has contracted second marriage. PW-2, mother of the respondent has supported the version of the respondent. According to her, the respondent was maltreated. She was subjected to leave the matrimonial house. She was sent to petitioner's house but was administered beatings. The matter was also reported at Police Post Nohradhar. The petitioner was doing tailoring work and was also an agriculturist.

8. The petitioner has also appeared as a witness. According to him, the matter was compromised. After compromise, the respondent came for only one day and thereafter left the house. He was ready and willing to take her alongwith their son back. He was working on the land of his father and was an agriculturist. He has to bear the expenses towards the maintenance of his parents. He admitted that the parents of the respondent had reported the matter against him at Police Station Nohradhar. He has also admitted that the respondent had to obtain a search warrant from the Court to get the custody of her child. He denied that his income was Rs.10-12000/- per month. He admitted it to be Rs.3,000/- per month.

9. Mr. Jeevesh Sharma, learned counsel has also argued that the parties have obtained divorce by way of customary deed. The parties

are Hindus. The divorce can only be under Hindu Law. Learned counsel has also drawn the attention of the Court to Annexure P-5, application, dated 6.4.2013, whereby the petitioner wanted to place on record the birth certificate of a child. The respondent has filed detailed reply to the same on 26.7.2013. The application was rejected by the learned Sessions Judge, Sirmaur at Nahan, on 10.12.2013.

10. What emerges from the facts enumerated, hereinabove, is that the relation between the parties remained cordial for a period of two years. Thereafter, the petitioner started maltreating the respondent. She was given beatings. She was forced to leave the matrimonial house and was also forced to go to the Court to get the custody of the child. She has not contracted the second marriage rather the respondent has deposed in her statement that the petitioner was living with one Satya Devi. The petitioner is working as a Tailor. He is also an agriculturist. The learned Courts' below have rightly come to the conclusion that the income of the petitioner could not be less than Rs. 5,000/-. The respondent has only been held entitled to a sum of Rs.1500/- per month, towards maintenance. The learned Sessions Judge, Sirmaur at Nahan, has already reduced the amount of compensation from Rs.10,000/- to Rs.5,000/-. The respondent had to leave the matrimonial house due to the maltreatment meted out to her. She has not left the house voluntarily. The matter was also reported at Police Post Nohradhar. Thus, there is no merit in the contentions raised by Mr. Jeevesh Sharma, learned counsel for the petitioner, that the respondent is habitual of filing complaints. She has been forced to file complaints against her husband initially at Police Post Nohradhar. She has to go to the Court to get the custody of her son. The petitioner has not led any clinching evidence to establish that the respondent has contracted second marriage.

11. Accordingly, there is no merit in the petition and the same is dismissed. Pending applications if any are also disposed of.

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

State of H.P. .....Petitioner.

Vs.

Bhupinder Singh .....Respondent.

Cr. Revision No. 62 of 2008
Decided on: September 18, 2014

Code of Criminal Procedure, 1973- Section 227- The prosecutrix filed an FIR stating that she had gone to the hospital along with her son- The accused was on night duty- The prosecutrix was asked to sit in the Doctor's duty room- The accused offered tea to the prosecutrix- the prosecutrix felt giddiness after taking tea - The accused gave her

injection and raped her- She became pregnant- Charge sheet filed but no charge was framed by the learned Additional Sessions Judge against the accused for the offences punishable under Section 376 (2)(d) and 506 IPC – revision was filed against the order framing charge-held that the allegations in the FIR show that the prosecutrix was a consenting party- The FIR was filed belatedly and there was no sufficient ground for concluding that the accused had committed the offences punishable under Section 376 (2) (d) and 506 IPC- Further held that the Court is not to act as a mouthpiece of the prosecution but has to sift the evidence in order to find out whether there was sufficient reasons to frame the charge against the accused- Petition dismissed. (Para – 4, 5 & 8)

Cases Referred:

State of Bihar vrs. Ramesh Singh, (1977) 4 SCC 39

Union of India vrs. Prafulla Kumar Samal and another, (1979) 3 SCC 4

Dilawar Bsalu Kurane vrs. State of Maharashtra, (2002) 2 SCC 135

Sushil Ansal vrs. State, 2002 Cri. L.J. 1369

For the petitioner: Mr. R.P. Singh, Asstt. Advocate General.

For the respondent: Mr. J.R.Poswal and Mr. Tarlok Jamwal, Advocates.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This Criminal Revision Petition is instituted against the judgment/order dated 7.1.2008, rendered by the learned Sessions Judge, Bilaspur, H.P., in Sessions Trial No. 42 of 2006.

2. Key facts, necessary for the adjudication of this Criminal Revision are that FIR No. 60 of 2005 dated 1.4.2005 was registered at Police Station Ghumarwin, on the basis of application filed by the prosecutrix. According to the case of the prosecution, the prosecutrix had gone to Ghumarwin hospital in the year 2004 for routine check up alongwith her husband. They got acquaintance with the doctor (hereinafter referred to as the accused). The accused called them to his house and in consequence thereof, they visited the house of doctor on 13.5.2004. Both the families started visiting each others house. The prosecutrix suffered from Typhoid. She went to the hospital alongwith her son. The accused was on night duty. He asked them to sit in the Doctors' duty room. After arranging the tea, the accused went away. When she took the tea, she started feeling giddiness. She enquired from the accused as to what was happening, he told that it was due to weakness. The accused gave her two injections and she did not know what happened thereafter. When she got up, she found her Salwar kept on one side and blood was on the bed sheet of the hospital. The underwear of the accused was stained with blood. On that day, she was undergoing menstrual course. Thereafter, the accused kept on having sex with her at different places including hotels and Rest Houses. She

became pregnant. She went to the hospital for aborting the pregnancy. Although the prosecutrix asked the accused to have Court marriage with her but on the advice of the Advocates, he told that if he solemnizes second marriage, he would be suspended.

3. The case was investigated by the police. Various documents were taken into possession. The challan was put up in the Court of Addl. C.J.M., Ghumarwin on 3.12.2005. The learned Addl. C.J.M., Ghumarwin, committed the matter to the learned Sessions Judge, Bilaspur, vide order dated 1.11.2006. The matter came up before the learned Sessions Judge for framing of charge. The learned Addl. Sessions Judge, after sifting the entire evidence did not frame any charge against the accused under Section 376(2)(d) and 506 IPC, on the basis of FIR No. 60 of 2005.

4. I have gone through the records of the case including FIR dated 1.4.2005. It is not mentioned in the FIR as to on which date, month or year, the accused had committed rape on the victim. According to the averments contained in the FIR, the accused was having regular sex with her. She was rather consenting party. She infact wanted to marry with the accused. However, the accused had declined to marry her.

5. It cannot be believed that a woman would go to the hospital suffering from Typhoid at night. She should have gone with her husband and not with her child aged 11 years. The events started unfolding from the year 2004. However, the FIR was registered only on 1.4.2005. The prosecutrix has not even mentioned the date when she visited the Ghumarwin hospital for the first time. The learned Sessions Judge, Bilaspur, has rightly come to the conclusion that the prosecutrix was consenting party to the alleged acts of sexual intercourse with the accused. The prosecutrix and the accused both were married. There were no probable grounds for presuming that the accused had committed offence under Section 376 (2)(d) and 506 IPC. He was rightly discharged of the offence vide impugned order date 7.1.2008. The version of the prosecutrix does not inspire confidence at all.

6. Their lordships' of the Hon'ble Supreme Court in the case of ***State of Bihar vrs. Ramesh Singh,*** reported in ***(1977) 4 SCC 39,*** have laid down the following test and considerations while ordering discharge of the accused or to proceed with the trial as under:

> "5. In *Nirmaljit Singh Hoon vrs. State of West Bengal*— Shelat, J. delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in *Chandra Deo Singh v. Prokash Chandra Bose* – where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 "that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was prima

facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused". Illustratively, Shelat, J., further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case".

7. Their lordships' of the Hon'ble Supreme Court in the case of ***Union of India vrs. Prafulla Kumar Samal and another,*** reported in ***(1979) 3 SCC 4,*** have explained the scope and ambit of Section 227 Cr.P.C. as under:

> "10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:
>
> (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;
>
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (3) The test of determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
>
> (4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

8. Their lordships' of the Hon'ble Supreme Court in the case of ***Dilawar Bsalu Kurane vrs. State of Maharashtra,*** reported in ***(2002) 2 SCC 135,*** have held that the function of the Judge, while exercising

power under Section 227 Cr.P.C., is not to act as a post office or a mouthpiece of the prosecution but has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. When two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he can discharge the accused. Their lordships' have held as under:

> "12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Sec. 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Sec. 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. [See Union of India vs. Prafulla Kumar Samal & Anr., (1979 3 SCC 5)]."

9. The Delhi High Court in the case of ***Sushil Ansal vrs. State,*** reported in ***2002 Cri. L.J. 1369,*** held that the order for discharge is permissible only in those cases where the Court is satisfied that there are no chances of conviction of accused and trial would be an exercise in futility. In the instant case, after sifting through the evidence, there are no chances of conviction of the accused. The Court is not to weigh the evidence adduced before the trial Court but is to sift the evidence to find out prima facie case against the accused. In those cases, where it appears to the Court that the continuation of the proceedings would result in futility, the same should be closed.

10. Accordingly, there is no merit in the present revision petition, the same is dismissed, so also the pending application(s), if any.

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

Dharam Singh .....Petitioner.
Vs.
State of H.P & anr. .....Respondents.

Cr. Revision No. 73 of 2005.
Reserved on: September 12, 2014.
Decided on: September 19, 2014

Code of Criminal Procedure, 1973, Section 401- Revision against order of acquittal- Complainant filed a complaint stating that she saw the accused standing at the door of the cowshed of 'D'- There was fire inside the cowshed- Held, that the complainant had made improvements in her statement- She had stated in the Ruka that she saw the accused standing at the door of the cowshed, whereas she stated in the court that she saw the accused coming out of the cowshed- There was discrepancy regarding time at which the accused was seen- There was enmity between the complainant and the accused- Independent witnesses were not examined- Cowshed of the father of the accused was adjacent to the cowshed of the 'D' which would make it unlikely that the accused would put cowshed of 'D' on fire at risk of the cowshed of his father- In these circumstances, the acquittal was justified. (Para – 16 to 20)

For the petitioner: Mr. Subhash Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG for respondent No. 1.
Mr. Dushyant Dadwal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This Criminal Revision is instituted against the judgment rendered by the learned Addl. Sessions Judge, Ghumarwin, Distt. Bilaspur, H.P., in Sessions Trial No. 26/7 of 2004/2003, dated 25.11.2004, whereby respondent No. 2 (hereinafter referred to as the accused), who was charged with and tried for offence under Section 436 IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 26.11.2002 at about 8:45 AM, Smt. Jai Dei (PW-1), resident of Ropa Ghulater, went to her cowshed. She saw the accused standing at the door of the cowshed of Dharam Singh. There was fire inside the cowshed. In the meantime, Smt. Banti Devi, wife of Sadda Ram, came there and started extinguishing the fire. Smt. Jai Dei raised an alarm and called the co-villagers for help. The villagers came on the spot. They extinguished the fire. The petitioner Dharam Singh was employed at

Shimla. He informed the police at Police Station, Ghumarwin on telephone that his cow shed has been set on fire at Ghumarwin. The police went to the spot. The statement of PW-1 Jai Dei was recorded vide Ext. PA under Section 154 Cr.P.C. FIR Ext. PW-8/A was registered under Section 436 IPC. The police investigated the matter and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 10 witnesses to prove its case. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has denied the case of the prosecution. The learned Addl. Sessions Judge, Ghumarwin, on 25.11.2004 acquitted the accused, hence this revision petition.

5. I have heard learned counsel for both the sides and gone through the judgment and record very carefully.

6. PW-1, Smt. Jai Dei testified that on 26.11.2002 at about 8:45 AM when she went to the cowshed the accused Chaman Lal was coming out of the cow shed of Dharam Singh. Smoke was rising from inside the cow shed of Dharam Singh. She shouted for help. The co-villagers reached the spot including her mother-in-law, Shankar Dass and Tulsi Ram. They brought the buffaloes out of the cow shed of Dharam Singh.

7. PW-2, Shankar Dass testified that on 26.11.2002 when he reached his house after fetching water from the water tap, he saw cowshed of Dharam Singh burning and villagers extinguishing the fire. He went to the spot. Jai Dei (PW-1) was saying that the cowshed was set on fire by the accused Chaman Lal. Banti Devi, mother of the accused was also at the spot and was also extinguishing the fire.

8. PW-3, Sundari Devi is the mother-in-law of Jai Dei, PW-1. She also deposed that on 26.11.2002, she went to the spot at about 9:15 AM. She also saw the accused coming out of the cowshed of Dharam Singh. There was fire inside the cowshed of Dharam Singh. She cried for help. Jai Dei and Dila Ram were present there. Thereafter, villagers came and extinguished the fire. She also stated that the accused Chaman Lal had set on fire the cowshed and threatened them earlier. She admitted in her cross-examination that her family was not having good terms with the family of the accused due to litigation.

9. PW-4, Kamla Devi is the wife of Dharam Singh. She deposed that on 26.11.2002, she had brought buffaloes out of the cowshed at about 8:00 AM and had tethered the same in the courtyard and thereafter she went to jungle. She heard noise when she was on her way to jungle. She came back and saw that several persons were extinguishing the fire in the cowshed. Jai Dei and her mother-in-law Sundri told her that the cowshed was set on fire by the accused.

10. PW-5, Dharam Singh deposed that on 26.11.2002 at about 12:45 PM, he received message on telephone from his son that his cowshed in the village has been set on fire by the accused. Thereafter,

he informed the police on telephone. He came to the village on 27.11.2002.

11. PW-6, Dila Ram is the brother-in-law of Dharam Singh. He deposed that he went to the house of Dharam Singh. Nobody was in the house. He went towards the cowshed of Dharam Singh and saw the accused coming out from the cowshed. There was fire inside the cowshed. He stated that 35-40 big bundles of grass were kept in the courtyard. These were put on fire by the accused.

12. PW-7, Sher Singh is the brother of Dharam Singh. He stated that on 30.11.2002, when he was coming to his village from Bilaspur, he was attacked by the accused Chaman Lal, his father and one Tulsi Ram with *'darat'* and *dandas*. The accused and his family was inimical towards them and due to enmity the accused had set the cowshed of Dharam Singh on fire.

13. PW-8, ASI Ashok Kumar recorded F.I.R. Ext. PW-8/A on the basis of statement Ext. PA.

14. PW-9, Constable Daulat Ram is a formal witness.

15. PW-10, ASI Ram Dass testified that on 26.11.2002 after receiving a telephonic message, he went to the spot. He recorded the statement of Jai Dei Ext. PA under Section 154 Cr.P.C. FIR was registered. He prepared the site plan. He also took pictures Ext. P-3 to P-10.

16. According to PW-1, Jai Dei, she went to her cowshed at about 8:45 AM and saw the accused coming out of the cowshed of Dharam Singh. However, she has made improvement in her statement. In Ext. PA '*rukka*', it is stated that she saw the accused standing on the door of the cowshed. PW-3, Sundri Devi testified that she went to the spot at about 9:15 AM. She saw accused coming out of the cowshed of Dharam Singh and there was fire inside the cowshed. According to Jai Dei (PW-1), the incident took place at about 8:45 AM but according to PW-3 Sundri Devi, it happened at 9:15 AM. If the accused had set the cowshed on fire at 8:45 AM, there was no occasion to the accused to come out at 9:15 AM from the cowshed.

17. PW-3 Sundri Devi, mother-in-law of Jai Dei (PW-1) has also admitted that her family was not having good terms with the family of the accused due to litigation. According to PW-1 Jai Dei, co-villagers had come to put off the fire. However, PW-2 Shankar Dass, testified that the accused and his mother Banti were also extinguishing the fire. PW-4, Kamla Devi is the interested witness. She was not present on the spot. She was told by PW-1, Jai Dei and her mother-in-law (PW-3) Sundri, about the incident. PW-6, Dila Ram is the brother-in-law of Dharam Singh. According to him, the accused has also put on fire the grass. It was not at all the case of the prosecution.

18. It has come on record that the cowshed of the father of the accused Sh. Sadda Ram and of Dharam Singh were adjoining. The

accused was not supposed to put on fire the cowshed adjoining to his father's cowshed, knowing fully that the fire would also engulf his father's cowshed. According to PW-4 Kamla Devi, she had already taken the cattle out of the cowshed at 8:00 AM. However, PW-1 Jai Dei deposed that she, with the help of other co-villagers, had brought the buffaloes of Dharam Singh out of the cowshed.

19. According to PW-1 Jai Dei, she was first to reach the spot. However, PW-6, Dila Ram deposed that he went to the spot first of all and saw the accused coming out of the cowshed. PW-1 Jai Dei, has not deposed that PW-6 Dila Ram, was already on the spot before her. Moreover, in case PW-6, Dila Ram had reached the spot, his name was bound to be recorded in the statement of PW-1 Jai Dei, Ext. PA.

20. The prosecution has only examined the closely related witnesses of the petitioner. The prosecution has not examined Pradhan or Up-Pradhan of the Gram Panchayat, though they were available on the spot. PW-1, Jai Dei is sister-in-law of Dharam Singh while PW-3, Sundri Devi is also from the family of Dharam Singh. PW-4, Kamla Devi is the wife of Dharam Singh. PW-6, Dila Ram is brother-in-law of Dharam Singh. It has also come on record that there was litigation between the family of Dharam Singh and the father of the accused, Sadda Ram.

21. The prosecution has miserably failed to prove that the accused has put the cowshed on fire. There are major contradictions and discrepancies in the statements of the prosecution witnesses. They do not inspire any confidence. The trial Court has correctly appreciated the evidence available on record. This Court is not inclined to interfere with the well reasoned judgment of the trial Court. The Revision Petition is accordingly dismissed.

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

Dinesh Kumar .....Appellant.

Vs.

Yashpal and others ...Respondents.

FAO (MVA) No. 97 of 2007.

Date of decision: 19.09.2014.

Motor Vehicle Act, 1988- Section 166- Claimant sustained permanent disability to the extent of 30% qua his right lower limb- claimant was undergoing training as dental technician- his income taken as Rs. 4,000/- per month- taking the loss of the earning capacity as 30%, the loss of income was taken as Rs. 1,000/- per month- he was aged 23

years at the time of accident- applying the multiplier of 15, compensation of Rs. 1,80,000/- was awarded to the petitioner. (Para 8 to 11)

Cases referred:

Sarla Verma Vs. Delhi Road Transport Corporation AIR 2009 SC 3104
Reshma Kumari & ors Vs. Madan Mohan & anr. AIR 2013 SCW 3120

For the appellant:	Mr.Dinesh Bhanot, Advocate.
For the respondents:	Mr.Narender Sharma, Advocate, for respondents No. 1 and 2. Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered

Mansoor Ahmad Mir, Chief Justice, (Oral).

The challenge in this appeal is to the award dated 9.6.2006, passed by the Motor Accident Claims Tribunal-II Solan, H.P, for short "The Tribunal" in MAC Petition No. 27-NL/2 of 2003 titled Dinesh Kumar vs. Yashpal and others, whereby compensation to the tune of Rs.1,03,500/- came to be awarded in favour of the claimant and against respondents No. 1 and 3, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

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

3. The claimant has questioned the impugned award on the ground of adequacy of compensation. In the given circumstances, I deem it proper not to discuss and return findings on issues No. 1 and 3, are upheld.

4. Issue No.2. Admittedly, the claimant became victim of a vehicular accident which was caused by driver, namely, Kumari Alka Chaudhary-respondent No. 2 herein while driving maruti car bearing registration No. PUC-0007 rashly and negligently at Mohali Bazar, hit the motorcycle NO. PB-07-H-5921, on which the claimant was travelling as pillion rider. The claimant sustained injuries, was shifted to hospital where he remained admitted from 11.3.2003 to 15.3.2003.

5. The claimant has examined Dr. P.D. Sharma, Medical Superintendent and Chairman Handicapped Board, DH Solan who proved the disability certificate Ext. PW4/A, issued by the Medical Board. He stated that as per disability certificate Ext. PW4/A the petitioner has sustained permanent disability to the extent of 30% qua his right lower limb. In cross-examination he stated that this 30% disability is qua particular portion of the body and not in relation to the entire body. Therefore, from the statement of this witness, coupled with the permanent disability certificate Ext.PW4/A, the claimant has proved that

he sustained 30% permanent disability qua his lower right limb in the said accident.

6. While going through the statement made by the doctor, one comes to an inescapable conclusion that the claimant has suffered 30% disability which has affected his earning capacity. The Tribunal has granted compensation under the head "loss of past and future income and general damages" as Rs.50,000/- which is too meager. The Tribunal has also awarded Rs.20,000/- each under the heads " Pain and sufferings" and "loss of amenities of life" which is adequate. The learned counsel for the petitioner has not disputed the impugned award so far as it relates to pain and sufferings and loss of amenities of life.

7. Thus, the only question is whether the amount awarded under the head "loss of past and future income and general damages" is adequate. I am of the considered view that it is too meager for the following reasons.

8. The claimant was undergoing training as dental technician, has become a dental technician, who has been rendered disabled, lost future prospects of earning and virtually, his life has become miserable, has to undergo pain and suffering throughout his life, his physical frame is shattered and his matrimonial life also stands affected.

9. By making guesswork, it can be held that he was earning Rs.4000/- per month and lost 30% of his earning capacity, thus has lost earning capacity to the tune of Rs.1000/- per month, at least.

10. Admittedly, the claimant was 23 years of age at the time of the accident. The multiplier of "15" was applicable as per the Schedule appended to the Act read with the judgment of the apex Court delivered in **Sarla Verma versus Delhi Road Transport Corporation,** reported in **AIR 2009 SC 3104**, upheld in **Reshma Kumari & ors vs. Madan Mohan & anr.** reported in **2013 AIR SCW 3120.**

11. Viewed thus, it is hereby held that the claimant is entitled to compensation under the head "loss of income" to the tune of Rs.1000x12= 12000x15 = Rs.1,80,000/- with interest @ 7.5 % per annum, from today.

12. The amount of Rs.50,000/- has been awarded by the Tribunal under the head "loss of past and future income and general damages". The said amount was to be awarded only under the head "general damages" and is accordingly awarded under the said head.

13. The insurer-respondent No. 3 is directed to deposit the enhanced amount of Rs.,1,80,000/- alongwith interest @7.5% per annum, within six weeks from today and on deposit, the same shall be released in favour of the claimant through payees' account cheque.

14. Having said so, the compensation is enhanced and impugned award is modified, as indicated above.

15. The appeal stands disposed of accordingly. Send down the record, forthwith.

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

National Insurance Company Limited ...Appellant.
Vs.
Parshotam Lal & others ...Respondents.

FAO No. 38 of 2011
Decided on: 19.09.2014

Motor Vehicle Act, 1988- Section 166- Mahindra Pick up hit the motorcycle due to which the claimant who was travelling as pillion rider sustained injury- held, that Mahindra Pick up falls within the definition of Light Motor Vehicle as gross unladen weight of the vehicle is below 7500 kilograms - the driver had a valid and effective driving licence to drive the same- no endorsement of PSV was required- it was also not pleaded by Insurer that accident had taken place due to the reason that driver of the vehicle was competent to drive one kind of vehicle and he was driving a different kind of vehicle which caused the accident, therefore, Insurance Company was rightly held liable.

(Para-23, 24 and 27)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. Vs. Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. Vs. Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

National Insurance Co. Ltd. Vs. Swaran Singh and others, AIR 2004 Supreme Court 1531

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Sanjay Jaswal, Advocate, for respondent No. 1.
Mr. Rahul Mahajan, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and order, dated 4th September, 2010, made by the Motor Accident Claims Tribunal

(I) Kangra at Dharamshala, H.P., (hereinafter referred to as "the Tribunal") in M.A.C.P. No. 28-N/II-2008, titled as Purshottam Lal versus Kamal Kishore Sharma and others, whereby compensation to the tune of Rs. 2,94,620/- with interest @ 9% per annum from the date of institution of the petition till deposit of the amount and the costs assessed at Rs. 2000/- came to be awarded in favour of the claimant-injured and against the insurer (hereinafter referred to as "the impugned award") on the grounds taken in the memo of appeal.

Brief facts:

2. The claimant-injured being victim of the motor vehicular accident, which was caused by the driver, namely Shri Kamal Kishore, on 18th April, 2007, at about 11.50 a.m., near bridge at Khhajan, while driving the vehicle, Mahindra Pick up, bearing registration No. HP-68-0622, rashly and negligently, hit the same with the motor cycle on which the claimant-injured was travelling as a pillion rider, sustained injuries, was taken to Nurpur hospital, remained bed ridden for three months at Nurpur and for 23 days at Pathankot, filed claim petition before the Tribunal for grant of compensation to the tune of ` 4,83,509/- as per the break-ups given in the claim petition.

3. The claim petition was resisted by the owner-insured, the driver and the insurer on the grounds taken in the memo of objections.

4. The following issues were framed by the Tribunal on 23rd April, 2009:

> *"1. Whether the accident took place due to rash and negligent driving of vehicle No. HP-68-0622 by respondent No. 1 as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *3. Whether the present petition is not maintainable as alleged? OPR*
>
> *4. Whether the petitioner has suppressed the true facts from the Tribunal as alleged? OPR*
>
> *5. Whether the driver of the vehicle in question was not holding a valid and effective driving licence at the time of the accident? OPR-3*
>
> *6. Whether the petition is collusive as alleged? OPR-3*
>
> *7. Whether the vehicle was being plied in violation of terms and conditions of the insurance policy as alleged? OPR-3*
>
> *8. Whether the petition is bad for non joinder of necessary parties? OPR-3*
>
> *9. Whether there was contributory negligence in causing the accident as alleged? OPR-3*

10. Whether the petitioner was travelling as gratuitous passenger as alleged? OPR-3

11. Relief."

5. The parties have led the evidence in support of their case. The Tribunal, after scanning the evidence, oral as well as documentary, held the claimants entitled to compensation and saddled the appellant-insurer with liability.

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

7. The appellant-insurer has questioned the impugned award to the extent whereby findings have been returned by the Tribunal saddling it with liability.

8. I deem it proper not to discuss the findings returned by the Tribunal on issue No.1. However, there is ample evidence on the file led by the claimant to the effect that the driver of the offending vehicle had driven the offending vehicle rashly and negligently and had caused the accident.

9. The findings returned by the Tribunal on issues No. 3, 4, 6 and 8 to 10 are not in dispute. Thus, the findings returned on these issues are upheld.

10. Issues No. 2, 5 and 7 are interlinked, therefore, I deem it proper to determine all these issues together.

11. The onus to prove issues No. 5 and 7 was on the appellant-insurer, has failed to prove the same. Thus, the same have been decided against the appellant-insurer.

12. I have gone through the record read with the impugned award and am of the considered view that the Tribunal has rightly decided issues No. 5 and 7 against the appellant-insurer for the following reasons:

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

"2. .....

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

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

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

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

"3. Necessity for driving licence. *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor

vehicle shall be such as may be prescribed by the Central Government."

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

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

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

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

20. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

"The question now arises as to whether the driver who possessed driving licence for driving abovementioned

vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.....*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

21. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and

after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."*

22. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,**

reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

> *"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.*
>
> *A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.*
>
> *Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].*
>
> *9. .....*
>
> *10. .....*
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> *11. .....*
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> *12. .....*
>
> *13. .....*
>
> *14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.*
>
> *Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.*
>
> *15. .....*
>
> *16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.*

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

23. Having glance of the above discussions, I hold that the endorsement of PSV was not required. The offending vehicle-Mahindra Pick Up falls within the definition of Light Motor Vehicle, as given in Section 2 (21) of the MV Act, for the reason that the gross unladen weight of the vehicle is below 7500 kilograms and the driver was having valid and effective driving licence to drive the same.

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

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

"84. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motorcycles without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are `goods carriage', `heavy-goods vehicle', `heavy passenger motor-vehicle', `invalid carriage', `light motor-vehicle', `maxi-cab', `motorcycle', `omnibus', `private service vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for `motorcycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for `light motor vehicle' is found to be driving a `maxi-cab', `motor-cab' or `omnibus' for which he has no licence. In each case on evidence led before the tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because

of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.

(Emphasis added)"

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

"105. .....

(i) .....

(ii) .....

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

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

(v).....

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

27. Applying the test, it was for the insurer to prove that the owner-insured has committed willful breach, which it has failed to do so. Accordingly, the Tribunal has rightly saddled the appellant-insurer with liability.

28. Learned counsel for the appellant-insurer has strenuously argued that the compensation awarded is excessive. The insurer cannot press such a ground. However, I have gone through the impugned award. The compensation awarded is just, cannot be said to be excessive in any way.

29. Viewed thus, findings returned by the Tribunal on issues No. 2, 5 and 7 are upheld.

30. Having glance of the above discussions, the impugned award merits to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed alongwith all pending applications.

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

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

State of Himachal Pradesh .....Appellant.

Vs.

Rakesh Kumar and another .....Respondents.

Cr. Appeal No. 330 of 2008
Reserved on: 12.9.2014
Decided on : 19.9.2014

Indian Penal Code, 1860- Section 307, 325, 323, 365 read with Section 34- Complainant, his father and brother were present in a Truck- a Jeep bearing registration No. HP-24A-762 came in which accused were present-accused asked the complainant to come near the Jeep, when the complainant went near the Jeep, the accused forcibly dragged him inside the jeep - jeep was driven for some distance, the accused gave beatings to the complainant and one of the accused threatened the complainant with knife-the complainant was thrown out of the Jeep and he sustained fracture in his leg- The accused were acquitted by the Trial Court- An appeal was preferred against the order of Trial Court- Held that, the complainant had failed to raise hue and cry when he was being forcibly dragged towards Jeep which would suggest that he had voluntarily gone in the Jeep to accompany the accused- The complainant had further failed to disclose to the PW-3 the reasons for sustaining the fracture in his leg which shows that a false story was invented by the complainant

to implicate the accused- PW-7 had deposed what was narrated to him by another witness who was not examined and his testimony would be hearsay- PW-9 had not supported the prosecution version, therefore, in these circumstances, the conclusion of Trial Court that the Prosecution had failed to prove its case beyond reasonable doubt was sustainable– Appeal dismissed. (Para- 18 to 21)

For the Appellant:	Mr. Parmod Thakur, Additional Advocate General.
For the Respondents:	Mr. Sanjeev Bhushan, Advocate, for respondent No. 1. Mr. T.S Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed by the State, against the impugned judgment, rendered on 16.1.2008, by the learned Sessions Judge, Bilaspur, in, Sessions trial No. 32 of 2004, whereby, the learned trial Court acquitted the accused/respondents for theirs having committed offence punishable under Sections 307, 325, 323, 365 read with Section 34 IPC.

2. Brief facts of the case, are, that, in the year 2002, the complainant was the second driver on truck No. HPU-1505, of which, one Shri Baldev Singh was the first driver. On 26.3.2002 the complainant had brought bricks for the construction of his house, which he unloaded at about 4.00 p.m. near his house. Thereafter he took the truck, in order to bring sand from Galamor (Beri) situated near his house. In the truck, Baldev Singh, his father and brother Dev Raj were also sitting. When the truck was fully loaded with sand, a jeep bearing registration Number HP-24-A 762, came there at about 9.00 p.m. and its occupants asked the complainant through Baldev Singh to come to them. Upon this, the complainant went to the jeep, where he was forcibly dragged in it, by the accused persons. Thereafter the accused persons asked the jeep driver to drive it, and after some distance, the accused asked the complainant as to why he remains with one Shri Virender and started beating him with fist and leg blows. Accused Ranjit Singh has shown to him a knife and threatened him that he would be killed. The owner of the Jeep, Girdhari Lal was also occupying the front seat of the jeep. The accused threw the complainant from the moving jeep near the house of one Shri Kanshi Ram, as a result of which, his left leg got fractured and he also sustained injuries on right foot. Thereafter the accused persons again came to the place where the complainant had been thrown and gave him beatings with fist and leg blows. On raising the alarm by the complainant, accused ran away. The complainant by dragging himself reached the courtyard of one Shri Kanshi Ram. In the meantime, his father and Devi Ram also reached there and took him to

the Zonal Hospital Bilaspur. Zonal Hospital Bilaspur intimated the police Station, Sadar of the complainant having admitted in hospital in an injured condition. On receipt of intimation, ASI Krishan Chand alongwith HHC Om Prakash rushed to the hospital and recorded the statement of complainant under Section 154 Cr.P.C. During the Course of investigation, site plan of the occurrence was prepared and jeep was taken into possession. Blood stained pant of the complainant was also taken into possession besides a knife, which had been produced by accused Ranjit Singh, after getting its sketch prepared. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused were charged, for, theirs having committed offence punishable under Sections 307, 325, 323, 365 read with Section 34 IPC, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They did not choose to lead evidence in defence.

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

6. The State of H.P., is, aggrieved by the judgment of acquittal, recorded by the learned trial Court, in, favour of the accused/respondents. The Learned Additional Advocate General has concertedly, and, vigorously contended, that, the findings of acquittal, recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction, and, concomitantly an appropriate sentence, be also imposed upon the accused/respondents.

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

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

9. The first witness, who stepped into the witness box, in, proof of the prosecution case, is, PW-1, Prakash Chand, who deposes that he is working as second Driver in truck bearing registration No. HP-11-1505. Baldev has been deposed to be the first driver of the aforesaid

vehicle. He deposes that on 26.3.2002 bricks were loaded from Ropar to Changer Bhajaun and the same was unloaded in the evening at about 4.00 p.m. near his house. He further deposes that thereafter at Gala Mor the sand was to be loaded in the truck. His father Dhanu Ram, brother Dev Raj and Baldev Singh, the first driver were deposed to be present with him in the truck. After one hour, Baldev and Prakash have been deposed to have left for Deoth side and have returned to the place where the sand was loaded in the truck, after one and a half hours. At about 9 in the evening a vehicle bearing registration No. HP-24A-762 came from deoth side. The said vehicle was deposed to have been driven by Bittu. He deposes that owner of the vehicle Girdhari Lal and Bittu were also the occupants of the vehicle. Roki and Ranjit, present in the court, have been deposed to have occupied the vehicle bearing registration No. HP-24A-762. He further deposes that he was called by Baldev, truck driver, upon which he went near the vehicle. Roki and Ranjit have been deposed to have forcibly dragged him inside the vehicle and taken him in the jeep towards Deoth and started giving beatings to him with fist and leg blows on the pretext as to why he had been playing Dandi Dance with Virender. Accused Ranjit is stated to have been shown a knife to him and threatened him to do away with his life. He further deposes that he has been thrown out from the moving jeep near the house of Kanshi Ram. In sequel thereto, his leg got fractured. He deposes that the accused came to that place and again gave beatings to him. On raising alarm, the accused persons ran away from the courtyard of Kanshi Ram. Kanshi Ram has been deposed to have taken him to the hospital, where his statement under Section 154 Cr.P.C comprised in Ex. PW-1/A was got recorded, which bears his signatures. The police also took into possession his blood stained pant Ex. P-1 under memo Ex. PW-1/B. He has recognized the knife with which he was threatened by the accused. In his cross-examination, he admitted it to be correct that he has no personal enmity with the accused and that for this reason, there was no reason for them to have taken away his life, when he was allegedly thrown from the jeep, at that time when its speed was 60 kms per hour. He denied that a false case has been foisted against the accused at the instance of one Shri Devi Ram, Up Pradhan who had contested the election of Gram Panchayat for the post of Up-pradhan against accused Rakesh Kumar.

10. PW-2, Dhanu Ram, father of the complainant, has supported the fact that the accused had taken his son in a jeep towards the Deoth side from the place where they were loading sand in the truck. He further deposes that after about one hour, he was told by Shri Prakash Chand of village Karyana Ghati that his son was lying near the house of Kanshi Ram in an injured condition. On this information, he went there and found his son with fractured leg and foot. He further deposes that his son was taken to the hospital for medical treatment. He further deposes that during investigation, blood stained pant Ex. P-1 of the complainant was taken into possession. In his cross-examination, he deposed that Shri Prakash Chand resident of Karyana was also one of the occupants of the jeep at the relevant time.

11. PW-3 Kanshi Ram deposes that about five years ago, at night, he heard the cries of the complainant, who was lying in his court-yard in an injured condition and blood was oozing from his leg. He further deposes that at that time the complainant did not disclose to him as to how his leg got fractured. He further deposes that the people from the village were also assembled in his Court-yard and complainant was taken to the Zonal Hospital Bilaspur. He further deposes that the complainant did not utter anything about the accused at that time. He was declared hostile. Learned PP requested the Court to cross-examine this witness. On his being permitted by the Court, this witness was cross-examined. During the course of his cross-examination, he admitted that his statement was recorded by the police. In his cross-examination by the learned defence counsel, he feigns ignorance as to how and under what circumstances, the complainant sustained injuries and fracture on his person.

12. PW-4 Dr. A.K Sharma, deposes that he was posted as Medical Officer in Zonal Hospital, Bilaspur in the year 2002. He further deposes that he had medically examined the complainant. He deposes that complainant was brought in the hospital by the police with alleged history of fight. In his opinion, injuries sustained by the complainant were grievous in nature and can be caused if a person is thrown out from a moving vehicle on a hard surface and with the fist blows. The weapon used was blunt and probable duration of injures was within 6 hours. MLC comprised in Ex. PW-4/A is deposed to have been issued by him, which bears his signatures.

13. PW-5 Dr. D Bhangal deposes that on examination of X-Ray of the complainant, he found that there was evidence of fresh fracture of base of 5th Mata-tarsal bone and fresh fracture of shafts of both bones left tibia and fibula. He further deposes that he has issued report comprised in Ex. PW-5/A, which bears his signatures.

14. PW-6 Tarsem Kumar deposes that he is an agriculturist and jeep bearing registration No. HP24-A-0762 is in the name of his father. Bittu is deposed to be the driver of jeep at the relevant time. He further deposes that in the year 2002/2003 he was traveling in the jeep in which 2/3 persons were also sitting, one was Ranjit and another was Rocky and third person was not known to him. He further deposes that they went towards Bhajoon where the truck was parked and the sand was in process of loading in the said truck. He further deposes that they stayed there for some time and then another person sat in the jeep, whose name is Prakash Chand. He further deposes that then they came near to the house of Chet Ram and they all got down there. He further deposes that thereafter he did not know what has happened. He was declared hostile and on being permitted by the Court he was cross-examined. During the course of his cross-examination he admitted that accused persons were sitting in the jeep on 26.3.2002 at about 8.00 p.m., but denied that they had any conversation with the complainant in his presence. He further admitted that his statement was recorded by the police on 27.3.2002 and the same was read over and explained to

him. He further deposes that the accused persons are known to him. He has stated it to be incorrect that the accused persons had forcibly put the complainant inside the jeep and started giving beatings to him with fist and leg blows and near the house of Kanshi Ram, the complainant had been thrown out from the moving jeep. He also denied that accused Ranjit Singh had taken out a knife and threatened the complainant with dire consequences. He further denied the portion A to A of his statement made before the Police. In his cross-examination by the learned defence counsel, he deposed that no quarrel had taken place between the accused and the complainant in his presence and after dropping the complainant, accused and one another person, had gone to their houses.

15. PW-7 Shri Dev Raj deposes that he is an agriculturist. He deposes that he was constructing a house at the relevant time when on 26.3.2002, the complainant had brought bricks in his truck to his house, which they had un-loaded. He further deposes that he alongwith Dhanu Ram, father of the complainant and the complainant himself accompanied in the said truck to Galamore for loading the concrete. He further deposes that at that time a jeep had stopped near the truck and the accused who were sitting in it had called the complainant through Shri Baldev and made the complainant to sit in the jeep and took him away. He further deposes that thereafter Prakash Chand son of Shri Krishnu told that the accused had thrown the complainant from the moving jeep. He further deposes that then they went to the place where the complainant was lying in an injured condition and the complainant was then taken to the hospital for treatment. During the course of his cross-examination he admitted that owner of the truck, Prakash Chand and the complainant had boarded the jeep and left the place where the truck was being loaded with Bajri.

16. PW-8 HC Prakash Chand deposes that he was posted as MC in Police Sadar, Bilaspur in the year 2002. He deposes that he was associated in the investigation. He further deposes that on 2.4.2002 Ranjit Singh accused had come to the police station and handed over him a knife. Memo Ex. PW-8/A was prepared and was signed by him besides him it was also signed by C. Rajesh Kumar and accused Ranjit Singh. He further deposes that knife was put into a parcel and was sealed and prior to its sealing, khaka was prepared which is Ex. PW-8/B, which bears his signatures as well as of C Rajesh Kumar.

17. PW-9 Shri Narinder Kumar deposes that he was the driver of the jeep in the year 2002. He further deposes that he does not remember the date and month, but it was year 2002, he was going to Kali in the jeep in which Jagat Ram and his wife were also sitting. He further deposes that on having reached Kali, he dropped them there and while returning there was a truck parked two kilometers away from Kali towards Bilaspur, which was being loaded with Bajri and sand. He further deposes that there his jeep was stopped and two persons whose names he does not remember boarded the jeep. He further deposes that in his jeep owner of the jeep Tarsem Lal alongwith two other persons were also sitting from village Kahli. He further deposes that the accused present in the Court are not the same persons, who barded the jeep at

Gala More. He was declared hostile and on being permitted by the Court he was cross-examined. During the course of his cross-examination he deposes that his statement was recorded by the Police. He denied that the accused persons were traveling in the jeep. He further denied that the complainant had been forcibly dragged inside the jeep by the accused and that he was given beatings by them. He further denied that near the house of Kanshi Ram the accused kicked out the complainant from the moving jeep and that by alighting from it, started giving him beatings to him on the road.

18. PW-10 ASI Krishan Chand deposes that he had gone to Zonal Hospital, Bilaspur on 27.3.2002 to verify the report which was entered in the daily diary No. 47/02. He deposes that in the hospital he recorded the statement of the complainant comprised in Ex. PW-1/A, which was sent to the police Station for registration of the case. He further deposes that an application Ex. PW-10/B was moved for medical examination of the complainant. MLC of complainant comprised in Ex. PW-4/A was obtained. He further deposes that at the instance of father of the complainant, he prepared the spot map comprised in Ex. PW-10/C from where the accused persons had allegedly abducted the complainant. He further deposes that there he had proceeded to the place where Prakash Chand was thrown from the moving jeep near the house of Shri Kanshi Ram and in this regard he prepared the site plan comprised in Ex. PW-10/D. The jeep along with its documents has been deposed to have taken into possession vide memo Ex. PW-3/B. He further deposes that he had recorded the statement of Kanshi Ram comprised in Ex. PW-3/A correctly including its portions from 'A' to 'A' to 'D' to 'D', similarly statements of Tarsem Kumar mark 'Y' Ex. PW-10/E and that of Shri Narender Kumar Ex. PW-10/F were recorded, correctly including their relevant portions. He further deposes that on 28.3.2002 the complainant handed over to him his blood stained pant which was taken into possession vide memo Ex. PW-1/B. He further deposes that knife Ex. P-2 has been deposed to have produced by accused Ranjit Singh, which has been deposed to have taken into possession under memo Ex. PW-8/A and Khaka Ex. PW-8/B was prepared. He denied that the statements of the witnesses were not recorded correctly.

19. The prosecution case has been contended to be firmly anchored upon the testimony of PW-1, the victim/injured who when in square and forthright terms has deposed in tandem with the prosecution version, as such his testimony has been contended to be enjoying probative worth. However, even though the testimony of PW-1, does as contended by the learned Additional Advocate General communicate a version in unison with the genesis of the prosecution story, nonetheless given the fact as comprised in the cross-examination of his father and brother of theirs being also present at the apposite stage when the accused purportedly forcibly dragged him to the vehicle occupied by both the accused, yet, the omission on the part of the complainant/injured to attract the attention of his father and brother present at the stage contemporaneous to the occurrence, by raising a loud cry, invites an inference that such omission was occasioned by his rather having acquiesced to occupy the jeep or his having volitionally taken to occupy

the jeep in the company of both the accused. The effect of the said omission on the part of the complainant/injured to draw the attention of his father and brother in the manner aforesaid though present at the site of occurrence for eliciting their intervention for dissuading the accused from forcibly dragging him in the jeep, when has been construed to be connoting the acquiescence of or conveying the factum of the injured/victim having volitionally occupied the vehicle along with the accused, its effect get accentuated in the face of PW-2, the father of the complainant having omitted to in his examination-in-chief depose in tandem with PW-1. Further more PW-3 the person who proceeded to the courtyard of his house, upon hearing the cries of the injured and saw blood oozing from his legs, has in his examination-in-chief deposed the fact that the injured-victim at that stage omitted to disclose to him the reasons for his sustaining a fracture of his leg. The effect of the deposition of PW-3 in as much, as it comprises the testimony of the person who first saw the injured victim, in an injured condition and to whom an immediate disclosure on enquiry by PW-3 about the reasons for his sustaining the fracture was to be made, when has deposed that the victim injured was reticent qua the reasons for his having sustained fracture of his leg, voices the fact that, hence, the victim/injured has subsequently invented, in sequel to deep premeditation, a false story for attributing an incriminatory role to the accused, whereas in case a genuine incriminatory role was attributable to the accused then an immediate disclosure qua it ought to have emanated, at the instance of the injured/victim before PW-3, whereas it did not, as a corollary when the victim/injured remained reticent qua the purported incriminatory role of the accused in quick spontaneity of his having sustained fracture of his leg, sequels a forthright inference that the incriminatory role as ultimately attributed by the injured/victim to the accused is seeped in prevarication.

20. The testimony of PW-7 though has been pressed into service by the learned Additional Advocate General to persuade this Court that it comprises evidence of probative worth and potency, however in the face of it, having emanated on a reading of his deposition comprised in his examination-in-chief of a disclosure qua the occurrence having been narrated to him by Prakash S/o Krishnu who however has not been cited as a witness, as such, when he omits to render an eye witness account qua the occurrence, rather unravels an account as revealed to him by Prakash, it comprises hearsay evidence, hence, was discardable as tenably done by the learned trial Court.

21. Preeminently the deposition of PW-9 an eye witness to the occurrence as also a co-occupant of the vehicle, inside which the alleged occurrence took place, as also, from which the accused threw out the victim/injured, has not lent support to the prosecution version. The effect of his having omitted to lend support the prosecution case or to the genesis of the occurrence constrains this Court to conclude that, no succor can be derived by the prosecution from the testimony of PW-9. Consequently, when the deposition of PW-9 comprised the best evidence in proof of the prosecution version, his having turned hostile or his having abstained to give impetus to the prosecution version, fillips an

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

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

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

RFA No. 105 of 2007 with RFA Nos. 147, 226, 227, 230, 232, 233, 237, 238, 239, 241, 243, 244, 326 of 2007 and RFA No. 64 of 2008.
Reserved on: 12.8.2014.
Decided on: 19.09.2014.

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1. RFA No. 105 of 2007.

Union of India .....Appellant.
Vs.
Chhering Tobden & ors. .....Respondents.

2. RFA No. 147 of 2007

Union of India ..Appellant.
Vs.
Mohan Lal & others ..Respondents.

3. RFA No. 226 of 2007

Union of India ..Appellant
Vs.
Lachhi Ram & another ..Respondents.

4. RFA No. 227 of 2007

Union of India ...Appellant
Vs.
Nathu & another ...Respondents

5. RFA No. 230 of 2007

Union of India ..Appellant
Vs.
Chet Ram & others ..Respondents

6. RFA No. 232 of 2007

Union of India ..Appellant
Vs.
Ved Ram & another …Respondents

7. RFA No. 233 of 2007

Union of India …Appellant
Vs.
Belu & another ..Respondents

8. RFA No. 237 of 2007

Union of India …Appellant
Vs.
Tota Ram & another ..Respondents

9. RFA No. 238 of 2007

Union of India ..Appellant
Vs.
Tape Ram & others ..Respondents

10. RFA No.239 of 2007

Union of India …Appellant
Vs.
Sohan Lal & another ..Respondents

11. RFA No.241 of 2007

Union of India ..Appellant
Vs.
Belu & others ..Respondents

12. RFA No. 243 of 2007

Union of India ..Appellant
Vs.
Tek Ram & others ..Respondents

13. RFA No. 244 of 2007

Union of India ..Appellant
Vs.
Tashi Yangzum & anr. ..Respondents

14. RFA No. 326 of 2007

Union of India ..Appellant
Vs.
Jeet Ram & others ..Respondents

15. RFA No. 64 of 2008

Union of India ..Appellant
Vs.
Surti Devi & others ..Respondents

Land Acquisition Act, 1894, Section 18- Land of the petitioners was acquired for setting up Army Transit Camp – The claimants had not led any evidence that they had raised orchard, danga and breast walls on the acquired land- Average price of the land as per the sale deed was Rs.10,425/- per biswa in respect of small pieces of land, hence after necessary deduction of 40% the average value would come to Rs.6,255/- per biswa and by granting appreciation @ 10% from 1991, the value would come to Rs.7,505/- per biswa. (Para – 11)

Land Acquisition Act, 1894, Section 18-Land was acquired for the construction of Transit Camp- As per sale deed, the land measuring 2 biswas was sold for a sum of Rs.15,000, which shows that the market value of the land was Rs.7,500 per biswa- Another sale deed proved that 3 biswas land was sold for Rs. 55,000, - the average value on the basis of these two transactions would be Rs. 14,730 – 40% deduction is required to be made as the land sold was in small parcels. (Para – 12)

For the appellant(s): Mr. Sandeep Sharma, Assistant Solicitor General of India, in all the appeals.

For the respondents: Mr. Sunil Mohan Goel, Advocate for private respondents in all the appeals.
Mr. Parmod Thakur, addl. AG with Mr. Neeraj K. Sharma, Dy. AG for respondents-State in all the appeals.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, the same were taken up together for disposal by a common judgment.

2. The appellants have challenged the award dated 24.3.2005 rendered by the learned Addl. District Judge, Fast Track Court, Kullu,

H.P. in Reference Petition Nos. 63, 62, 90, 79, 56, 69, 74, 53, 83, 93, 77, 104, 88, 71 and 58 of 2002, respectively.

3. Key facts, necessary for the adjudication of these appeals Are that the Government of Himachal Pradesh intended to acquire the land for setting up of Army Transit Camp. Notification No. Home (A) F (13)-10/88 dated 23.12.1993 for Phati Palchan and No. Home (A) F (13)-10/88 dated 23.12.1993 for Phati Barua under Section 4 of the H.P. Land Acquisition Act, 1894 (hereinafter referred to as the Act) were issued. These were published in Rajpatra, H.P. Extra Ordinary, dated 3.1.1994. Notifications under Sections 6 & 7 of the Act were also published in different newspapers. Notices were also issued to the claimants under Section 9 of the Act on 5.11.1996. The land of the claimants was acquired for Phati Palchan as well as in Phati Barua. The Land Acquisition Collector made a common award dated 24.11.1997 for the land situated in Phati Palchan measuring 11-2-00 bighas and Phati Barua, measuring 371-9-00 bighas. The market value of the land was worked out by the Land Acquisition Collector as under:

(i) PHATI PALCHAN:-

1. Market value of 11-3-0 bighas land =Rs. 10.62 lac;

2. Solatium 30% (u/s 23(2) of the Act)= Rs. 3.186 lac; and

3. Payment u/s 23-1(A) of the Act @ 12% per annum w.e.f. 23/12/93 to 23/11/97 = Rs. 4.9914 lac.

Total:- 18.7974 lac.

(ii) PHATI BARUA:-

1. Market value of 371-09-00 bigha land = Rs.169.245;

2. Solatium 30% of above = Rs. 50.77350;

3. Payment u/s 23-1(A) w.e.f. 23/12/93

To 23/11/97 @ 12% p.a. = 79.54515.

Total:- Rs.299.56365."

4. The claimants, feeling aggrieved by the award dated 24.11.1997 filed reference petitions on the ground that the market value assessed was low, inadequate and un-reasonable. According to them, the land acquired was situated near Manali town. It was also adjoining Solang Skia Slopes and also Hot Springs of Vashist and Nehru Kund were in the vicinity. It is also gate-way to Rohtang pass. Many offices of GREF and SASE were situated near the acquired land. The market value of the land was not less than 60,000/- per biswa. There were fruit bearing trees on the land. They have also raised dangas and breast walls.

5. The appellant(s) contested the reference petitions by filing separate replies. According to them, the compensation awarded by the Land Acquisition Collector was adequate. The Manali town was 11 kms. away from the acquired land. It has no potential for the tourism.

6. The rejoinders were filed by the claimants. Issues were framed by the learned Addl. District Judge, Kullu on 17.1.2003. The learned Addl. District Judge, Kullu passed the award on 24.3.2005, whereby the market value of the acquired land of Phati Palchan was Rs. 7505/- per biswa (1,50,100/- per bigha) and of Phati Barua Rs.8838/- per biswa (Rs.1,76,760/- per bigha) on the date of issuance of the notification under Section 4 of the Act. The statutory benefits were also awarded.

7. The appellant(s) have challenged the award dated 24.11.1997. Mr. Sandeep Sharma, Asstt. Solicitor General of India has vehemently argued that the learned Addl. District Judge, Kullu has not taken into consideration the distance between the acquired land from the Manali town. He then contended that the assessment could not be made on the basis of small plots. The assessment was to be made on the basis of classification of the land. He lastly contended that the interest was to be ordered from the date of passing of the award by the Reference Court. Mr. Sunil Mohan Goel, Advocate for the private respondents, has supported the judgment dated 24.3.2005 of the learned Addl. District Judge, Kullu, H.P.

8. I have heard the learned Advocates on both the sides and gone through the award dated 24.3.2005 alongwith the record.

9. The land of the claimants was acquired by the State Government for the construction of Transit Camp in Phati Palchan and Phati Barua. Notification under Section 4 of the Act was issued. Notices under Section 6 & 7 were also issued. The claimants were issued notices under Section 9 of the Act. Since the appellants were not satisfied with the award made by the Land Acquisition Collector on 24.11.1997, references were filed before the learned Addl. District Judge, Kullu.

10. The claimants have not led any evidence to prove that they have raised orchard on the acquired land. They have also not led any evidence that they have raised *dangas* and breast walls. The Court would take firstly the market value of the acquired land of Phati Palchan. The notification was issued under Section 4 of the Act on 23.12.1993. PW-3, Kewal Ram has deposed that the acquired land of Phati Palchan adjoin National Highway No. 21. Phati Vashishat also adjoins this Phati. There is Solang nullah slopes on one side of Rohtang Pass. It is a gateway of Rohtang Pass. Tourist Resorts are also situated near the acquired land. According to him, at the relevant time, the value of the acquired land was Rs.1,00,000/- per biswa. PW-2, Jagat Ram deposed that he alongwith Rattan and Hetu sold 0-13-0 bigha land for a sum of Rs.1,62,500/- to Sh. Ramanand Sagar vide sale deed Ext. PW-2/A. This land is also situated in Phati Palchan. It was sold on 30.4.1991 at the

rate of 12,500/- per biswa. According to sale deed Ext. PW-4/A dated 15.4.1991, the land measuring 2-17-0 bighas was sold for a sum of Rs.4,56,000/- to Ramanand Sagar i.e. at the rate of Rs.8,000/- per biswa.

11. The respondents have relied upon the certified copy of the sale deed Ext. RW-1/A dated 16.8.1993. It was proved by Surat Ram. According to him, he sold 0-8-0 bighas of land for a sum of Rs.15,000/- to Ramesh in the same Phati. Thus, the value of one biswa land comes to Rs.1875/-. However, he has admitted that this land was at some distance from the road. The acquired land of the claimants adjoins the National Highway. RW-2, Tek Ram has proved Ext. RW-2/A. He has sold 0-4-0 bighas of land for a consideration of Rs.5,000/- in Phati Palchan. However, this sale deed is of Phati Vashishat and not of Phati Palchan. As far as the sale transaction Ext. RA is concerned, the same has not been proved in accordance with law. It is true that sale deeds Ext. PW-2/A and Ext. PW-4/A are of small plots of land. The average price would come to Rs.10,425/- per biswa in respect of small pieces of land. Necessary deduction to the extent of 40% is required to be made and then the average value would come to Rs.6255/- per biswa and by granting appreciation in the value of land @ 10% from 1991, it would come to Rs. 7505/- per biswa for Phati Palchan.

12. Now, as far as Phati Barua is concerned, the notification was issued under Section 4 of the Act on 23.12.1993. PW-5 Tikka Ram and PW-6 Lalu Ram deposed that the Manali Bazar is on one side and Solang nullah slopes. The acquired land has potential for tourism. The land is situated on the right bank of Solang nullah and about 1 km. away from Solang-Sarchu Highway. According to them, the market value of the acquired land was Rs.1,00,000/- per biswa, 10-12 years ago and now it is Rs.1,50,000/- or 2,00,000/- . They have placed reliance upon sale deed Ext. PW-1/A dated 20.12.1993. According to this sale deed, the land measuring 0-2-0 bighas of land was sold by PW-1 Nathu Ram for a sum of Rs. 15,000/-. Thus, the market value of the land comes to Rs.7500/- as per sale deed Ext. PW-1/A. The sale has taken place in the same month in which the notification under Section 4 was issued. The appellants belonging to Phati barua have placed strong reliance on Ext. PW-5/A dated 1.2.1992. It was proved by PW-5, Tikka Ram. This sale has taken place in the year 1992. The land measuring 0-3-0 bighas was sold for Rs.55,000/-. Thus, by giving 10% appreciation in the value of land for subsequent two years, the market value comes to Rs.21,960/-. The appellants have also placed reliance on sale deeds Ext. RC, Ext. RE and Ext. RG. However, neither the vendors nor the vendees have been examined and thus, the sale deeds are required to be discarded.

13. Now, as far as Ext. PD is concerned, this notification was issued for acquiring land in the year 1997. It has rightly been discarded by the learned Addl. District Judge, Kullu. The average value on the basis of transactions Ext. PW-1/A and Ext. PW-5/A comes to Rs.14,730/-. However, 40% deduction is required to be made as far as plots of lands in these sale deeds were small. The total market value of

the acquired land of Phati Barua comes to Rs.8838/- per biswa and Rs.1,76,760/- per bigha. The learned Addl. District Judge has rightly assessed the market value of the land taking into consideration the sale deeds and by deducting 40% of the amount by taking into consideration smaller size of the plots sold. The land in question has been acquired for the purpose of setting up Transit Camp. Though, as per the Land Acquisition Collector, the quality and classification of the land was *bathal dom, bathal charam, banjar kadim/abadi and gairmumkin,* however, the fact of the matter is that the potentiality of the land would remain the same since the land has been acquired for setting up of Army Transit Camp. The land is being put to some use and thus, there is no illegality committed by learned Addl. District Judge, Kullu by assessing the market value of the acquired land in respect of quality/*kism* of the acquired land. The learned Addl. District Judge, Kullu has awarded the interest from the date of the notification issued under Section 4 of the Act and the claimants were entitled to other statutory benefits under the Act. The learned Addl. District Judge, Kullu, has correctly assessed the value of acquired land of Phati Palchan @ Rs. 7505/- per biswa i.e. Rs.1,50,100/- per bigha and @ Rs. 8838/- per biswa and Rs.1,76,700/- per bigha for Phati Barua alongwith the statutory benefits.

14. Accordingly, there is no merit in these appeals, the same are dismissed.

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

Dharam Pal Thakur ...Petitioner.

Vs.

State of Himachal Pradesh & others ...Respondents.

CWPIL No. 10 of 2014

Date of Order: 22.09.2014

Constitution of India, 1950- Article 226- Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- The purpose of Shimla Road Users and Pedestrians (Public Safety and Convenience) Act is to restore the sanctity of the Shimla city- State had renewed 2538 permits for vehicles and 318 permits were also issued up to 21.8.2014- however, the names of the permits holders and by whom the permits were issued were not specified- State directed to furnish the list of the permit holders along with the full particulars and to restrict the plying/movement of vehicles without passes- State further directed to create more off-street and on-street parking places/parking zones- H.R.T.C. is directed to issue the permit to the taxies strictly in terms of the earlier order dated 14.10.2011. (Para- 2 to 24)

Present: Mr. Ajay Mohan Goel, Advocate, for the petitioner.
Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1, 2, 4 and 5.
Mr. G.S. Rathore, Advocate, for respondent No. 3.
Mr. Hamender Chandel, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Respondents No. 1 and 3 to 6 have filed replies. Respondent No. 2 has yet to file reply. Respondent No. 1 has also filed status report/compliance report.

2. Keeping in view the fact that public interest is involved, this petition was ordered to be diarized as Public Interest Litigation vide order, dated 22nd July, 2014, and the respondents were directed to file status report(s).

3. In response to direction (a), the respondents have not filed the details as to what steps they have taken to comply with the mandate of the Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007, (hereinafter referred to as "the Act"). The replies filed are vague. They are directed to file the status report(s) indicating as to what measures they have taken to do the needful in terms of the mandate of the Act.

4. In compliance to direction (b), respondent No. 1 has stated that 3023 permits have been issued from the year 2008 to 2014 and 2538 have been renewed, but has not furnished the particulars of the permit holders.

5. It is also mentioned in the affidavit that the Secretary, Vidhan Sabha, is also empowered in terms of the Act/Rules and Regulations to issue permits to the Members of the H.P. Legislative Assembly and as per the information, 318 permits have been issued upto 21st August, 2014.

6. It is not known to whom these 318 permits/passes have been issued and by whom.

7. In this backdrop, we deem it proper to array Secretary, Himachal Pradesh Legislative Assembly as a party-respondent in the array of respondents and shall figure as respondent No. 7. Registry to make necessary correction in the cause title.

8. Issue notice to newly added respondent No. 7 returnable within four weeks. Mr. Romesh Verma, learned Additional Advocate General, waives notice on behalf of respondent No. 7. Respondent No. 7 is directed to furnish the list of person(s) alongwith full particulars, in whose favour, the said 318 passes/permits have been granted.

9. Respondents No. 1 and 6 are also directed to furnish the list of the permit holders/pass holders alongwith the full particulars, in whose favour the passes/permits have been issued.

10. Respondents No. 1, 6 and 7 are further directed to file affidavits indicating as to whether they have followed the mechanism provided under Sections 3, 4 and 6 of the Act.

11. In compliance to direction (c), respondent No. 1 has stated that CCTV cameras are in place at CTO and Silli Chowk to monitor the entry and movement of the unauthorized vehicles, but it does not contain the details what mechanism they have adopted to prevent/deter the plying/movement of the vehicles without passes/permits.

12. In compliance to direction (d), respondent No. 1 has filed the compliance report evasively. It is stated in the reply that the traffic is being managed by the police officers/officials, who are manning the traffic management/traffic posts and challans have been filed against the violators in terms of the mandate of the Act and the rules occupying the field.

13. The proceedings have been drawn in terms of Section 11 of the Act read with Section 184 of the Motor Vehicles Act (hereinafter referred to as "the MV Act"). It is not stated in the reply that how many challans have been made so far and what is the mechanism adopted to check unauthorized plying of vehicles on restricted/sealed roads and how the mandate of the MV Act/Rules is being followed.

14. In compliance to directions (e) and (f), respondent No. 1 has not given the details as to how many parking places are in place; how many sites for parking places have been identified and what steps have been taken to prevent the unauthorized parking. However, in para (f) of the compliance/status report, it has been stated that the Deputy Commissioner, Shimla District has declared the road from Cart Road via Cancer Hospital to the main gate of IGMC, Shimla and the road leading from Gurudwara (Cart Road) to DDU Hospital as "No Parking Zones" vide notifications, dated 24th July, 2014 and 30th July, 2014, respectively, and are manning the same. The report is silent as to what steps have been taken to prevent its fallout and consequences.

15. Respondent No. 6 has stated in para 22 of the reply as to what steps they have taken to create more off-street and on-street parking places/parking zones, but what steps they have taken to implement the same and what steps they have taken to achieve the mandate of the Act is not forthcoming. Respondents No. 1 and 5 have also not stated what steps they have taken to comply with directions (e) and (f).

16. Mr. Ajay Mohan Goel, learned counsel for the petitioner, has stated at the Bar that the respondents have taken steps to control and regulate the ingress and egress to IGMC Hospital without any hindrance, but that has resulted in traffic jamming and illegal parking near IGMC main gate towards Manchanda Clinic and Lakkar Bazar and has prayed that the respondents be directed to do the needful. Respondents to take appropriate steps.

17. In compliance to direction (g), respondent No. 5 has stated in the reply that the HRTC Taxis, though are being run on the sealed/restricted roads in terms of the directions passed by this Court on 14th October, 2011, in CWP No. 1916 of 2009 and CWP No. 7784 of 2010, but the drivers/owners of the said taxis are misusing the same and have created havoc in the entire Shimla; the taxis are being driven dangerously at high speed; the pedestrians are not in a position to walk and have also sought intervention of this Court.

18. Respondent No. 1 has stated in para 19 of the reply that HRTC has outsourced the taxi services to the private operators. Respondents No. 1 and 3 to 5 to report as to whether that action is in terms of the mandate of the Act and order, dated 14th October, 2011 (supra) made by this Court and whether any leave was sought from this Court to that extent.

19. Respondents No. 1 and 3 to 5 are further directed to restrict the use of the said HRTC Taxis strictly in terms of order dated 14th October, 2011 (supra), copy of which is also made part of the file and mention whereof has been made in para 2 (g) of the reply filed by respondent No. 4, read with the provisions of the Act.

20. The purpose of granting permission to ply the HRTC taxis is contained in the order (supra) read with the Act, but appears to have been misused. Respondents to indicate what steps they have taken to prevent their misuse.

21. Respondent No. 1 has also stated in the reply that there is no need and justification to review the existing permits and re-issue the same.

22. It appears that the residents, who are residing in and around the prohibited/restricted/sealed area, have also been granted the permits/passes. The respondents are directed to file status report to the effect as to whether the said permits/passes has been granted strictly in terms of the Act; whether any permit/pass has been granted to any such resident who is not now residing there and has shifted to any other place and whether the permit holders/pass holders, though not residing within the limits of sealed/restricted roads, are parking their vehicles in the said areas and are performing their job/running the business in the nearby market etc.

23. We have also perused the news paper cutting, dated 9th September, 2014, submitted by the learned counsel for the petitioner, in terms of which new permits have been granted to ply the HRTC taxis on

34 new routes by the HRTC authorities. Respondents No. 3 and 5 to file separate affidavits containing the full details as to how many permits have been granted to whom and who has to ply the said taxis and whether outsourcing is permissible.

24. We deem it proper to record herein that the aim and object of the Act is to restore the sanctity of the Shimla City and the sole of the Act is how to preserve and maintain the beauty of the City.

25. Having glance of the above discussions, we deem it proper to direct the respondents to file fresh report(s) in terms of order, dated 22nd July, 2014 read with the directions made hereinabove. Any deviation shall be seriously viewed.

26. List on **27th October, 2014.** Copy **dasti.**

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

The Principal Secretary (Personnel) & another ...Appellants.
Vs.
Pratap Thakur ...Respondent.

LPA No. 11 of 2012
Reserved on: 16.09.201
Decided on: 22.09.2014

Constitution of India, 1950- Article 14- Equal pay for equal work- Petitioner claiming that the post of Junior Translator in H.P. State Administrative Tribunal is similar to the post sanctioned and created in various other departments- he is entitled to the pay scale as was being granted in other departments- held that while determining parity the Court has to consider factors like the source and mode of recruitment/appointment, qualifications, nature of work, value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. - the similarity of designation or nature of work is not sufficient to grant equal pay - the petitioner had not laid any foundation to establish that functions, responsibilities and duties of the posts were similar- therefore, he is not entitled for the pay equal to the other person.

(Para-11 to 21)

Cases referred:

Hukum Chand Gupta Vs. Director General, Indian Council of Agricultural Research and others, (2012) 12 Supreme Court Cases 666

State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, (2009) 13 Supreme Court Cases 635

Steel Authority of India Limited and others Vs. Dibyendu Battacharya, (2011) 11 Supreme Court Cases 122

Union Territory Administration, Chandigarh and others Vs. Manju Mathur and another, (2011) 2 Supreme Court Cases 452

State of Punjab & Anr. Vs. Surjit Singh & Ors., 2009 AIR SCW 6759

New Delhi Municipal Council Vs. Pan Singh & Ors., 2007 AIR SCW 1705

State of Haryana and others Vs. Charanjit Singh and others etc., AIR 2006 Supreme Court 161

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

For the respondent: Mr. M.L. Sharma, 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 24th February, 2011, made by the learned Single Judge in CWP (T) No. 7679 of 2008, titled as Pratap Thakur versus State of Himachal Pradesh and others, whereby the writ petition filed by the writ petitioner-respondent herein came to be allowed (hereinafter referred to as "the impugned judgment"), on the grounds taken in the memo of appeal.

2. The writ petitioner-respondent invoked the jurisdiction of the H.P. State Administrative Tribunal in terms of Section 19 of the Administrative Tribunals Act, 1985, by the medium of Original Application No. 829 of 2001, seeking quashment of Annexure A-10 and directing the writ respondents-appellants to grant pay scale of Rs.4400-7000 with effect from 1st January, 1996 with all consequential benefits and interest @ 15% per annum to the writ petitioner, who was holding the post of Junior Translator in the erstwhile H.P. State Administrative Tribunal, on the averments contained in the said petition. After abolition of the H.P. State Administrative Tribunal, was transferred to this Court, came to be diarized as CWP (T) No. 7679 of 2008.

3. Precisely, the case of the writ petitioner was that he was appointed as Junior Translator on 16th May, 1995 in the pay scale of Rs.950-1800 (Annexure A-1), was confirmed on the said post with effect from 1st March, 1998 vide Annexure A-2, was promoted as Senior Translator with effect from 15th December, 1998 in terms of Annexure A-3.

4. The writ petitioner has laid the foundation of his case on the ground that the posts created/ sanctioned in the H.P. State Administrative Tribunal are similar to the posts sanctioned and created in various departments of the State of Himachal Pradesh especially, Himachal Pradesh Secretariat, Governor's Secretariat and Himachal Pradesh Vidhan Sabha Secretariat. The post of Junior translator was sanctioned in the cadre of H.P. State Administrative Tribunal in the grade of Rs.400-600, was revised to Rs.950-1800/1200-2100 with effect from 1st January, 1986, and the post was at par with the Junior Translator in the Himachal Pradesh Vidhan Sabha Secretariat because same pay scale was admissible in Vidhan Sabha also and essential qualifications for appointment were also similar. The pay scales were revised in terms of notifications, dated 20th January, 1998 (Annexure A-6) and dated 1st September, 1996 (Annexure A-7), but the pay scale of Junior Translator in the H.P. State Administrative Tribunal was not revised and in order to have parity, the H.P. State Administrative Tribunal made a proposal for revising the pay scale of Junior Translators from Rs. 950-1800/1200-2100 (pre-revised) to Rs.4400-7000. However, the writ respondents-State have rejected the same vide Annexure A-10.

5. The writ respondents have resisted the petition on the grounds taken in the respective memo of objections. Writ respondents No. 1 and 2 have filed joint reply and writ respondent No. 3 has filed separate reply.

6. Writ respondents No.1 and 2 have specifically pleaded that the case was examined by the Government and it was found that there is no parity and accordingly, the prayer was rejected. It is apt to reproduce para 6 (iv), 6 (v) (b) and 6 (v) (e) of the reply filed by writ respondents No. 1 and 2 herein:

> *"Para-6 .....*
>
> *(iv) Admitted to the extent that a request was received from R.No. 3 to re-revise the pay scale of the post of Junior Translator from 3120-5160 to Rs. 4400-7000 w.e.f. 1.1.1996 which was not agreed to by the Govt. as there was no parity in the matter of pay scale of the posts of Junior Translator in H.P. Administrative Tribunal and Himachal Pradesh Vidhan Sabha.*
>
> *(v) .....*
>
> *(a) .....*
>
> *(b) As submitted against para 6 (ii) above the post of Junior Translator in H.P. Vidhan Sabha has been allowed the pay scale of Rs. 4400-7000 w.e.f. 1.1.1996 on Punjab pattern. The same has rightly been denied to the applicant as this post does not exist in the counter-part Department in Punjab and accordingly he has been allowed the revised pay scale of Rs. 3120-5160 as per general conversion*

table issued by the Finance Department vide letter No. Fin(PR)B(7)-1/98 dated 9.1.1998 (Annexure R-1).

(c) …….

(d) …….

(e) It is not correct that the duties and responsibilities of the post of Junior Translator are higher than those of Clerk. Both of these categories have been placed in identical pay scales since 1978 i.e. Rs. 400-600 revised to Rs. 950-1800 w.e.f. 1.1.1986. As regards qualifications the same are prescribed taking into account the nature of job of a particular post."

7. Writ respondent No.3 though has made recommendation for grant of the said grade but has not given the details how the two posts are similar and whether the functions, duties and responsibilities of the Junior Translators at Himachal Pradesh State Administrative Tribunal and Himachal Pradesh Vidhan Sabha are similar and are performing as such.

8. The Writ Court, after examining the pleadings, passed the impugned judgment, which, on the face of it, is not in accordance with law, needs to be set aside for the following reasons:

9. The writ petitioner has based his case on the foundation that the post of Junior Translator in the Himachal Pradesh State Administrative Tribunal was equivalent to the post of Junior Translator in the Himachal Pradesh Vidhan Sabha, had sought relief on that ground and, thereafter, they pleaded that they are entitled to that grade.

10. The Writ Court/learned Single Judge has not marshalled out the facts and merits of the case read with the office orders/notifications to the effect whether the duties and responsibilities of the writ petitioner were similar to that of the Junior Translator in the Himachal Pradesh Vidhan Sabha in order to determine the claim of parity.

11. The Apex Court in **Hukum Chand Gupta Vs. Director General, Indian Council of Agricultural Research and others, reported in (2012) 12 Supreme Court Cases 666,** held as to how parity can be claimed or granted. It is apt to reproduce relevant portion of para 20 of the judgment herein:

20. ……. There cannot be straitjacket formula for holding that two posts having the same nomenclature would have to be given the same pay scale. Prescription of pay scales on particular posts is a very complex exercise. It requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbents on different posts. Even though, the two posts may be referred to by the same name, it would not lead to the

necessary inference that the posts are identical in every manner. These are matters to be assessed by expert bodies like the employer or the Pay Commission. Neither the Central Administrative Tribunal nor a writ court would normally venture to substitute its own opinion for the opinions rendered by the experts. The Tribunal or the writ court would lack the necessary expertise to undertake the complex exercise of equation of posts or the pay scales."

12. The Apex Court in another case titled as **State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, reported in (2009) 13 Supreme Court Cases 635,** held that the Court has to consider factors like the source and mode of recruitment/appointment, qualifications, nature of work, value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. It is apt to reproduce para 15 of the judgment herein:

"15. In our view, the approach adopted by the learned Single Judge and the Division Bench is clearly erroneous. It is well settled that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated. Similarity in the designation or nature or quantum of work is not determinative of quality in the matter of pay scales. The court has to consider the factors like the source and mode of recruitment/appointment, qualifications, the nature of work, the value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. In other words, the quality clause can be invoked in the matter of pay scales only when there is wholesale identity between the holds of two posts."

13. The Apex Court in the case titled as **Steel Authority of India Limited and others Vs. Dibyendu Battacharya, reported in (2011) 11 Supreme Court Cases 122,** has discussed the development of law and the judgments made by the Apex Court right from the year 1968, in paras 18 to 29 of the judgment. It is apt to reproduce paras 30, 31 and 33 of the judgment herein:

30. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting

parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the concerned posts. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties.

31. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The expert committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/ wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work.

32. .....

33. By the impugned order, the respondent has not been granted the post in Grade E-1 but salary equivalent to that of Shri B.V. Prabhakar has been granted to the Respondent. The order itself is mutually inconsistent and contradictory. The representation of the respondent had been for waiving the criteria meaning thereby that the respondent sought a relaxation in the eligibility criteria for the post in Grade E-1. It is evident from the representation itself that the respondent never possessed the eligibility for the post of Grade E-1. The Law does not prohibit an employer to have different grade of posts in two different units owned by him. Every unit is an independent entity for the purpose of making recruitment of most of its employees. The respondent had not been appointed in centralised services of the company.

14. The Apex Court in **Union Territory Administration, Chandigarh and others Vs. Manju Mathur and another, reported in (2011) 2 Supreme Court Cases 452,** held that similarity of designation or nature or quantum of work is not determinative of entitlement to equality in pay scales.

15. The Apex Court in the case titled as **State of Punjab & Anr. Vs. Surjit Singh & Ors., reported in 2009 AIR SCW 6759,** has discussed the development of law right from the year 1960 till 2009. It is apt to reproduce para 30 of the judgment herein:

> *"30. Mr. Swarup may or may not be entirely correct in projecting three purported different views of this Court having regard to the accepted principle of law that ratio of a decision must be culled out from reading it in its entirety and not from a part thereof. It is no longer in doubt or dispute that grant of the benefit of the doctrine of 'equal pay for equal work' depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity."*

16. It would also be profitable to reproduce para 13 of the judgment rendered by the Apex Court in **New Delhi Municipal Council Vs. Pan Singh & Ors., reported in 2007 AIR SCW 1705,** herein:

> *"13. They, thus, formed a class by themselves. A cut-off date having been fixed by the Tribunal, those who were thus not similarly situated, were to be treated to have formed a different class. They could not be treated alike with the others. The High Court, unfortunately, has not considered this aspect of the matter."*

17. The Apex Court in a case titled as **State of Haryana and others Vs. Charanjit Singh and others etc. etc., reported in AIR 2006 Supreme Court 161,** held that the principle of 'equal pay for equal work' has no mechanical application in every case. It is apt to reproduce para 17 of the judgment herein:

> *"17. Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on*

qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant

> *factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."*

18. A Division Bench of this Court in a case titled as **Roshan Lal Vs. Hon'ble High Court of Himachal Pradesh and another,** being **CWP No. 873 of 1993,** decided on 27th October, 1994, held that even if a post of one cadre is created in two departments and different pay scales are granted, that cannot be a ground to claim parity. In order to claim parity, the writ petitioners have to indicate that their jobs, duties, responsibilities and functions are similar. In this case, the Court has examined whether the post of Book Binder sanctioned in the High Court and Secretariat of the State Government and in other departments are entitled to same pay scale? No doubt, the post of Book Binder was created in all these departments, but it was held that it is for the writ petitioner to plead and prove that he was performing the same type of work and responsibilities and other factors are similar. This Court, after discussing all facts and factors, rejected the plea for grant of parity and the writ petition was dismissed. It is apt to reproduce relevant portion of the judgment herein:

> *"Having heard the learned counsel for the petitioner, we find no justification in the submission. It is too much of the employee of the High Court to claim that the High Court should be equated with the Printing and Stationery Department of the State Government. Even on the basis of job, there would be no similarity. The Printing and Stationery Department would have continuous and different varieties of work needing a different type of Book-Binder than the Book-Binder in the High Court."*

19. A similar question has also arisen in a recent case titled as **Himachal Pradesh State Electricity Board Vs. Rajinder Upadhaya & others,** being **LPA No. 51 of 2009,** decided on 11th September, 2014, and after discussing the law, it has been held by this Court that in order to claim parity, the writ petitioner has to indicate that their functions, responsibilities and the duties are similar. It is apt to reproduce para 30 of the judgment herein:

> *"30. It was for the writ petitioners to plead, marshal and prove that they were performing the similar duties as the Circle Scale Superintendent was performing and the duties, which are being performed by the Law Officer Grade-I are being performed by them also."*

20. Viewed thus, the writ petitioner has failed to carve out a case for grant of parity.

21. In view of the above discussions, the learned Single Judge has fallen in error in allowing the writ petition and quashing the decision of the State in rejecting the writ petitioner's claim vide Annexure A-10.

22. Having glance of the above discussions, the impugned judgment merits to be set aside. Accordingly, the appeal is allowed, the impugned judgment is set aside and the writ petition is dismissed. Pending applications, if any, are also disposed of.

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

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

Vs.

Brij Mohan @ Biju S/o Sh Lokpal. .....Respondent.

Cr. Appeal No. 482 of 2008.
Judgment reserved on:28.07.2014
Date of Decision: 22.09.2014

Indian Penal Code, 1860- Section 376- Prosecutrix, a student of 5th class, was raped by the accused- pregnancy test was found to be positive, but the prosecutrix had spontaneous abortion- the prosecutrix stated before the Court that accused had not done anything to her- she admitted in her cross-examination that she was making a tutored version- her mother also stated that prosecutrix had not disclosed to her that accused had raped her- her father also denied the prosecution version- medical examination did not support the prosecution version- held, that the Trial Court had rightly acquitted the accused. (Para 11 to 15)

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- the Appellate Court should not set aside the judgment of acquittal when two views are possible- the Court must come to the conclusion that the view of the Trial Court was perverse or otherwise unsustainable- the Court is to see whether any inadmissible evidence has been taken into consideration and can interfere only when it finds so. (Para 16)

Cases referred:

Mookkiah and another Vs. State, (2013) 2 SCC 89

State of Rajashthan Vs. Talevar and another ,2011 (11) SCC 666

Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78

State of Rajasthan Vs. Shera Ram @ Vishnu Dutt 2012 (1) SCC 602

Balak Ram and another Vs. State of UP AIR 1974 SC 2165

Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57

Raghunath Vs. State of Haryana (2003) 1 SCC 398

State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075

S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others AIR 2008 SC 2066,

Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra (2008) 11 SCC 186

Arulvelu and another Vs. State (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P (2009) 16 SCC 98

Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

Anjlus Dungdung Vs State of Jharkhand (2005) 9 SCC 765

Nanhar Vs. State of Haryana, (2010) 11 SCC 423

Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116

State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382

Sharad Birdhichand Sarda Vs. State of Maharashtra AIR 1984 SC 1622

Bhugdomal Gangaram and others etc Vs. The State of Gujarat AIR 1983 SC 906

State of UP Vs. Sukhbasi and others AIR 1985 SC 1224

For the appellant: Mr. B.S.Parmar & Mr. Ashok Chaudhary, Addl. Advocate General with Mr.Vikram Thakur, Dy. Advocate General & Mr.J.S.Guleria, Assistant Advocate General.

For the respondent: Mr.Peeyush Verma and Mr.Lalit Kumar Sehgal, Advocates.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Shimla HP in Sessions Trial No. 23-R/7 of 2007 titled State of HP Vs. Brij Mohan decided on 19.4.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 4.11.2006 and 6.11.2006 at Khauni rivulet accused namely Brij Mohan committed rape upon prosecutrix. It is further alleged by

prosecution that on the aforesaid date, time and place the accused also intimidated the prosecutrix and threatened her that he would kill the prosecutrix if the prosecutrix disclose the factum of rape to her parents. It is further alleged by prosecution that prosecutrix was the student of 5th class and was studying in Sawarna High School. It is further alleged by prosecution that accused used to tease the prosecutrix. It is further alleged by prosecution that prosecutrix did not menstruate and her mother inquired to know from her the reason upon which prosecutrix disclosed that accused committed rape upon her. It is further alleged by prosecution that MLC Ext PW5/A was conducted and pregnancy test of the prosecutrix was found positive. It is alleged by prosecution that prosecutrix had spontaneous abortion. The clothes of the prosecutrix were took into possession vide memo Ext PW1/B. It is further alleged by prosecution that site plans Ext PW11/A, Ext PW11/B and Ext PW11/D were prepared by the Investigating Officer. It is alleged by prosecution that birth certificate of the prosecutrix was also obtained vide memo Ext PW11/E. It is further alleged by prosecution that the copies of the admission and withdrawal register Ext PC and Ext PD and copy of attendance register Ext PH were also obtained. It is further alleged by prosecution that sample of hairs of prosecutrix and accused were took into possession. It is further alleged by prosecution that report of Forensic Science Laboratory is Ext PW11/G. It is further alleged by prosecution that the hairs of the accused and prosecutrix were sent to Forensic Science Laboratory Junga. Accused did not plead guilty and claimed trial.

3. The prosecution examined as many as eleven witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Jagriti
PW2	Smt.Bhagpatti
PW3	Sh Onkar Chand
PW4	Sh Deepak
PW5	Dr. Usha Darcho
PW6	Dr.Sumeet Attri
PW7	Ms. Dayawanti
PW8	Sh Sanjeev Kumar C.No.1272
PW9	Sh Sanjeev Kumar C.No.198
PW10	Sh Rustam Alli
PW11	Sh Ram Rattan

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

Sr.No.	*Description:*
Ext. PW1/A	Copy of FIR
Ext. PW1/B	*Recovery memo of Salwar and Shirt.*
Ext. PW5/A	*MLC of prosecutrix.*
Ext. PW5/B	*Copy of application moved to M.O.*
Ext. PW5/C	*Copy of application moved to M.O.*
Ext. PW5/D	*MLC of prosecutrix.*
Ext. PW6/A	*Copy of application moved to M.O.*
Ext. PW6/B	*MLC of Brij Mohan accused*
Ext. PW10/A	*Statement of Bhagmati u/s 161, Cr.P.C.*
Ext. PA	*Copy of family Registrar*
Ext. PB	*Birth certificate of prosecutrix.*
Ext. PC	*Copy of admission and withdrawal register of Govt. Primary School, Chanderpur.*
Ext. PD	*Copy of admission and withdrawal register of Govt. primary School, Sarswatinagar.*
Ext. PE	*Birth certificate of prosecutrix.*
Ext. PF	*Copy of family Register.*
Ext. PG	*Birth certificate of Brij Mohan accused.*
Ext. PH	*Copy of attendance register.*
Ext. PJ	*Copy of attendance register*

Ext. PW11/A	*Site plan*
Ext. PW11/B	*Site plan*
Ext. PW11/C	*Seal impression*
Ext. PW11/D	*Site plan*
Ext. PW11/E	*Seizure memo*
Ext. PW11/F	*Seizure memo*
Ext. PW11/G	*FSL report*
Ext. PW11/H	*Statement of Bhagwati u/s 161 Cr.P.C.*
Ext. PW11/J	*Statement of Deepak Kumar u/s 161 Cr.P.C.*
Ext. PW11/K	*Statement of Onkar u/s 161,Cr.P.C.*

5. The statement of accused was also recorded under Section 313 Cr.P.C. Accused did not examine any defence witness. Learned trial Court acquitted the accused qua charge under Section 376 IPC.

6. Feeling aggrieved against the judgment passed by learned Trial Court appellant filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the appellant and learned Advocate appearing on behalf of respondent and also gone through the entire record carefully.

8. Question that arises for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 prosecutrix has stated that in the year 2006 she was student of 5th class in primary school Sawarna. She has stated that accused did not do anything to her. She has thereafter stated that in the year 2006 accused present in Court took her forcibly to a river and

committed rape upon her. She has stated that accused also threaten her to kill her in case she disclosed the incident to her parents. She has stated that when she did not menstruate her mother enquired reason and thereafter prosecutrix told her mother about the rape committed by accused. She has stated that she did not disclose the factum of rape earlier to her mother because she was afraid due to threatening given by accused. She has stated that she was medically examined. She has stated that investigating agency took into possession her school uniform vide memo Ext. PW1/B. She has identified her salwar Ext P1 and shirt Ext P2 which were took into possession. She has denied suggestion that accused did not commit rape upon her.

9.1 PW2 Smt Bhagpatti has stated that prosecutrix is her daughter. She has stated that one year ago prosecutrix told her that Vicky and accused Biju present in Court intercepted prosecutrix when she was going to school. She has stated that Vicky and accused Biju used to catch her by her arm. She denied suggestion that prosecutrix told her that she was raped by Vicky and accused Biju. She denied suggestion that prosecutrix told her that due to fear prosecutrix did not disclose the name of the accused earlier. She denied suggestion that in order to save the accused she has resiled from her earlier statement. She admitted that accused belongs to well to do family and accused has sufficient property.

9.2 PW3 Onkar Chand has stated that prosecutrix is his daughter. He has stated that on dated 7.11.2006 he and his wife took prosecutrix to police station Jubbal. He has stated that he does not know what the prosecutrix told to police officials. He has denied suggestion that prosecutrix was raped by Vicky and accused Biju. He has admitted that miscarriage took place to the prosecutrix. He denied suggestion that in order to save accused he has resiled from his earlier statement. Accused had given statement that he has no objection if copy of family register, copies of admission and withdrawal register based on school record and birth certificate issued by Panchayat Secretary and copy of attendance register of school are read in evidence. In view of the statement of accused learned Public Prosecutor tendered family register Ext PA, birth certificate Ext PB, copies of admission and withdrawal registers Ext PC and Ext PD, birth certificate Ext PE, copy of family register of accused Ext PF, birth certificate of accused Ext PG and copies of school attendance register Ext PH and PJ.

9.3. PW4 Deepak has stated that police officials showed him some clothes. He has stated that clothes belong to prosecutrix. He has stated that police obtained his signature on a paper. He has stated that prosecutrix did not explain anything to the police in his presence. He has denied suggestion that in order to save the accused he has resiled from his earlier statement.

9.4 PW5 Dr.Usha Darcho has stated that she was posted as Medical Officer in Civil Hospital Jubbal since January 2005. She has stated that on dated 7.11.2006 prosecutrix was brought to her by lady constable Dayawanti with the alleged history of sexual assault. She has

stated that prosecutrix narrated the sexual assault committed upon her on dated 4.11.2006 and 6.11.2006 by Vicky and accused Biju. She has stated that prosecutrix had taken bath after sexual assault. She has stated that urination and defecation habits were normal. She has stated that on examination of the prosecutrix she was conscious and well oriented to place person and time. She has stated that gait was normal and other secondary sexual organs were also normal. She has stated that vaginal orifice admitted one finger. She has stated that prosecutrix was advised for urine test for determination of pregnancy. She has stated that pregnancy test of prosecutrix was found positive. She has stated that as per test report sperm was not found. She has stated that there were recent signs of vaginal penetration. She has stated that pubic hair, vaginal smear slides and underwear were kept preserved and handed over to police official for chemical examination. She has stated that as per chemical examiner no semen/blood was found over the samples. She has stated that she issued MLC Ext PW5/A which bears her signature. She has stated that again police moved an application to conduct medical examination of the prosecutrix. She has stated that prosecutrix fell down when she was lifting basket of dung and after some time spontaneous vaginal bleeding started. She has stated that prosecutrix had sustained spontaneous abortion. She has stated that she issued MLC Ext PW5/D. She has stated that spermatozoa could be detected in the vagina within three hours from the intercourse and dead spermatozoa could be detected in the vagina for 3/4 days. She has stated that as per FSL report no spermatozoa alive or dead were found.

9.5 PW6 Dr.Sumeet Atri has stated that he was posted as Medical Officer in CHC Sarswati Nagar since August 2006. He has stated that police moved an application for medical examination of accused. He has stated that he examined the accused and issued MLC Ext.PW6/A. He has stated that accused was capable of performing sexual act. He has stated that he took samples as mentioned in MLC Ext PW6/B and the same were handed over to investigating agency for forwarding the same to Forensic Science Laboratory.

9.6 PW7 Constable Dayawanti has stated that she was posted as constable in Police Station Jubbal since 27.9.2004. She has stated that on dated 7.11.2006 she took prosecutrix to Civil Hospital Jubbal for medical examination. She has stated that after medical examination two parcels and an envelope were handed over to her and she deposited the parcels and envelope to MHC Jubbal.

9.7 PW8 Constable Sanjeev Kumar has stated that he was posted as Constable in police station Jubbal since 4.6.2006. He has stated that on dated 12.11.2006 MHC police station Jubbal handed over to him sixteen parcels and three envelopes duly sealed vide RC No. 65/2006 for being carried to FSL Junga which he deposited at FSL Junga in the same condition on dated 13.6.2006. He has stated that case property was not tampered while it remained in his custody.

9.8 PW9 HC Sanjeev Kumar has stated that he was posted as MHC in police station Jubbal since March 2006 till October 2007. He has

stated that on dated 7.11.2006 lady constable Dayawanti deposited with him two parcels and an envelope sealed with seal JH. He has stated that on dated 12.11.2006 he handed over all the parcels and envelopes to Constable Sanjeev Kumar for being carried to FSL Junga vide RC No. 65/2006. He has stated that on dated 16.11.2006 constable Sanjeev Kumar returned to him the RC on which he had obtained receipt. He has stated that case property was not tampered with so long it remained in his custody.

9.9 PW10 Rustam Alli has stated that he was posted as Incharge in police post Swarswati Nagar from May 2006 to April 2007. He has stated that on dated 8.11.2006 the file was handed over to him for investigation. He has stated that investigation pertains mainly to Harish alias Vicky who is not accused in present case. He has stated that he obtained birth certificates of accused Brij Mohan and prosecutrix. He has stated that he recorded the statements of Panchayat secretary and school teachers under Section 161 Cr PC. He has stated that prosecutrix was medically examined on dated 6.1.2007 at Jubbal. He has stated that on dated 8.1.2007 he recorded supplementary statements of prosecutrix and her parents. He has stated that statement of Bhagpati Ext PW10/A was recorded as per version given by her. He denied suggestion that he recorded the statement Ext PW10/A according to his own version. He denied suggestion that it came in his investigation that accused Brij Mohan was not connected with the offence.

9.10 PW11 Ram Rattan has stated that he was posted as Inspector/SHO in police station Jubbal since 2006 to 2007. He has stated that on dated 7.11.2006 prosecutrix arrived at police station along with her parents and lodged FIR Ext PW1/A. He has stated that prosecutrix was sent to Civil Hospital Jubbal for medical examination and MLC Ext PW5/A was obtained. He has stated that he prepared site plan Ext PW11/A as per location shown by prosecutrix. He has stated that prosecutrix also produced clothes which were took into possession vide memo Ext PW1/B. He has stated that he also prepared site plan Ext PW11/D and also obtained birth certificate of the prosecutrix from gram panchayat vide memo Ext PW11/E. He has stated that school leaving certificate of prosecutrix was obtained from primary school Sawara which was took into possession vide memo Ext PW11/F. He has stated that report of FSL is Ext PW11/G. He has stated that he recorded the statements of the prosecution witnesses as per their versions. He denied suggestion that no report was lodged in police station. He denied suggestion that he recorded the statements of the prosecution witnesses as per his own version. He has stated that he obtained signatures of the witnesses upon blank papers. He denied suggestion that accused has been falsely implicated in the present case.

10. Submission of learned Additional Advocate General appearing on behalf of the appellant that testimony of prosecutrix has not been properly appreciated by learned trial Court and further submission of learned Addl. Advocate General that accused be convicted on the testimony of prosecutrix is rejected being devoid of any force for

the reason hereinafter mentioned. Court has carefully perused the testimony of the prosecutrix. It is well settled law that testimony of the witness should be read as a whole and should not be read in isolation. After careful perusal of the testimony of the prosecutrix as a whole we are of the opinion that it is not expedient in the ends of justice to convict the accused on the testimony of prosecutrix.

(A) Testimony of the prosecutrix did not inspire confidence of the Court due to contradictory statement in examination in chief and cross examination.

11. We have perused the testimony of prosecutrix carefully. Prosecutrix has specifically stated in examination in chief when she appeared before learned trial court that accused Brij Mohan and Vicky did not do anything to her. Prosecutrix has also stated in her cross examination that she has given tutored statement and not the truth version. In view of the admission of the prosecutrix that she is giving tutored version and not the truth version it is not expedient in the ends of justice to convict the accused. We hold that testimony of prosecutrix did not inspire confidence of Court.

(B) Testimony of PW2 Smt Bhagpatti mother of the prosecutrix is also fatal to the prosecution case.

12. Even PW2 Smt Bhagpatti mother of the prosecutrix did not support the prosecution case. PW2 has stated in positive manner when she appeared before learned trial Court that prosecutrix did not narrate the incident of rape. PW2 Smt Bhagpatti has specifically stated in positive manner that prosecutrix did not disclose to her that Vicky and Biju have raped her. She has also stated in positive manner that prosecutrix did not locate the place where prosecutrix was raped. She has also stated that prosecutrix does not know the meaning of rape. In view of the above stated facts it is held that the testimony of PW2 Smt Bhagpatti mother of the prosecutrix is also fatal to the prosecution case and same also did not inspire confidence of Court.

(C) Testimony of PW3 Onkar Chand father of the prosecutrix is also fatal to the prosecution.

13. PW3 Onkar Chand has specifically stated in positive manner that he does not know what the prosecutrix told to the investigating agency. He has denied suggestion that prosecutrix informed his wife about the rape committed by Vicky and accused Biju. Even PW3 Onkar Chand father of the prosecutrix did not support the case of the prosecution as alleged by the prosecution. PW3 was declared hostile by the prosecution and he was cross examined at length but no incriminating evidence against the accused came after lengthy cross examination of the father of prosecutrix by prosecution. Hence it is held that testimony of PW3 Onkar Chand is also fatal to the prosecution case. As per prosecution story the incident took place on dated 4.11.2006 and 6.11.2006 and medical examination of the prosecutrix was conducted on dated 7.11.2006 and in the MLC report the age of the prosecutrix has

been shown as 17 years. The accused was also medically examined on dated 8.11.2006 and as per MLC report Ext PW6/B the age of accused Brij Mohan has been shown as 18 years.

(D) FSL report placed on record has also become fatal to the prosecution case.

14. As per chemical analyst report Ext PW11/G the blood and semen were not found upon pubic hair, vaginal slide, underwear, shirt and salwar of the prosecutrix and also upon the shirt and pubic hair of the accused.

(E) MLC certificate of prosecutrix ruled out presence of dead or alive spermatozoa in the vagina of the prosecutrix which is fatal to the prosecution case.

15. It is the case of the prosecution that rape was committed upon the prosecutrix on dated 4.11.2006 and 6.11.2006 by accused person. It is proved on record that prosecutrix was medically examined on dated 7.11.2006 at 2.40 PM by Dr. Usha Darcho Medical Officer who was posted at Civil Hospital Jubbal. PW5 Dr Usha Darcho has stated in positive manner when she appeared in witness box that as per FSL report no spermatozoa alive or dead were found in the vaginal swab of the prosecutrix. PW5 Dr Usha Darcho has specifically stated that alive spermatozoa could be detected in the vaginal swab for three hours after intercourse and dead spermatozoa could be detected for about 3/4 days. Prosecutrix was examined on the next day of the alleged sexual intercourse and no dead spermatozoa were found in the vaginal swab of the prosecutrix which is fatal to the prosecution case.

16. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See **(2013) 2 SCC 89 titled Mookkiah and another Vs. State**. See **2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another**. See **AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan**. See **2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt**). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration in admissible evidence. (See **AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP**, See **(2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat**, See **(2003) 1 SCC 398 titled Raghunath Vs. State of Haryana**, See **AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others**, See **AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others**. **Sambhaji Hindurao Deshmukh and others Vs. State of**

Maharashtra, See **(2009) 10 SCC 206 titled Arulvelu and another Vs. State**, See **(2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P**, See:**(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh**). It was held in case reported in **(2005) 9 SCC 765 titled Anjlus Dungdung Vs State of Jharkhand** that suspicion however strong cannot take place of proof. It was held in case reported **in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana** that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of defence. Also See **(1984) 4 SCC 116 titled Sharad Birdhichand Sarda Vs. State of Maharashtra**). It was held in case reported in **AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon** that moral conviction however strong cannot amount to legal conviction sustainable in law. (See **AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra**. See **AIR 1983 SC 906 titled Bhugdomal Gangaram and others etc Vs. The State of Gujarat**. Also See **AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others**)

17. In view of the above stated facts the judgment passed by learned trial Court is affirmed and appeal filed by appellant-State is dismissed. Benefit of doubt is given to accused in the present case keeping in view the entire facts and circumstances of the present case. All pending application(s) if any are also disposed of.

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

Pyara Singh ...Petitioner
Vs.
State of Himachal Pradesh ...Respondent

Cr.M.P.(M) Nos. 1058 of 2014 a/w Ors.
Reserved on: 19.9.2014
Date of Decision: 23.09.2014.

Code of Criminal Procedure, 1973- Section 439- FIR for the commission of offence punishable under Section 304/34 IPC was registered against the petitioners- held that while granting bail, the Court has to see the nature and gravity of the accusation, severity of the punishment in the case of conviction, nature of supporting evidence, reasonable apprehension of tampering of the witness or apprehension of threat to the complainant and prima facie evidence in support of the charges- offence punishable under Section 304/34 IPC is a grave offence- petitioner was a habitual offender against whom three cases had already been registered and other petitioners had created an atmosphere of fear due to which deceased died of heart attack- conduct of the petitioners would disentitle them to be released on bail- petition dismissed. (Para- 8 & 9)

Cases referred:

Govind Sagar Vs. State of H.P. 2014 (2) Him.L.R., 1127

State of Maharashtra Vs. Captain Buddhikota Subha Rao, AIR 1989 SC 2299

Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another, AIR 2004 SC 1866

For the Petitioner(s): Mr.Ramakant Sharma, Advocate.
For the Respondent: Mr.Virender Kumar Verma, Additional Advocate General with Ms.Parul Negi, Deputy Advocate General.
ASI Mohar Singh, I.O. Police Station, Paonta Sahib in person.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan J.

The petitioners have approached this Court for grant of bail in respect of FIR No. 213 of 2014, dated 6.6.2014 registered at Police Station Paonta Sahib, District Sirmour under Section 304/34 I.P.C.

2. Notice of the petitions was given to the State. Today the Additional Advocate General has filed the status report and also produced the records of the investigation. Mr. Virender Kumar Verma, learned Additional Advocate General has strenuously argued that the accused Pyara Singh is a habitual offender, against whom three cases have already been registered on different occasions and taking into consideration his criminal history, he should not be enlarged on bail. In so far as the other co-petitioners are concerned, it has been claimed that despite being fully aware of the fact that the deceased Inder Pal Singh was a heart patient, yet they not only physically assaulted him, but created an atmosphere, full of threat and fear, resulting in his death due to heart attack.

3. The prosecution case in brief is that on 6.6.2014 police received information from 108 Ambulance service that an injured has been taken to Civil Hospital, Paonta Sahib, who had been beaten up. As such, the police visited Civil Hospital, Paonta Sahib, where Gurinder Pal Singh gave statement under Section 154 Cr.P.C. to ASP (P), IPS, Sh.Rohit Malpani, wherein he stated that he was a transporter and having two brothers. Inder Pal Singh was the eldest while Harpreet Singh was the younger brother. His brother Inder Pal Singh was a heart patient for the last one and half years and was under treatment at Patiala and Mulana M.M. Hospital. He was having a truck Tata 407 No. H.P-63-4108. His brother Harpreet Singh had gone to Truck Union, Taruwala for collecting money. His elder brother Inder Pal Singh had to take Rs.10,000/- from Pyara Singh and his sons. On 6.6.2014 his brother Harpreet Singh called Inder Pal Singh in the office of the Union for

settling the accounts and accordingly he along with Inder Pal Singh visited the office of Truck Union, Taruwala on their motorcycle. At about 1 O'clock Pyara Singh and his both sons started hurling abuses to Inder Pal Singh and the accused Avtar Singh alias Goldy tried to inflict a blow upon Inder Pal Singh. He told the accused not to hit his brother Inder Pal Singh and specifically informed them that he was a heart patient and therefore, no force should be used against him, but the accused persons paid no heed to this and started giving beatings to Inder Pal Singh with fist blows, who fell down on the floor and become unconscious. Virender, Bachiter and his younger brother Harpreet Singh tried to give some water to Inder Pal Singh, but he did not respond and was immediately taken to hospital, while the accused ran away from the spot. The Medical Officer declared Inder Pal Singh dead and as such, this case came to be registered against the accused under Section 304/34 I.P.C.

4. Sh. Ramakant Sharma, learned counsel for the petitioners strenuously argued that the provisions of Section 304 I.P.C. would not attract to the facts of the present case, especially when the deceased admittedly died of myocardial infarction and not because of the beatings given by the accused. Further stated that taking the prosecution story as it is, it cannot be said that the petitioners had committed injuries to kill the deceased, in fact the petitioners had not even inflicted any injury on the person of the deceased, which is further corroborated by the medical evidence. He would also contend that no recoveries are required to be effected and the petitioners are unnecessarily languishing in the jail since 6.6.2014. He would also contend that the bail is the rule while jail is the exception and would further place reliance on the judgment of this Court in ***Govind Sagar Vs. State of H.P. 2014 (2) Him.L.R., 1127***, wherein this Court has held as under:-

> "5. What probably has been over-looked by Mr. Verma is the fact that the object of bail is only to secure the appearance of the accused person at the time of trial by granting reasonable amount of bail. Therefore, the object of bail is neither punitive nor preventative. At this stage deprivation of liberty will have to be considered a punishment, unless of course, the presence of the accused person cannot be secured. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Even otherwise, the law with regard to bail is now well settled. As early as in the year 1978, the Hon'ble Supreme Court in ***Gurcharan Singh vs. State (Delhi Administration) (1978) 1 SCC 118*** laid the following criteria for grant of bail:
>
> > "22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub- section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice

of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

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24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

6. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar versus Ashish Chatterjee and another, (2010) 14 SCC 496***, has laid down the following principles to be kept in mind, while deciding petition for bail:

> (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
>
> (ii) nature and gravity of the accusation;
>
> (iii) severity of the punishment in the event of conviction;
>
> (iv) danger of the accused absconding or fleeing, if released on bail;
>
> (v) character, behaviour, means, position and standing of the accused;
>
> (vi) ikelihood of the offence being repeated;
>
> (vii) reasonable apprehension of the witnesses being influenced; and
>
> (viii) danger, of course, of justice being thwarted by grant of bail.

7. Thereafter, in a detailed judgment, the Hon'ble Supreme Court in ***Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694***, while relying upon its decision rendered by its Constitution Bench in Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly

the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available." (Emphasis supplied)

8. In ***Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40***, the Hon'ble Supreme Court made the following pertinent observations in paras 21, 22, 23, and 40 as under:-

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or

that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

40. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

5. On the other hand, learned Additional Advocate General has seriously opposed this application by contending that it was on account of the beatings and the threat perception created by the bail petitioners that the deceased died of myocardial infarction. He further contended that the learned Sessions Judge, Sirmour had vide a detailed order running into 14 pages rejected the bail application and since there was no changed circumstances, the petitioners could not be permitted to file successive bail applications and for this purpose relied upon the following observations of Hon'ble Supreme Court in ***State of Maharashtra Vs. Captain Buddhikota Subha Rao, AIR 1989 SC 2299***:

"7. Liberty occupies a place of pride in our socio-political order. And who knew the value of liberty more than the founding fathers of our Constitution whose liberty was curtailed time and again under Draconian laws by the colonial rules. That is why they provided in Article 21 of the Constitution that no person shall be deprived of his personal liberty except according the procedure established by law. It follows therefore that the personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of

liberty of anti-social and anti-national elements. Article 22 casts certain obligations on the authorities in the event of arrest of an individual accused of the commission of a crime against society or the Nation. In cases of undertrials charged with the commission of an offence the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be made, mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc. In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to the gravity of the offence alleged to have been committed. One such application No. 36 of 1989 was rejected by Suresj, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail-applications were rejected by Puranik, J. by a common order on 6th June, 1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995/89 otherwise he would have disposed if of by the very same common Order. Before the ink was dry on Puranik, J.'s order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J.; in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to realize is that in Criminal Application No. 375 of 1989, the respondent had made an identical request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J. only a couple of days before, in the absence of any substantial change in the fact-situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. IN such a situation the proper course, we think, is to direct that the matter be placed before the same learned judge who

> disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a judge familiar with the facts would be able to dispose of the subsequent application with dispatch. It will also result in consistency. In this view that we take we are forfitied by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan V. Ishtiaq Hasan Khan, (1987)2 SCC 684: (AIR 1987 SC 1613). For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation. That is what prompted Shetty. J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint demands that we say no more."

On the same preposition he placed reliance on the following observations of Hon'ble Supreme Court in ***Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another, AIR 2004 SC 1866*:**

> "14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records when the seventh application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745/2001 dated 25th July, 2001. While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(1) of the Code. This Court also in specific terms held that condition laid down under Section 437(1)(1) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself

would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.

20. Before concluding, we must note though an accused has a right to make successive applications for grant of bail the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the Court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. IN the impugned order we do not see any such fresh ground recorded by the High Court while granting bail. It also failed to take into consideration that at least on four occasions order refusing bail has been affirmed by this Court and subsequently when the High Court did not grant bail, this Court by its order dated 26th July, 2000 cancelled the said bail by a reasoned order. From the impugned order, we do not notice any indication of the fact that the High Court took note of the grounds which persuaded this Court to cancel the bail. Such approach of the High Court, in our opinion, is violative of the principle of binding nature of judgments of superior Court rendered in a lis between the same parties, and in effect tends to ignore and thereby render ineffective the principles enunciated therein which have a binding character.

21. For the reason stated above, we are of the considered opinion that the High Court was not justified in granting bail to the first respondent on the ground that he has been in custody for a period of 3½ years or that there is no likelihood of the trial being concluded in the near future, without taking into consideration the other factors referred to hereinabove in this judgment of ours."

6. I have given my deep and thoughtful consideration to the arguments raised by the respective parties.

7. The following factors are required to be considered before granting bail:

(i) nature of accusation and severity of punishment in case of conviction and nature of supporting evidence;

(ii) reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;

(iii) and prima facie satisfaction of the court in support of the charge.

Any order *dehors* of such reasons suffers from non-application of mind.

8. Now, in case the nature of accusation is seen, it cannot be denied that the bail petitioners have been charged under Section 304/34 IPC, which is a grave offence punishable with life imprisonment. Moreover, the records of the investigation and past history and conduct of the petitioners, particularly of Avtar Singh does not convince this Court that in the event of release of the petitioners on bail, they would not violate the conditions of bail and it cannot be said with certainty that they will not tamper with the evidence or threaten or dissuade the prosecution witnesses and at this stage the records of the investigation further reveal that there is sufficient material available in support of the charge against the bail petitioners.

9. Mr. Ramakant Sharma, learned counsel for the bail petitioners would then strenuously argued that no recovery is required to be effected since the investigation is complete and no fruitful purpose would be served in case the petitioners are kept in judicial lockup, as they are languishing there for the last more than three months. I am afraid that looking into the seriousness of the allegations against the bail-petitioners, they cannot be enlarged on bail even on this ground.

10. For the aforesaid reasons, I find no merit in these bail petitions and the same are accordingly dismissed. However, it is made clear that the observations made in this order are solely for the purpose of deciding these petitions and nothing contained in this order shall be construed as an expression of opinion on any of the issues of facts or law arising for the decision in the main case. The learned trial Court shall decide the case uninfluenced by any observations made in this order. Petitions stand disposed of.

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

Ramanujam Royal College of Education ...Petitioner.

Vs.

National Council for Teacher Education and others ..Respondents.

CWP No. 9508 of 2013
Judgment reserved on : 8.9.2014
Date of decision: 23.09.2014.

Constitution of India, 1950- Article 226- petitioner, a Society, established a College for running B. Ed course on regular basis- the inspection was conducted and the Inspection Committee pointed out that list of existing teaching faculty approved by university, documents verifying that the salary to the teaching staff was being paid through cheques were not submitted and the size of multipurpose hall was only 1510.4 sq. feet against 2000 sq. feet as required under NCTE norms-

petitioner stated that two teachers were appointed by H.P. University while remaining were appointed on ad-hoc basis- size of the hall was being increased- affiliation of the institute was cancelled- held, that the teachers occupy an important position in the society, therefore, the trainee teachers must be given qualitative training and the Training Institutes should possess all the required facilities including well qualified and trained staff- the institute had not taken steps to fill up the posts in accordance with instructions/guidelines issued by UGC- advertisement was issued in the newspaper but no posts were filled up- posts were subsequently filled up without issuing a fresh advertisement and thus, appointment was not proper. (Para-19 to 31)

Service Law- Selection- Institute had issued an advertisement for the appointment of the posts of the teacher, but no posts were filled up- subsequently, teachers were appointed from the person who had applied earlier- held, that the life-span of an advertisement had come to an end and the posts could not be filled up without a proper fresh advertisement- appointments made by the Institute were back door appointments. (Para-32)

Constitution of India, 1950- Article 226- Practice and Procedure- the petitioner approaching the Court is bound to come with clean hands- if a litigant tries to pollute stream of justice by resorting to falsehood or by making false statement, he is not entitled to any relief. (Para-36)

Cases referred:

Andhra Kesari Education Society Vs. Director of School Education and Ors, AIR 1989, SC 183

Ram Sukh and others Vs. State of Rajasthan and others, 1990 SC 592

Dental Council of India Vs. Subharti K.K.B. Charitable Trust (2001) 5 SCC 486,

Rohit Singhal and others Vs. Principal, Jawahar N. Vidyalaya and others, (2003) 1 SCC 687

Manager, Nirmala Senior Secondary School Vs. N.I. Khan, (2003) 12 SCC 84

Visveswaraya Technological University and another Vs. Krishnaendu Halder and others (2011) 3 Scale 359

Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, AIR 1992, SC, 789

Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408

M. P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and Others (2007) 8 SCC 264

Ramjas Foundation and another Vs. Union of India and others (2010) 14 SCC 38

For the Petitioner : Mr. Ramakant Sharma, Advocate.
For the Respondents : Mr. Sanjeev Bhushan, Advocate, for respondents No. 1 and 2.
Mr. J.L.Bhardwaj, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

By medium of this writ petition, the petitioner has claimed the following substantive reliefs:

> *"(i) That the order dated 30.10.2013 at Annexure P-12 passed by the respondent No.1 whereby the appeal preferred by the petitioner has been rejected, may kindly be quashed and set-aside.*
>
> *(ii) That the order dated 29.12.2012 at Annexure P-10 issued by the respondent No.2, whereby the recognition of the petitioner institution "Ramanujam Royal College of Education" for B.Ed course has been withdrawn may kindly be quashed and set-aside and the respondents may further be directed to restore the recognition of the petitioner institution for B.Ed course in the interest of justice."*

2. The petitioner is a Society registered under the Societies Registration Act, who established a College for running B.Ed course on regular basis with an intake of 100 seats, pursuant to the 'No Objection Certificate' (for short 'NOC') issued by the Government of Himachal Pradesh. It is claimed that after obtaining NOC from the State Government, the petitioner got recognition for its College from the Northern Regional Committee of National Council for Teacher Education, Jaipur (for short 'NCTE') and the College is affiliated with the H.P.University.

3. The petitioner sought permission from NCTE for shifting the premises of the College from village Mangal to its new campus at village Samloh, Tehsil Arki, District Solan, H.P. vide letter dated 23.8.2006. The inspection committee constituted by NCTE inspected the institution in the new campus and granted permission at the new site vide letter dated 18.8.2010. However, the respondent No.1 on 3.8.2012 issued a show cause notice pointing out the following discrepancies:

> *"* The institution has not submitted the list of existing teaching faculty approved by affiliating university ;*
>
> ** The documents verifying that the salary to the teaching faculty is being paid either through cheques or bank transfer has not been submitted.*
>
> ** Size of multipurpose hall is only 1510.4 sq.feet against 2000 sq.feet as required under NCTE norms."*

4. In response to the queries raised by respondent No.1, the petitioner replied vide letter dated 14.9.2012 in the following manner:

"To
The Regional Director,
Northern Council for Teacher Education,
20/198, Kaveri Pata Near Mansarover Stadium,
Mansarover, Jaipur-302020.

Subject: Reply of notice under Section 14 (1) of the NCTE Act.

Ref: Your office letter No. F.NRC/NCTE/201st meeting/HP-77/2012/29156 dated 17 August, 2012. File No. : HP-177.

Respected Sir,

With profound regards, in reference to the pre said letter of your esteemed office I want to put some facts for your kind consideration.
1. The college has appointed six Lecturers as faculty for the B.Ed., two are approved by H.P. University whereas four are appointed on adhoc basis.
List of existing teacher attached (Annexure-I)
2. The salary to the staff is being disbursed through cheque.
Certificate from bank manager is attached (Annexure-II)
3. The size of multipurpose hall has been increased by expanding it to 2000 sq.ft. The map of building is attached.(Annexure-III)
Therefore, your esteemed goodself is requested to please take the decision in favour of the institution and oblige.
Thanking you,
Yours faithfully,

Sd/-
Chairman,
Managing Committee,
Ramanujam Royal College of Education, H.P. 177.

Sd/-
President,
Managing Committee,
Ramanujam Royal Group of Institutes. "

5. Vide another letter dated 14.9.2012 the following information appears to have been imparted to respondent No.2 by the petitioner:-

"To
The Regional Director,
Northern Council for Teacher Education,
20/198, Kaveri Pata Near Mansarover Stadium,
Mansarover, Jaipur-302020.

Subject: Grant of Permission for two months.

Ref: Your office letter No. F.NRC/NCTE/201st meeting/HP-177/2012/29156 dated 17 August, 2012. File No. : HP-177.

Respected Sir,

With profound regard, in reference to the pre said letter of your esteemed office I want to put some facts for your kind consideration.

1. *The college has appointed six Lecturer as faculty for the B.Ed., two are approved by H.P. University whereas four are appointed on adhoc basis. We have also send a request to the Dean, College Developing Committee Himachal Pradesh University, Shimla for supplying the panel to conduct interview, so it is on the H.P.U., Shimla whenever they supply the panel. List of existing teacher attached (Annexure-I)*

2. *The salary to the staff is being disbursed through cheque. Certificate of bank manager is attached (Annexure-II)*

3. *Size of multipurpose hall is 1510.4 sq.feet against 2000 sq.feet as required under NCTE norms. We have started construction work to increase the size of multipurpose hall to 2000 sq. feet it will took minimum two months to complete.*

Therefore, your esteemed goodself is requested to grant us permission for two months to complete the above mentioned compliance for taking final decision in favour of the institution and oblige.

Thanking you,

Yours faithfully,

Sd/-
Chairman, Managing Committee,
Ramanujam Royal College of
Education, H.P. 177."

6. Vide order dated 29.12.2012, the respondent No.1 withdrew the recognition of the petitioner-institution for B.Ed course by according the following reasons:

> *".....AND WHEREAS, the case of the institution was considered by the NRC in its 201st meeting held from July 12th to 15th, 2012 and the Committee decided that show cause notice under Section 17 of NCTE Act, 1993 be issued to the institution. Accordingly, a show cause notice was issued to the institution on 17.08.2012 on the following points:-*
>
> - *The institution has not submitted the list of existing teaching faculty approved by affiliating university.*
> - *The documents verifying that the salary to the teaching faculty is being paid either through cheques or bank transfer has not been submitted.*

- *Size of multipurpose hall is only 1510.4 sq. feet against 2000 sq.feet as required under NCTE norms.*

AND WHEREAS, the reply dated 14.09.2012 submitted by the institution in response to the show cause notice in the NRC office on 24.09.2012 was placed before the NRC in its 207th meeting held from November 27th to 30th, 2012 and the Committee decided that the recognition for the said course be withdrawal under provision of clause 17 of the NCTE Act, 1993 from the next following academic session. FDRs if submitted by the institution be returned on the following grounds:-

In the reply to Show Cause Notice, the institution has submitted its reply dated 14.09.2012 is received on 24.09.2012. As per the letter –

(a) The institution itself accepted that only two lecturers for B.Ed. course are approved by the H.P. University, whereas post of one Principal and five lecturers not approved by the affiliating university as per the NCTE norms and regulations, 2009.

(b) Proof of size of multipurpose hall has not submitted.

NOW THEREFORE, in exercise of the powers vested under Section 17 (1) of NCTE Act, 2009, the Northern Regional Committee hereby withdraw the above recognition granted to Ramanujam Royal College of Education, Village Mangal, P.O. Kandhar, Distt. Solan-171102, Himachal Pradesh for 100 seats in the B.Ed. Course on the grounds mentioned above with effect from the end of the academic session next following the date of communication of this order.

If the institution is not satisfied by the above order they can prefer an appeal to the Council (NCTE, New Delhi) in terms of Sections 18 of NCTE Act, 1993 within 60 days from the date of this order. The guidelines of appeal are enclosed herewith."

7. An appeal was thereafter preferred by the petitioner which was dismissed as time barred vide order dated 30.10.2013.

8. The petitioner now claims that once it had removed all the shortcomings and brought the same to the notice of respondent No.1, therefore, there was no question of respondent No.1 having withdrawn the affiliation.

9. In reply filed by respondent No.1, preliminary objection was taken to the effect that the petitioner had not approached the Court with clean hands and had virtually tried to mislead the Court. It has further been stated that the writ petition was liable to be dismissed on account of concealment of facts alone. It was further claimed that matters of recognition of the institutes are guided by the regulations which are required to be strictly adhered to. It is further averred that the petitioner-institute had advertised seven posts of Lecturers in Education and one post of Principal in the Tribune on 30.12.2012 and the meeting of the

Selection Committee duly constituted by the Himachal Pradesh University took place on 18.3.2013. As per the proceedings of Selection Committee in response to advertisement, 17 candidates had applied for the post of Lecturer while none had applied for the post of Principal. After scrutiny, it was found that only one candidate was eligible while the rest were ineligible. However, even the eligible candidate did not attend the interview.

10. The petitioner's thereafter did not issue any fresh advertisement and on the basis of the same advertisement which had already been exhausted, another Selection Committee meeting was convened on 18.6.2013 wherein again reference of 17 candidates was given and now five candidates had been shown to have been selected. It is claimed that this aspect of the matter could not be explained by the petitioner and, therefore, was required to be enquired into and even the role of the H.P. University was required to be probed.

11. In rejoinder to the aforesaid averments and in order to justify its stand of having appointed Lecturer on the basis of the advertisement, the petitioner has made the following averments:

> *".....The respondents have failed to appreciate that when the more approved lecturers were required, the requisition was given to the University for constitution of the Selection Committee by nominating subject experts and Vice Chancellor, nominee and on that count, the selections were awaited. Since the institution was shifted from existing infrastructure to the new infrastructure, wherein the size of multi purpose hall was somewhat deficient and the deficiency was immediately removed, have also been ignored to be considered by the respondents. Pursuant to the advertisement issued by the petitioner institution in the Tribune of 30.12.2012, five eligible candidates were selected by the Selection Committee constituted by the University on 18.6.2013. Notably, the Selection Committee was duly constituted as per norms of the H.P. University on the nomination of subject experts and Vice Chancellor nominee before making the selection on 18.6.2013. The deficiencies as pointed out while withdrawing the recognition of the petitioner institution have duly been removed and fully eligible and qualified Principal is on the rolls, however, Selection Committee for his regular appointment has not been constituted by the University because of withdrawal of recognition by the respondents, however, he is fully eligible and qualified for regular appointment, as such."*

12. The matter came up for consideration before this Court on 2.7.2014 when after noticing the aforesaid discrepancies, this Court passed a detailed order directing the petitioner to file an affidavit explaining these discrepancies.

13. In compliance to the aforesaid order, the petitioner filed its affidavit, the relevant portion whereof reads as follows:

"3. That an advertisement was issued in the daily newspaper the Tribune on 30.12.2012 requiring staff in the college vide notice issued at Annexure A-1.

4. That on the request of the petitioner at Annexure A-2, the panel of experts and V.C. nominee was supplied to the petitioner college at Annexure A-3 (colly). Needless to state that one of the V.C. nominee Professor S.K. Garg was changed, with the change of the guard, hence at the request of the petitioner, for supply of his substitute, Professor R.S.Chauhan was nominated as such on 04.03.2013.

5. That pursuant to the advertisement at Annexure A-1, 17 candidates applied for the post of the lecturer/Assistant Professor, but none for the post of Principal, up till 17.04.2013. A list of the applicants is at Annexure A-4.

6. That vide notification dated 29.05.2012 issued by the H.P. University, the requirement of possessing NET qualification was dispensed with and as such M.Ed. & M.Phil in Education were made eligible for appointment to the post of Lecturer/Assistant Professor. Since requisite number of M.Ed. & M.Phil candidates had become available, hence the petitioner proceeded with the conducting of the interviews for the post of lecturer/Assistant Professor and accordingly the V.C. nominee and subject expert etc. were called for 18.04.2013.

7. That the selection committee conducted the interview on 18.04.2013, wherein none of the candidates appeared in the interview, was found eligible, although one of the candidate Sh. Param Jeet Singh Dhaliwal was eligible, yet he had not appeared in the interview. In fact, the exemption granted by the H.P. University vide notification dated 29.05.2012, dispensing with the requirement of NET, had been turned down by the UGC but the said factum was not in the notice of petitioner and in view of that, mere M. Ed. & M. Phil passed candidates were not eligible for the post of Lecturer/Assistant Professor and they were rightly held ineligible by the selection committee. The notification dated 29.05.2012 is not available with the petitioner but the same finds mention in the corrigendum issued by the H.P.University at Annexure P-5. A copy of the proceedings of the Selection Committee dated 18.04.2013 is at Annexure A-6.

8. That in the advertisement issued at Annexure A-1, since there was no last date fixed for inviting applications for the posts in question, hence more candidates continued applying and when requisite number of NET qualified candidates became available for the post of lecturers/Assistant Professor, the petitioner again constituted the selection committee and invited the V.C. nominee and subject expert for conducting the interviews again, which were held on 18.06.2013, wherein there was no candidate for the post of Principal but requisite number of Lecturers/Assistant Professor were recommended for appointment. A copy of the proceedings held

on 18.06.2013, is brought on record as Annexure A-7. The list of the candidates who were the applicants after previous interview up-till 18.06.2013 is brought on record as Annexure A-8."

14. Subsequently, when the matter came up for consideration before this Court on 11.7.2014, the following order was passed:

"It is not disputed that College had advertised one post of Principal and seven posts of Lecturers in Education in newspaper "The Tribune" in its edition dated 30th December 2012. In response whereof, 17 candidates had applied for the post of lecturers and one had applied for the post of Principal. After scrutiny of academic record of the candidates, the college found that one candidate Sh. Paramjit Singh Dhaliwal was eligible while the rest of the 16 candidates were in-eligible. Even Sh. Paramjit Singh Dhaliwal did not appear in the said interview. Thus the life and purpose of the advertisement came to an end on the basis of the interviews fixed for 18.4.2013 and in such circumstances, a fresh advertisement was required to be issued calling upon all the eligible candidates to apply for the posts in question. The petitioner did not resort to said procedure, which constrained this court to pass the following order on 2.7.2014:

"The perusal of document, Annexure P-13, dated 18.4.2013 at page 32 of the paper book shows that the following statement has been recorded therein:

"……The college had advertised one post of Principal and seven posts of Lecturers in Education in the newspaper namely the Tribune dated 30.12.2012. In response to the advertisements Seventeen candidates have applied for the post of lecturers and none applied for the post of Principal. After scrutiny of academic record of the candidates, it was found that only one candidate Paramjit Singh Dhaliwal was eligible, rest of the sixteen candidates were ineligible. However Shri Paramjit Singh Dhariwal didn't appear in the interview."

Thereafter another document annexed with the writ petition Annexure P-13 dated 19.6.2013, contains the following statement:

"….The College had advertised one post of Principal and seven posts of Lecturers in Education in the newspaper namely "The Tribune" dated 30.12.2012. In response to the advertisements Seventeen candidates have applied for the post of lecturers and none applied for the post of Principal. On the basis of academic records of the candidates and their performance following candidates were selected for appointment of Lecturers on regular basis on UGC scale:

1. Teaching of Life Science : Mr. Atul Thakur S/o Sh. Bir Singh Thakur

2. Teaching of Social Science :Mr. Kashmir Singh S/o Sh. Behmi Singh

3. Teaching of English : Mr. Mohinder Singh S/o Sh. Braham Dass

4. Foundation Courses : Ms. Nidhi Awasthi D/o Sh. J.K. Mahindroo

5. Teaching of Social Science : Mr. Kanwal Preet Singh S/o Sh. Randhir Singh".

The learned counsel for the respondents has rightly pointed out that pursuant to the advertisement dated 30.12.2012, 17 candidates appeared and none of them were found eligible save and except only one candidate Paramjit Singh Dhaliwal, who did not appear in the interview. Then how in the proceedings recorded on 19.6.2013 it has been stated that pursuant to this very advertisement dated 30.12.2012, 17 candidates applied for the post of Lecturers and none applied for the post of Principal. In this meeting it has been further recorded that on the basis of the academic records of the candidates and their performance, the following candidates out of the above 17 candidates were selected for appointment of Lecturers on regular basis on UGC scale.

"1. Teaching of Life Science : Mr. Atul Thakur S/o Sh. Bir Singh Thakur

2. Teaching of Social Science : Mr. Kashmir Singh S/o . Sh. Behmi Singh

3. Teaching of English : Mr. Mohinder Singh S/o . Sh. Braham Dass

4. Foundation Courses : Ms. Nidhi Awasthi D/o Sh. J.K.Mahindroo

5. Teaching of Social Science : Mr. Kanwal Preet Singh S/o Sh. Randhir Singh".

Once the candidature of 17 candidates was considered earlier on 18.4.2013 as finds recorded in those proceedings and none was found so eligible, then how and in what circumstances now out of 17 candidates, 5 candidates have been selected for appointment as Lecturers, is not forthcoming. The petitioner shall file an affidavit explaining this position within one week. List on ***11.7.2014****. On that date, the original records of the proceedings be also made available to this Court."*

In compliance to the aforesaid order, the petitioner has produced the original record and filed an affidavit, wherein in paragraph-8, the following averments have been made:-

"8. That in the advertisement issued at annexure A-1, since there was no last date fixed for inviting applications for the posts in question, hence more candidates continued applying and when requisite Number of NET qualified candidates became available for the post of lecturers/Assistant professor, the petitioner again constituted the selection committee and invited the VC nominee and subject expert for conducting the interviews again, which were held on 18.6.2013, wherein there was no candidate for the post of principal but requisite Number of Lecturers/ Assistant Professor were recommended for appointment. A copy of the proceedings held on 18.6.2013, is brought on record as Annexure A-7. The list of the candidates who were the applicants after previous interview up till 18.6.2013 is brought on record as Annexure A-8."

The explanation offered by the petitioner is not at all satisfactory. There is no explanation as to whether the external examiners deputed by the University in terms of letter dated 5.1.2013 had been apprised of the aforesaid fact and if apprised whether they had applied their mind and made the subsequent recommendations.

A bare perusal of the proceedings of the Selection Committee, which met on 18.6.2013 as reflected in the document Annexure P-13 dated 19.6.2013 shows that out of six nominees, there were five nominees from the University, who appeared to have signed the proceedings on doted lines.

Taking into consideration the seriousness of the issue, the Himachal Pradesh University through its Registrar is impleaded as party and arrayed as respondent No. 3 to this petition, as admittedly it is on the basis of the recommendations made by the representatives of the University that appointments have been made. Mr. J.L. Bhardwaj, Advocate waives service of notice on behalf of respondent No. 3. The respondent No. 3 to file a detail affidavit explaining its position before the next date of hearing. The desirability of issuing notice to the members of the Selection Committee would be considered after the aforesaid affidavit is filed by the Registrar of the University.

List on 25.7.2014."

15. In compliance to the aforesaid order dated 11.7.2014, Professor Rajinder Singh Chauhan, presently working as Pro-Vice Chancellor, H.P. University, filed his affidavit, the relevant portion whereof reads as follows:

"1. That the duly constituted selection committee in terms of the provisions of Ordinance 38.5 (B) d has conducted interview on 18.04.2013 and found only one candidate i.e. Sh. Paramjit Singh eligible. However, he did not appear on the said date of interview.

2. That the Chairman of the Selection Committee who is either the President of the Governing Body of the College or his nominee finalized the date for conducting the interviews for the appointment of teaching faculty on 18.06.2013 and since the Vice Chancellor of the University had appointed the nominees and subject experts to participate in the counseling process for appointment of teaching faculty, the members visited the Petitioner's college on 18.06.2013 and conducted the interviews for the appointment of teaching faculty. After perusal of the applications submitted by the candidates, the eligible candidates were selected as teaching faculty out of list of the candidates who had applied for the post of Assistant Professor which is annexed herewith as Annexure R-1. As per the qualifications prescribed by the National Council for Teacher Education and University Grants Commission, five candidates who appeared in the interview on 18.06.2013 were selected. It is submitted that due to inadvertence, the Selection Committee who

were the nominees and subject experts as appointed by the Vice-Chancellor of the University could not notice that they had earlier conducted interviews on 18.04.2013 on the basis of advertisement dated 30.12.2012 nor the said fact was brought into notice by the nominee of the petitioner college who otherwise were aware that the interviews on the basis of the advertisement dated 30.12.2012 cannot be conducted again. However, it is submitted that so far the selection is made by the Selection Committee who were the nominees and subject experts of the Vice-Chancellor of University have selected the candidates who were having the requisite minimum eligibility required for holding the post of Assistant Professor (Education). To demonstrate that the persons who had earlier applied and were not eligible is clear from the Annexure A-4 appended by the petitioner college while filing the compliance affidavit dated 09.07.2014 in compliance to the order dated 02.07.2014 passed by the Hon'ble Court.

3. That the role and responsibility of the Selection Committee is to interview the eligible candidates who appear for interview before the Selection Committee. The legality and propriety of the procedure is to be seen by the management of the college administration and the Chairman of the Selection Committee i.e. Chairperson/President of the Management Committee who had produced a list of candidates before the Selection Committee. Further, it is to be stated that the Selection Committee is to judge suitability of candidates for the post and to make recommendations to the appointing authority in order of merit."

16. A counter affidavit to the affidavit of Sh. Rajinder Singh Chauhan was filed by the petitioner wherein it was stated that the petitioner was unaware of the fact that on the basis of the advertisement dated 30.12.2012, no fresh interview could be conducted and this fact was not even brought to its notice by the members of the Selection Committee. The relevant portion of his affidavit, reads as follows:

"Para-2: That the contents of this para of the affidavit to the extent it has been alleged that the petitioner, who was aware that the interviews on the basis of advertisement dated 30.12.2012 could not be conducted again, had not brought the fact to the notice of the members of the Selection Committee, are wrong and are hence denied. The fact remains that the petitioner was not aware of this technicality that the interview could not be conducted again on the same advertisement. He was under bonafide belief that since no candidate appeared in the earlier interview fixed for 18.04.2014 and subsequently eligible qualified candidates had become available hence the second interview was conducted on 18.06.2014. He has not concealed anything deliberately and none of the selected candidates has been given any sort of favour and only fully qualified and eligible candidates have been selected by the Selection Committee. It is humbly submitted that the petitioner has not got any undue gain by holding interview on the same

advertisement and he has not done anything intentionally or willfully or with malafide intention to mislead the University. He be not may to suffer for his bonafide mistake/lack of due diligence as he has conducted the second interview on the same advertisement, under the bonafide impression that first interview had not led into any conclusive result and there was no expressed or any contrary instructions of the respondent-University in this behalf. However, now a fresh advertisement has been issued on 02.08.2014 in the daily news paper at Annexure A-10 annexed herewith for making fresh selection for the posts in question. The petitioner has also requested the respondent University for providing Panel for conducting interview to the post of Principal as well as Lecturer vide Annexure A-11 through registered post, the receipt of the same is placed on record at Annexure A-12."

17. It is to be borne in mind that the teachers occupy a very pivotal position in our society. They are shaping the future of our children. Teachers are instrumental in moulding the character of students, and would be of immense help to students to unearth their hidden talents. Such being the importance of teachers, the trainees must be given qualitative training and the Training Institutes should possess all the required facilities including well qualified and trained staff.

18. In ***Andhra Kesari Education Society v. Director of School Education and Ors, AIR 1989, SC 183***, the Hon'ble Supreme Court recognized the importance of education for B.Ed., pointing out that, as those persons have to handle tiny tods, therefore, Teacher alone could bring out their skills and intellectual activities. He is the engine of the educational system. He is a superb instrument in awakening the children to cultural values. He must possess potentiality to deliver enlightened service to the society. His quality should be such as could inspire and motivate into action to the benefiter. He must keep himself abreast of ever-changing communities. He is not to perform in wooden and unimaginative way; he must eliminate unwarranted tendencies and attitudes and infuse noveliar and national ideas in younger generation; and his involvement in national integration is more important; indeed, indispensable.

19. In ***Ram Sukh and others vs. State of Rajasthan and others, 1990 SC 592,*** the Hon'ble Supreme Court did not permit the untrained Teachers to teach the children, observing that they require proper handling by well-trained Teachers.

20. In ***Dental Council of India v. Subharti K.K.B. Charitable Trust (2001) 5 SCC 486,*** the Supreme Court expressed its deep concern over the emergence of education shops without adhering to the norms. It was held:

"12. At present, there is tremendous change in social values and environment. Some persons consider nothing wrong in commercializing education. Still however, private institutions cannot be permitted to have educational shops in the country. Therefore, there are statutory prohibitions for establishing and administering

educational institution without prior permission or approval by the authority concerned. On occasions, the authorities concerned, for various reasons, fail to discharge their function in accordance with the statutory provisions, rules and regulations. In some cases, because of the zeal to establish such educational institution by persons having means to do so, approach the authorities, but because of red tapism or for extraneous reasons, such permissions are not granted or are delayed. As against this, it has been pointed out that instead of charitable institutions, persons having means, considering the demands of the market rush for establishing technical educational institutions including medical college or dental college as a commercial venture with the sole object of earning profits and/or for some other purpose. Such institutions fail to observe the norms prescribed under the Act or the Regulations and exploit the situation because of the ever-increasing demand for such institutions."

"It is equality true that unless there are proper educational facilities in the society, it would be difficult to meet with the requirements of younger generation who have keen desire to acquire knowledge and education to compete in the global market.....Since ages our culture and civilization have recognized that education is one of the pious obligation of the Society.... It is for us to preserve that rich heritage of our culture of transcending the education continuously unpolluted."

21. In ***Rohit Singhal and others Vs. Principal, Jawahar N. Vidyalaya and others, (2003) 1 SCC 687*** the Hon'ble Supreme Court expressed its great concern regarding children education, observing that *"Children are not only the future citizens but also the future of the earth. Elders in general, and parents and teachers in particular, owe a responsibility for taking care of the well-being and welfare of the children. The world shall be a better or worse place to live according to how we treat the children today. Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well functioning Society. However, children are vulnerable. They need to be valued, nurtured, caressed and protected."*

22. In ***Manager, Nirmala Senior Secondary School Vs. N.I. Khan, (2003) 12 SCC 84***, the Supreme Court indicated the role of teachers thus:-

"A teacher affects eternity. He can never tell where his influence stops; said Henry Adam. Any educational institution for its growth and acceptability to a large measure depends upon the quality of teachers.

2. Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonized by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline between the teacher and the taught, where both are worshippers of learning, no

discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teachers are really important."

23. In ***Visveswaraya Technological University and another vs. Krishnaendu Halder and others (2011) 3 Scale 359***, while approving the fixation of criteria higher than those fixed by All India Council for Teacher Education, Supreme Court made a reference about the mushrooming of Private Institutions in Teacher Education. The observation reads thus:-

"11. The primary reason for seats remaining vacant in a State, is the mushrooming of private institutions in higher education. This is so in several States in regard to teachers training institutions, dental colleges or engineering colleges. The second reason is certain disciplines going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Fixing of higher standards, marginally higher than the minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. Therefore, a student whose marks fall short of the eligibility criteria fixed by the State/University, or any college which admits such students directly under the management quota, cannot contend that the admission of students found qualified under the criteria fixed by AICTE, should be approved even if they do not fulfill the higher eligibility criteria fixed by the State/University."

24. Importance of education was highlighted by Division Bench of this Court, (of which I was author) in **Surinder Kumar and others vs. State of Himachal Pradesh and others**, CWP No. 409 of 2014, wherein the following observations from the judgment delivered by the High Court of Jammu and Kashmir by Justice Mansoor Ahmad Mir (as his Lordship then was) in OWP No. 674 of 2010 titled **Khursheed Ahmad Sheikh & Ors. vs. State of others** decided on 6.6.2012, was relied upon which reads as under:

"21. The importance of education has been highlighted in a judgment delivered by the High Court of Jammu and Kashmir by one of us (Hon'ble the Acting Chief Justice) in OWP No.674 of 2010 titled Khursheed Ahmad Sheikh & Ors. versus State of Others, along with connected matters, decided on 06.06.2012, wherein the need for quality education has been emphasized in the following manner:-

"24) At the very outset let us advert to the essence of word 'Education' being the foundation of all the writ petitions. The purpose of essence of education is a basis for foundation of nation, thus while establishing Universaties or Centres outside

State, necessary requirements of the enactments/ Acts/Rules and Regulations are to be followed. Any institution established or run to dehors of rules virtually amounts to demolishing the society. The Regulations, Acts, Rules, applicable serve the interests of students, teachers and the public at large. Their role is of paramount importance; the good education aims at to preserve harmony among affiliated institution."

"35. Before proceeding further on the issue, the purpose and concept of Education be reminiscent:

The dictionary meaning of Education is learning; to gain knowledge. The petitioners, like all those people who pursue and are in search of particular knowledge, have a propensity to become the torch bearers only if the same is pursued and accomplished in a very fair; transparent and legal manner; but if the degrees, as in the case in hand, are provided like a street commodity the fate of the future can just be anticipated.

36. This court would not hesitate even to say that if the objection regarding the sanctity of petitioners degrees would not have been raised by the respondents, the probability was that they would have made their entry on different posts, again meant for imparting education, and the same would have resulted in generational waywardness, for, a candle cannot light another unless it continues to burn its own flame."

25. A Division Bench of this Court, (of which I was author) in CWP No. 7688 of 2013 titled H-Private Universities Management Association (H-PUMA) vs. State of H.P. decided on 23.7.2014, was dealing with the right of private universities to make admission to various technical courses in the institution dehors the rules wherein it was held that right to establish an educational institution was not a business or trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be permissible. This Court also upheld the right of the State to act as a regulator to maintain academic standard. The following observations from the judgment deserve to be taken note of:

"20. In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the

public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.

23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in Visveswaraiah Technological University and another vs. Krishnendu Halder and others (2011) 4 SCC 606 and reiterated in Mahatma Gandhi University and another vs. Jikku Paul and others (2011) 15 SCC 242."

26. This Court in CWP No.2609 of 2014 titled Miss Kiran Bala and others vs. Himachal Pradesh University and others, decided on 28.8.2014 was ceased of a matter wherein the University without advertising the number of seats available for Ph.D. programme in Biotechnology, had granted permission to certain students in a manner which by no standards could be said to be fair or transparent, which constrained this Court to make the following observations:

"9. From the above, it is not understandable how the University in this era still claims that it is not mandatory to notify or advertise the number of seats available for Ph. D. Program. The respondents - University in its overzealousness to contest the petition have gone to the extent of making the averments which can only be

termed to be preposterous when it claims that petitioner had remained in the University for almost four long years and could not feign ignorance about the process of enrollment/admission under the Ph.D. Program in Biotechnology and about the past practice of Ph.D. enrollment. Is it to suggest that Ph.D. program offered by the University meant for the former students of the University, because it is only then they alone, who would have personal knowledge regarding "process of enrollment/admission under the Ph.D. Program in Biotechnology". The respondents should have avoided leveling uncalled for allegations against the petitioners, which otherwise have nothing to do with the admissions of the Ph.D. program.

10. The Hon'ble Supreme Court has clearly spelt out in a catena of decisions that criteria for selection in such like course has to be merit alone. In fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be a travesty of justice if the rule of merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the rule of merit can be compromised.

11. From the facts of the present case, it is evident that not only the merit has been a causality, the respondents have failed to observe and oversee that procedure adopted is fair and transparent. It has been the consistent view of the Hon'ble Supreme Court that merit alone is the criteria for such admission and circumvention of merit is not only impermissible but is also abuse of the process of law. [See: Priya Gupta vs. State of Chhattisgarh (2012) 7 SCC 433, Harshali vs. State of Maharashtra (2005) 13 SCC 464, Pradeep Jain vs. Union of India (1984) 3 SCC 654, Shrawan Kumar vs. DG of Health Services 1993 Supp. (1) SCC 632, Preeti Srivastava vs. State of M.P. (1999) 7 SCC 120, Guru Nanak Dev University vs. Saumil Garg (2005) 13 SCC 749 and AIIMS Students' Union vs. AIIMS (2002) 1 SCC 428].

12. This court cannot ignore the fact that these admissions relate to Ph.D. courses, where there is throughout competition and the entire life of a student depends on his/ her admission to this course. Higher the competition, greater is the duty on the part of the authorities concerned to act with utmost caution to ensure transparency and fairness. It is one of the primary obligations of the University to see that a candidate of higher merit is not denied seat to the appropriate course and the same is not offered to a lesser meritorious candidate. There is no gain saying that the process of admission is a cumbersome task for the authorities but that per se cannot be a ground for compromising merit. The authorities concerned are expected to perform certain functions which must be performed in a fair and proper manner.

13. The essence of the judgement rendered by the Hon'ble Supreme Court dealing with these kind of issues is to nurture discipline, fairness and transparency in the selection and

admission process and to avoid prejudice to any of the stakeholder. It is expected that the authorities would be perfect/ fair and transparent in the discharge of their duties. The Hon'ble Supreme Court has in fact held that a candidate who adopts mal-practices in collusion with the authorities or otherwise for seeking admission and if their admissions are found to be irregular or faulty in law by the courts, they shall normally be held responsible for paying compensation to such other candidates who have been denied admission as a result of admission of the wrong candidates. The law requires adherence to certain protocol in the process of selection and grant of admission, so that none should be able to circumvent or trounce this process with or without an ulterior motive.

14. The courts are duty bound to ensure that the litigation relating to academic courses particularly professional courses, should not be generated for want of will on the part of stakeholder to follow the process of selection and admission fairly, transparently and without any exploitation. The court cannot lose sight of the fact that career of more meritorious student is at stake. These are the matters relating to adherence to the rule of merit and when its breach is complained of, the judiciary may be expected to deal with such grievance preferentially and efficiently. [See : Asha vs. Pt. B.D. Sharma University of Health Sciences and others (2012) 7 SCC 389].

15. The respondents- University cannot be permitted to give admission to students in an arbitrary and nepotistic manner. The methodology adopted and the manner in which the admissions were given to respondents No. 3 to 5 leaves no doubt in the mind of this court that this process was neither fair nor transparent. It is required to ensure that arbitrariness and discrimination does not creep into the process of selection and equal opportunity is ensured to all eligible candidates in a just and fair manner.

16. The maxim boni judicis est causas litium dirimere places an obligation upon the court to ensure that it resolves the causes of litigation, so that litigation can be prevented by removing the cause of litigation itself."

27. Coming back to the facts of the case, it is not disputed that the vacancies of Principle and other Lecturers in the petitioner-College were required to be filled up after proper advertisement by the Selection Committee strictly in accordance with the latest guidelines/instructions of the University Grants Commission Regulations on minimum qualifications for appointment of teachers and other academic staff in the University and Colleges as circulated by the UGC vide communication No.F.3-1/2009 dated 28.6.2010 and further adopted by the University for implementation in the colleges affiliated to it and circulated by the University vide Notification No. 3-5/78-HPU (Genl.) Vol. IV dated 9th July, 2010. The aforesaid procedure has been prescribed by the respondent-University and informed to the petitioner vide letter dated 15.1.2013.

28. Clause 6.0.0 of the UGC Regulations deals with the selection procedure which reads as under:

> "**6.0.0 SELECTION PROCEDURES:**
>
> **6.0.1** The overall selection procedure shall incorporate transparent, objective and credible methodology of analysis of the merits and credentials of the applicants based on weightages given to the performance of the candidate in different relevant dimensions and his/her performance on a scoring system proforma, based on the Academic Performance Indicators (API) as provided in this Regulations in Tables I to IX of Appendix III.
>
> **3.1.0** The Direct recruitment to the posts of Assistant Professors, Associate Professors and Professors in the Universities and Colleges shall be on the basis of merit through all India advertisement and selections by the duly constituted Selection Committees as per the guidelines prescribed under these Regulations to be incorporated under the Statutes/Ordinances of the concerned university. The composition of such committees should be as prescribed by the UGC in these Regulations."

29. It was also not in dispute that the petitioner-institute had advertised seven posts of Lecturers in Education and one post of Principal in the newspaper (Tribune) on 30.12.2012, pursuant to which meeting of the Selection Committee duly constituted in terms of the UGC Regulations as adopted by the respondent-University took place on 18.3.2013. Admittedly, no posts pursuant to this advertisement had been filled up. The petitioner then resorted to a novel method of filling up of the vacancies whereby no fresh advertisement was issued and the petitioner convened meeting of the Selection Committee on 18.6.2013 on the basis of the applications received as per the old advertisement dated 30.12.2012.

30. Even the Selection Committee, which comprises of six members, out of whom, one is the direct nominee of the Principal, two V.C. Nominee, while two others are subject matter expert and the sixth member is deputed by the University representing the SC/ST/OBC/Women etc., did not care to ensure that there was fairness and transparency in filling up of the posts in question. The least what was expected from the Selection Committee was to ensure that the posts in questions are filled up after issuance of proper advertisement giving an opportunity to all the eligible candidates to apply. The petitioner institution which admittedly recognized by the University was bound to ensure that the doctrine of a quality and non-discrimination as mandated by Article 14 of the Constitution of India was not violated.

31. The petitioner institute was further required to ensure that the posts in question are filled up after issuing advertisement giving wide publicity and thereafter to ensure that there was a proper competition amongst the qualified persons after following due process of selection under the relevant Rules.

32. As observed earlier, since the life-span of an advertisement have come to an end, therefore, it can be conveniently held that there was no advertisement whatsoever issued by the petitioner when it sought to fill up the posts on the basis of the Selection Committee meeting convened on 18.6.2013. The appointments made by the petitioner-institute are nothing but back door and, therefore, the appointments are total a nullity.

33. The Hon'ble Supreme Court has deprecated the tendency of appointment of even daily waged labourers without advertisement and termed these appointments as back door and in violation of Article 16 of the Constitution of India (Refer: ***Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, AIR 1992, SC, 789).*** While in the case in hand, we are dealing with a case where the posts of Principle and Lecturers has been sought to be filled up without there being any proper advertisement or rather where there was no advertisement in the eyes of law.

34. It is settled law that appointments made without following proper procedure under the Rules/Government Circulars/University Circulars and without advertisement or inviting of applications from the open market, is flagrant and breach of the Articles 14 and 16 of the Constitution of India (Refer: ***Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408)***.

35. In ***M. P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and Others (2007) 8 SCC 264,*** the Hon'ble Supreme Court laid down following principles to be followed in the matters of public appointments:

"24. It is clear that in the matter of public appointments, the following principles are to be followed:

(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(6) The Court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

36. Now reverting back to the petition, the petitioner was duty bound to have approached the court with clean hands and tendency of unscrupulous litigants who do not have any respect for truth and who try to pollute stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case has to be eschewed. A litigant who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievances and, in such case, such person is not entitled to any relief from a judicial forums. This was so held by the Hon'ble Supreme Court in ***Ramjas Foundation and another vs. Union of India and others (2010) 14 SCC 38*** in the following terms:

"21. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case.

22. In Dalglish v. Jarvie (1850) 2 Mac. & G. 231 at page 238, Lord Langdale and Rolfe B. observed: (ER p.89)

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward."

23. In Castelli v. Cook (1849) 7 Hare, 89, pae 94 Wigram V.C. stated the rule in the following words: (ER p.38)

".....a plaintiff applying ex parte comes ....under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when other party

applies to dissolve the injunction, that any material fact has been suppressed or not property brought forward, the plaintiff is told the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

24. In Republic of Peru v. Dreyfus Brothers & Company 55 L.T. 802 at page 803, Kay J. held as under:

"I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith in the Court when ex parte applications are made."

25. The same rule was restated by Scrutton L., J in R. v. Kensington Income Tax Commissioner (1917) 1 K.B. 486. The facts of that case were that in April, 1916, the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington made an additional assessment upon the applicant for the year ending April 5, 1913, in respect of profits arising from foreign possessions. On May 16, 1916, the applicant obtained a rule nisi directed to the Commissioners calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding upon the assessment upon the ground that the applicant was not a subject of the King nor resident within the United Kingdom and had not been in the United Kingdom, except for temporary purposes, nor with any view or intent of establishing her residence therein, nor for a period equal to six months in any one year. In the affidavit on which the rule was obtained the applicant stated that she was a French subject and resident in France and was not and had not been a subject of the United Kingdom nor a resident in the United Kingdom; that during the year ending April 5, 1913, she was in the United Kingdom for temporary purposes on visits for sixty-eight days; that she spent about twenty of these days in London at her brother's house, 213, King's Road, Chelsea, generally in company with other guests of her brother; that she was also in the United Kingdom during the year ending April 5, 1914, for temporary purposes on visits, and spent part of the time at 213, King's Road aforesaid; and that since the month of November, 1914, she had not been in the United Kingdom.

26. From the affidavits filed on behalf of the Commissioners and of the surveyor of taxes, who showed cause against the rule nisi, and from the affidavit of the applicant in reply, it appeared that in February, 1909, a leasehold house, 213, King's Road, Chelsea, had been taken in the name of the applicant's brother. The purchase-money for the lease of the house and the furniture amounted to 4000, and this was paid by the applicant out of her

own money. The accounts of household expenses were paid by the brother and subsequently adjusted between him and the applicant. The Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Divisional Court observed that the Court, for its own protection is entitled to say "we refuse this writ of prohibition without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us".

27. On appeal, Lord Cozens-Hardy M.R. and Warrington L.J. approved the view taken by the Divisional Court. Scrutton L.,J. who agreed that the appeal should be dismissed observed:

"……and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

28. The abovenoted rules have been applied by this Court in large number of cases for declining relief to a party whose conduct is blameworthy and who has not approached the Court with clean hands - Hari Narain v. Badri Das AIR 1963 SC 1558, Welcome Hotel v. State of A.P. (1983) 4 SCC 575, G. Narayanaswamy Reddy v. Government of Karnataka (1991) 3 SCC 261, S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1, A.V. Papayya Sastry v. Government of A.P. (2007) 4 SCC 221, Prestige Lights Limited v. SBI (2007) 8 SCC 449, Sunil Poddar v. Union Bank of India (2008) 2 SCC 326, K.D. Sharma v. SAIL (2008) 12 SCC 481, G. Jayashree v. Bhagwandas S. Patel (2009) 3 SCC 141 and Dalip Singh v. State of U.P. (2010) 2 SCC 114.

29. In the last mentioned judgment, the Court lamented on the increase in the number of cases in which the parties have tried to misuse the process of Court by making false and/or misleading statements or by suppressing the relevant facts or by trying to mislead the Court in passing order in their favour and observed: (Dalip Singh case (2010) 2 SCC 114, SCC pp.116-17, paras 1-2)

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However,

post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final." (emphasis supplied)

30. In our view, the appellants are not entitled to any relief because despite strong indictment by this Court in Ramjas Foundation v. Union of India, they deliberately refrained from mentioning details of the cases instituted by them in respect of the land situated at Sadhora Khurd and rejection of their claim for exemption under clause (d) of notification dated 13.11.1959 by the High Court and this Court."

37. The petitioner is not so naïve to feign ignorance regarding mode, manner and procedure of recruitment and selection after all it is running a professional college. But surprisingly still it has tried to justify the illegal appointments made (paragraph 16 supra).

38. The petition deserves to be dismissed not only it lacks merit, but also because the petitioner has not approached this Court with clean hands. Accordingly, the present petition is dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

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

State of Himachal Pradesh .....Appellant.

Vs.

Chanalu Ram alias Kuber S/o Shri Mela Ram & Ors. ...Respondents.

Cr. Appeal No. 416 of 2008
Judgment reserved on: 5.8.2014
Date of Decision: 23.09.2014.

Indian Penal Code, 1860- Section 302- Deceased had gone to a Village to attend the marriage, where he had a quarrel with the accused- wife of the deceased went to the house of PW-1 after 2-3 days of the quarrel who told her that accused and deceased had visited her home- deceased had also not joined his duty- a Panchayat was called where the accused had made an extra judicial confession- matter was reported to police - the accused and deceased were last seen together on 9.7.2006- FIR was lodged on 12.7.2006 - dead body was also found on 12.7.2006- held that, the last seen theory comes into play only when time gap between the point of time when the accused and deceased were seen together and when the dead body of deceased is found is so small that possibility of any person other than the accused being the author of crime becomes impossible- the time gap between 9.7.2006 and 12.7.2006 was large and the last seen theory cannot be applied. (Para-11)

Indian Evidence Act, 1872- Section 3- Appreciation of evidence-circumstantial evidence- in case of circumstantial evidence, prosecution is under legal obligation to prove the circumstances from which the conclusion of guilt is to be drawn- the circumstances should be conclusive in nature- they should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused-circumstances should exclude the possibility of guilt of any person other than the accused. (Para-12)

Indian Evidence Act, 1872- Section 24- Extra Judicial Confession-Confession in criminal cases should be voluntary in nature and should be free from any pressure- when the witnesses had not stated that the confession was voluntary, confession should not be believed. (Para-14)

Indian Evidence Act, 1872- Section 27- As per prosecution case, a stone was recovered on the basis of disclosure statement made by the accused- however, neither the finger prints of the accused nor the blood of the deceased was found upon the stone- held, that the recovery is not sufficient to implicate the accused.

(Para-15)

Indian Evidence Act, 1872- Section 3- Proved- Court must guard against the danger of allowing conjecture or suspicion to take the place of legal proof - suspicion howsoever strong cannot take the place of proof. (Para-18)

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- the Appellate Court should not set aside the judgment of acquittal when two views are possible- the Court must come to the conclusion that the view of the Trial Court was perverse or otherwise unsustainable- the Court is to see whether any inadmissible evidence has been taken into consideration and can interfere only when it finds so.

Cases referred:

Kusuma Ankama Rao vs. State of A.P, AIR 2008SC 2819

State of U.P. Vs. Dr. Ravindra Prakash Mittal, AIR 1992 SC Court 2045

Hanumant Govind Nargundkar and another Vs. State of Madhya Pradesh, AIR 1952 SC 343
Musheer Khan @ Badshah Khan and another Vs. State of Madhya Pradesh, AIR 2010 SC Court 762
Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra AIR 2009 SC 56
State of Maharashtra Vs. Annappa Bandu Kavatage AIR 1979 Apex Court 1410
S.P. Bhatnagar and another Vs. The State of Maharashtra, AIR 1979 Apex Court 826
Ashok Kumar Chatterjee Vs. State of Madhya Pradesh AIR 1989 SC 1890
Sakharam Vs. State of Madhya Pradesh AIR 1992 SC 758
Dharm Das Wadhwani Vs. The State of Uttar Pradesh AIR 1975 SC 241
Bhagat Ram Vs. State of Punjab AIR 1954 SC 621
Prakash Vs. State of Rajasthan (DB), 2013 Cri.L.J. 2040,
Anjlus Dungdung Vs. State of Jharkhand (2005)9 SCC SC 765 (DB)
Charan Singh Vs. The State of UP AIR 1967 SC 520
Gian Mahtani and (2) Budhoo and others Vs. State of Maharashtra AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Sharad Birdhichand Sarda Vs. State of Maharashtra AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. the State of Gujarat AIR 1983 SC 906
State of U.P. Vs. Sukhbasi and others AIR 1985 SC 1224
Mookkiah and another Vs. State (2013)2 SCC 89
State of Rajasthan Vs. Talevar 2011(11) SCC 666
Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutta. 2012(1) SCC 602
Balak Ram and another Vs. State of U.P. AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002)3 SCC 57
Raghunath Vs. State of Haryana (2003)1 SCC 398
State of U.P. Vs. Ram Veer Singh and others AIR 2007 SC 3075
S. Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others AIR 2008 SC 2066 (2008) 11 SCC 186.
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2009)10 SCC 206 titled Arulvelu and another Vs. State, (2009)16 SCC 98 Perla Somasekhara Reddy and others Vs. State of A.P. and (2010)2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh.)

For the Appellant: Mr. B.S. Parmar, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General.
For the Respondents: Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal filed against the judgment passed by learned Sessions Judge Chamba Division in Sessions trial No. 12 of 2007 titled State of H.P. Vs. Chanalu Ram @ Kuber and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 9.7.2006 at 10/11 AM at village Maniyoga Pargana Himgiri Tehsil Salooni District Chamba accused persons in furtherance of common intention committed murder of deceased Desh Raj son of Baldev Ram resident of village Khudri, Pargana Pichhla Diur Tehsil Salooni District Chamba. It is further alleged by prosecution that accused persons in furtherance of common intention caused disappearance of evidence of murder of said Shri Desh Raj with intention to screen themselves from legal punishment. It is further alleged by prosecution that on dated 9.7.2006 Desh Raj deceased had gone to village Maniyoga in order to attend the marriage from where he had to join his duties. It is also alleged by prosecution that in July 2006 there was a marriage of the brother of PW3 Lachho Ram in village Manyoga and accused persons being members of the band party were also present in said marriage. It is alleged by prosecution that after the marriage was over accused persons came to house of PW1 Smt. Nardai wife of Gian at about 8/9 PM and started beating the drum/band in their house and Desh Raj deceased was also with them at that time. It is further alleged by prosecution that to co-accused Pyar Singh put his hand on shoulder of Nardai's daughter and deceased Desh Raj objected to it and he gave a slap to co-accused Pyar Singh and thereafter there was a quarrel between the accused persons and deceased Desh Raj and PW1 Nardai pacified the matter and thereafter deceased and accused persons left the house of Nardai. It is also alleged by prosecution that after 2/3 days wife of deceased Desh Raj came to the house of PW1 Nardai and asked her as to whether her husband Desh Raj came to her house with accused persons. It is further alleged by prosecution that thereafter Nardai told that deceased came to her house and also told that Desh Raj deceased had left her house along with accused persons. It is further alleged by prosecution that on dated 11.7.2006 PW13 Baldev Ram came to his home in the evening and he enquired from the family members about the whereabouts of Desh Raj upon which he was told that he had gone to attend the marriage from where he would go to his duties. It is also alleged by prosecution that thereafter Baldev Ram ran up at P.S. Tissa but he was informed that deceased had not joined his duties and then he went to village Manyoga in order to find out about whereabouts of deceased Desh Raj and enquired from Giano of Manyoga who told that deceased Desh Raj left to her house along with accused persons. It is further alleged by prosecution that thereafter Baldev Ram came to his house and called the

Pardhan and also called 10-15 other persons where co-accused Kewal had given extra judicial confession that he along with other accused persons have killed deceased Desh Raj with a blow of stone and thereafter concealed the dead body of deceased. It is further alleged by prosecution that thereafter matter was reported to the police and FIR Ext.PW10/B was registered. It is also alleged by prosecution that photographs of dead body were also got clicked and inquest reports Ext.PW11/A and Ext.PW11/B were prepared and dead body was sent to Regional Hospital Chamba for postmortem through PW9 C. Deep Singh and HHC Kishan Chand. It is alleged by prosecution that site plan of spot Ext.PW11/C was prepared and post mortem of deceased was conducted and as per opinion of medical officer cause of death was head injury which was caused with a blow of stone Ext.P5. It is further alleged by prosecution that as per FSL report there was no evidence of alcohol or poison in the stomach, small intestines, spleen, kidney and blood of the deceased. It is further alleged by prosecution that thereafter co-accused Channalu had given disclosure statement that he could get recovered the stone with which deceased was killed. It is further alleged by prosecution that as per disclosure statement of co-accused Chanalu stone was recovered and same was took into possession vide recovery memo Ext.PW11/E. It is further alleged by prosecution that site plan Ext.PW11/G and jamabandi Ext.PW6/C were obtained from PW6 Mohinder Singh Patwari vide application Ext.PW6/A and clicked photographs are Ext.PX/1 to Ext.PX/8 and negatives of photographs are Ext.PX/9 to Ext.PX/16. It is further alleged by prosecution that parcels were deposited with the malkhana and thereafter same were sent for chemical examination vide RC No. 39/06 through C. Deep Ram.

3 Charge was framed against accused persons by learned trial Court on dated 28.4.2007 under Section 302 read with Section 34 IPC and under Section 201 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

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

Sr.No.	Name of Witness
PW1	Smt. Nardai
PW2	Tara Chand
PW3	Lachho Ram
PW4	Mohar Singh
PW5	Dr. K.P. Singh
PW6	Mohinder Singh
PW7	Kuldeep Kumar

PW8	Chain Singh
PW9	Deep Kumar
PW10	HC Ashok Kumar
PW11	ASI Kaur Chand
PW12	ASI Mukesh Kumar
PW13	Baldev Ram
PW14	Man Singh
PW15	Somraj
PW16	Jai Singh
PW17	Gianu

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

Sr.No.	*Description:*
Ex.PW2/A.	*Seizure memo of clothes.*
Ex.PW5/A.	*Application to Medical Officer for post mortem of deceased Desh Raj.*
Ex.PW5/B	*FSL report*
Ex.PW5/C	*Post mortem report of Desh Raj*
Ex.PW6/A	*Application to Tehsildar*
Ex.PW6/B	*Tatima*
Ex.PW6/C	*Jamabandi for the years 2002-03*
Ex.PW8/A	*Statement under Section 154 Cr.P.C. of Shri Baldev Ram*
Ex.PW10/A	*Copy of DD No. 4/12.7.2006*
Ext.PW10/B.	*Copy of FIR*
Ex.PW11.A and	*Inquest reports*

Ext.PW11/B	
Ex.PW11/C	*Site plan.*
Ex.PW11/D	*Statement under Section 27 of Evidence Act.*
Ext.PW11/E	*Seizure memo of stone Ext.P5.*
Ext.PW11/F	*Seal impression*
Ext.PW11/G	*Site plan*
Ext.PW11/H	*Seizure memo of clothes*
Ext.PW11/J	*Seal impressions*
Ext.PW11/D and Ext.DA	*Statement of Nardai under Section 161 Cr.P.C. for confrontation purpose.*
Ext.PW11/L	*FSL report*
Ext.PX-1 to 8	*Photographs*
Ext.PX-9 to 16	*Negatives of photographs*
Ext.P1 to Ext.P5	*Shirt, pant of accused Piar Singh, shirts of accused Chanalu and stone*

5. Statements of the accused persons were also recorded under Section 313 Cr.P.C. They have stated that they are innocent and they have been falsely implicated in this case. Learned trial Court acquitted all the accused by way of giving them benefit of doubt.

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

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

8. Question that arises for determination before us in this appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to the appellant as mentioned in grounds of appeals.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 Nardai has stated that there was a marriage in July 2006 of bother of Shri Lachho Ram and accused persons present in Court were members of the band party in the marriage ceremony. She has stated that after marriage ceremony was over accused came to her house at about 8/9 PM and they beat the band in her house. She has stated that deceased Desh Raj was also with them at that time. She has stated that thereafter co-accused Pyar Singh put his hand on the shoulder of her daughter and deceased Desh Raj objected and slapped co-accused Pyar Singh. She has stated that thereafter there was a quarrel between the accused persons and deceased Desh Raj and she pacified them. She has stated that thereafter all of them left her house including deceased Desh Raj. She has further stated that after 2/3 days wife of deceased Desh Raj came to her house and asked her as to whether her husband Desh Raj came to her house with accused. She has stated that she informed the wife of deceased Desh Raj that Desh Raj had left her house along with accused persons. She has stated that accused persons remained in her house for half an hour. She has stated that when quarrel took place in her house between accused persons and deceased Desh Raj there was none except her and her daughter. She has admitted that deceased was intoxicated. Self stated that accused persons have also took alcohol at that time. She has denied suggestion that deceased Desh Raj had died due to fall from hillock. She has denied suggestion that accused persons did not come to her house. She has also denied suggestion that there was no quarrel between deceased Desh Raj and accused persons in her house.

9.2 PW2 Tara Chand has stated that on dated 15.7.2006 he brought the clothes of accused Chanalu and Piar Singh from their houses which were worn by accused persons and same were took into possession vide seizure memo. He has stated that shirt Ext.P1 and pant Ext.P2 belonged to accused Piar Singh and further stated that shirt Ext.P3 and pant Ext.P4 belonged to co-accused Chanalu Ram. He has denied suggestion that he had not gone to the houses of accused persons and has also denied suggestion that he had not brought the clothes of co-accused Chanalu and co-accused Piar Singh.

9.3 PW3 Lachho Ram has stated that there was marriage of his younger brother Paras Ram on dated 7.7.2006. He has stated that accused persons present in Court were members of the band party. He has stated that band party was engaged by him. He has further stated that deceased Desh Raj had also attended the marriage. He has stated that Dham (Final function of marriage ceremony) was celebrated on dated 9.7.2006. He has stated that thereafter he gave ` 1800/- to accused persons on Dham (Final function of the marriage ceremony) and thereafter accused persons left his house. He has stated that deceased Desh Raj also accompanied accused persons and thereafter they went to the house of Gianu where they also beat the drum. He has stated that in the house of Gianu quarrel took place between accused persons and deceased Desh Raj. He has stated that thereafter accused persons and Desh Raj left the house of Gianu at about 9/9.30 PM. He has further stated that on dated 11.7.2006 wife of Desh Raj came to his house and

enquired about Desh Raj. He has stated that he told her that deceased Desh Raj had left his house with accused persons and went to the house of Gianu on the same day of Dham (Final function of marriage). He has stated that thereafter dead body of Desh Raj was found in Manyoga on dated 12.7.2006. He has stated that he suspected that accused persons have killed Desh Raj. He has stated that no quarrel took place in his presence between accused persons and deceased Desh Raj. He has stated that Desh Raj had consumed liquor on that day. He has stated that he does not know that deceased Desh Raj had fallen from hillock under the influence of liquor and died due to fall.

9.4 PW4 Mohar Singh has stated that there was a marriage on 23rd Ashad 2006 in the house of Shri Lachho Ram of his brother Shri Paras Ram. He has stated that accused persons present in Court were members of band party. He has stated that accused persons came to his house in order to spend the night and they reached at 10 or 11 PM and he provided them bedding and they stayed during night in his house. He has stated that wife of deceased Desh Raj came to his house in order to enquire about deceased Desh Raj but he told her that he does not know about deceased. He has further stated that thereafter dead body of deceased Desh Raj was found in Manyoga hillock. He has stated that he heard that Desh Raj was with accused persons. He has stated that he heard that accused persons had killed deceased Desh Raj. He has stated that he does not know that deceased Desh Raj had consumed liquor. He has stated that he does not know that deceased had died due to fall.

9.5 PW5 Dr. Kulvinder Pal Singh has stated that he was posted as Medical Officer in RH Chamba and further stated that one Desh Raj son of Baldev Ram aged 32 years resident of Khudri District Chamba was brought to hospital through police docket Ext.PW5/A. He has conducted the post mortem examination of deceased Desh Raj on dated 13.7.2006 at 11 AM and has also observed as under. He has stated that on external appearance deceased was about 30 years male well built with black long hair wearing striped T-shirt, blue jean, blue underwear and black socks and shoes. He has further stated that his rigor mortis was present and entire body and face was studded with maggots. He has stated that entire body and face along with both eyes were eaten up by maggots. He has stated that no mark of ligature seen and there was a bruise 2x2 cms over the left temporal area. He has stated that on examination of cranium and spinal cord hematoma was present 3x3 cm below the skin of left temporal part of skull with overlying skin having swelling and bruise. He has stated that linear fracture 3 cm long over the left temporal bone and brain matter was liquefied and were containing shades of liquid blood. He has further stated that thorax and abdomen were found normal and on muscles bones and joints no injury was found. He has stated that cause of death was head injury. He has stated that injury was ante-mortem. He has stated that as per perusal of FSL report Ext.PW5/B there was no evidence of alcohol or poison in stomach, small intestines, spleen, kidney and blood. He has stated that as per opinion the cause of death was head injury and he issued post mortem report Ext.PW6/B which is in his hand and bears his signatures. He has stated that injury

found on head of deceased could be caused by stone Ext.P5. He has stated that injuries mentioned in post mortem report could be caused if deceased struck against the hard surface.

9.6 PW6 Mohinder Singh has stated that he is posted as Patwari in Patwar Circle Bhanjwar Tehsil Salooni District Chamba for the last more than three years. He has stated that application Ext.PW6/A was marked to him by Tehsildar for conducting the demarcation of place of incident. He has stated that he visited the spot on dated 5.9.2006 along with police officials and prepared tatime Ext.PW6/B, which is in his hand and bears his signatures and he issued copy of jamabandi Ext.PW6/C . He has stated that place of incident falls in Khasra No. 330. He has denied suggestion that he has prepared tatima in Patwarkhana and also denied suggestion that he did not visit the place of incident.

9.7 PW7 Kuldeep Kumar has stated that he is photographer by profession and on dated 12.7.2006 he was joined by police in the investigation and he clicked photographs Ext.P2 to Ext.P9 and negatives are Ext.P10 to Ext.P17 and after developing the same were handed over to police officials. He has stated that photographs did not bear his signatures. He has denied suggestion that he did not click the photographs of the spot.

9.8 PW8 Chain Singh has stated that on dated 12.7.2006 he was present and joined the police investigation. He has stated that ASI Kaur Chand P.S. Kihar recorded statement of Baldev Raj as per his version and after making endorsement on ruka at Manyoga Phat Ext.PW8/A the same was sent to police station Kihar for registration of case through him on the basis of which FIR was registered. He has further stated that after making the endorsement on the FIR in red circle the file was handed over to him which he took to the spot and handed over to ASI Kaur Chand. He has denied suggestion that he was not present at the spot. He has also denied suggestion that no ruka was given to him.

9.9 PW9 C. Deep Kumar has stated that prior to his posting at Surangani Police Post he was posted in P.S. Kihar. He has stated that on dated 12.7.2006 he along with HHC Kishan Chand was deputed to get the dead body of deceased Desh Raj post mortem at R.H. Chamba and he got the same post mortem at R.H. Chamba and obtained the post mortem report on dated 14.7.2006 along with viscera and one parcel which were handed over to him by Medical Officer who conducted the post mortem. He has stated that post mortem was conducted on dated 13.7.2006 and on dated 17.7.2006 MHC Ashok Kumar handed over to him viscera, four parcels and one envelope for being taken to FSL Junga vide RC No. 39/2006 which was deposited there by him on dated 19.7.2006. He has stated that case property was not tampered and after depositing the articles with FSL he handed over the RC back to MHC Ashok Kumar. He has denied suggestion that he did not take the case property to FSL Junga.

9.10 PW10 HC Ashok Kumar has stated that he remained posted as MHC P.S. Kihar from the year 2003 to 2006. He has stated that on dated 12.7.2006 vide rapat No. 4 of D.D. Ext.PW10/A, ASI Kaur Chand along with other police officials had proceeded to village Sunj where dead body of SPO Desh Raj was stated to be lying. He has stated that ASI Kaur Chand sent ruka Ext.PW8/A through SPO Chain Singh to P.S. on the basis of which FIR Ext.PW10/B was recorded by him at 8.15 PM which bears his signatures. He has stated that thereafter file was sent to spot for further investigation to ASI Kaur Chand and further stated that on dated 14.7.2006 HHC Kishan Chand deposited viscera duly sealed with 11 seals and one parcel with four seals of RH Chamba and one envelope which was addressed to FSL Junga. He has stated that he entered the same in malkhana register and on dated 15.7.2006 ASI Kaur Chand deposited with him three parcels duly sealed with seals 'K' and 'H' along with specimen seals. He has further stated that on dated 17.7.2006 he sent the aforesaid sealed parcels to FSL Junga vide RC No. 39/2006 through C. Deep Kumar for chemical analysis. He has stated that case property was not tampered with till it remained in his custody. He has denied suggestion that no case property was deposited with him. He has denied suggestion that he did not sent the same to FSL Junga.

9.11 PW11 ASI Kaur Chand has stated that in the year 2006 he was posted in P.S. Kihar as ASI/I.O. and on dated 12.7.2006 he along with other police officials in order to verify the report No. 4 were present at Manyoga Phat where statement of Baldev Ram was recorded. He has stated that statement of Baldev was recorded under Section 154 Cr.P.C. Ext.PW8/A and same was sent to P.S. Kihar for registration of FIR. He has stated that photographs of dead body were clicked and inquest reports Ext.PW11/A and Ext.PW11/B were prepared and dead body was sent for post mortem through C. Deep Ram and HHC Kishan Chand. He has stated that he also prepared site plan of spot Ext.PW11/C and on dated 13.7.2006 all four accused persons were arrested. He has further stated that thereafter accused persons were produced before Chief Judicial Magistrate Chamba and five days police remand was obtained. He has stated that on dated 15.7.2006 accused Chanalu Ram made a disclosure statement Ext.PW11/D in presence of witnesses Hoshiar Singh and Maan Singh that he could get recovered the stone with which he had killed deceased Desh Raj. He has stated that he had given disclosure statement that he hit the stone on head of Desh Raj. He has stated that disclosure statement of co-accused Chanalu Ram was reduced into writing and thereafter co-accused Chanalu led the police party to Manyoga Phat and located the place where he had concealed the stone. He has stated that as per location shown by co-accused Chanalu the stone was recovered but due to rainy season the stone was wet and blood stains were washed away. He has stated that stone was took into possession vide memo Ext.PW11/E. He has stated that stone is Ext.P5. He has stated that clothes of accused which were worn by accused at the time of incident also took into possession. He has stated that clothes worn by accused at the time of incident were washed away. He has stated that clothes of co-accused Chanalu are Ext.P3 and Ext.P4 and

clothes of co-accused Pyaru are Ext.P1 and Ext.P2 and they were took into possession vide seizure memo. He has stated that tatima of spot is Ext.PW6/B and jamabandi is Ext.PW6/C and photographs are Ext.PX-1 to Ext.PX-8 and negatives are Ext.PX-9 to Ext.PX-16. He has stated that he has also filed application Ext.PW6/A for post mortem of deceased. He has stated that after receipt of report from FSL Junga Ext.PW5/B and Ext.PW11/L he handed over the case file to SI/SHO Mukesh Kumar. He has denied suggestion that as deceased was police officer false case has been filed against the accused persons.

9.12 PW12 ASI Mukesh Kumar has stated that he was posted at P.S. Kihar since 2005. He has stated that after completion of investigation and its verification he prepared challan and filed before the Court.

9.13 PW13 Baldev Ram has stated that he is running a hardware shop at village Diur. He has stated that his son Desh Raj was posted as SPO in P.S. Tissa and was posted at Himgiri Check post at the relevant time. He has stated that on dated 09.07.2006 he had gone to village Manyoga in order to attend the marriage. He has stated that from marriage place deceased decided to join his duties directly. He has further stated that on dated 11.7.2006 he came to his home in the evening and he enquired about deceased Desh Raj upon which he was informed that deceased had gone to attend the marriage and from marriage place deceased decided to attend his duties. He has stated that thereafter he rang up at Police Station Tissa but it was told that deceased had not joined his duties. He has further stated that then he went to village Manyoga in order to find out about whereabouts of Desh Raj and enquired from Giano of village Manyoga who told that deceased Desh Raj had left her house with accused persons namely Chanalu Ram, Piar Singh, Kewal and Dharam Chand present in Court. He has stated that thereafter he came to his house and called Pardhan and other 10-15 persons and co-accused Kewal Ram was also called. He has stated that co-accused Kewal Ram told that he along with co-accused Chanalu Ram, Piar Singh and Dharam Chand have killed Desh Raj with blow of stone and thereafter deceased was dragged to Manyoga hillock and was concealed there. He has stated that thereafter his dead body was recovered and photographs Ext.P1 to Ext.P8 clicked and negatives of photographs Ext.P9 to Ext.P16 prepared. He has stated that thereafter dead body of Desh Raj was sent to R.H. Chamba for post mortem purpose. He has denied suggestion that deceased used to take alcohol. He has denied suggestion that under the influence of liquor deceased fell down from hillock and died. He has denied suggestion that co-accused Kewal did not give any extra judicial confession.

9.14 PW14 Man Singh has stated that on dated 15.7.2006 co-accused Chanalu @ Kuber had made a disclosure statement Ext.PW11/D that he had concealed one stone and he could get it recovered. He has stated that thereafter accused led the police party to Manyoga hillock and stone Ext.P5 was recovered at the instance of co-accused which was took into possession vide seizure memo. He has stated that stone Ext.P5

is the same which was recovered at the instance of co-accused Chanalu. He has stated that clothes of co-accused Piar Singh were took into possession. He has denied suggestion that no stone was recovered as per disclosure statement given by co-accused and he has also denied suggestion that co-accused Chanalu did not give any disclosure statement.

9.15 PW15 Som Raj has stated that on dated 9.7.2006 his brother Desh Raj had gone to attend a marriage in village Manyoga from where he was to join his duties at P.S. Tissa. He has stated that after 2/3 days they enquired about him from P.S. Tissa and they were told that he had not joined his duties and then they enquired about Desh Raj in village Manyoga. He has further stated that he came to know that deceased was in the company of accused persons and it also came to his knowledge that accused were taking liquor during whole day. He has stated that deceased and accused persons left the house at about 10 PM. He has stated that co-accused Kewal Singh told that Desh Raj was killed by accused persons in the house and thereafter his dead body was dragged to Manyoga hillock. He has stated that he also disclosed that deceased was killed at the instance of Tara Chand another SPO. He has stated that he was not present in the marriage. He has stated that co-accused Kewal disclosed the above incident to them in presence of his father Baldev Ram, Giano, Hans Raj and Satpal etc. He has denied suggestion that co-accused Kewal did not disclose anything.

9.16 PW16 Jai Singh has stated that on dated 9.7.2006 he was present in a marriage in village Manyoga and accused persons were the members of band party in the marriage. He has stated that accused persons teased a girl in the marriage and deceased Desh Raj objected to it and quarrel took place. He has further stated that accused persons left the marriage house in the evening after the marriage was over and deceased Desh Raj also accompanied them to his house as he was resident of area of accused persons. He has stated that on dated 12.7.2006 they came to know that deceased Desh Raj was murdered in the night of dated 9.7.2006. He has stated that dead body of deceased was found and photographs clicked and thereafter dead body was took into possession. He has stated that he remained Pardhan of Gram Panchayat Pichla Diur. He has stated that quarrel took place in the house of Gianu. He has denied suggestion that no quarrel took place between deceased and accused persons. He has stated that quarrel took place for 10-15 minutes. He has stated that he also pacified the accused and deceased. He has stated that dead body was lying open in the said hillock. He has denied suggestion that he was not present in the marriage. He has denied suggestion that no quarrel took place between deceased and accused persons.

9.17 PW17 Gianu has stated that there was marriage in village Manyoga in the house of Lachho Ram of his brother Paras Ram. He has stated that accused persons present in Court were members of band party in the marriage. He has stated that deceased Desh Raj was also present in the marriage. He has stated that co-accused Pyar Singh

teased his daughter upon which Desh Raj objected and slapped co-accused Pyar Singh but they separated them. He has stated that during night accused persons left the marriage house and deceased Desh Raj also went with them. He has stated that on the fourth day dead body of Desh Raj was found in Manyoga hillock in pasture land. He has stated that accused did not tease his daughter in his presence. He has stated that deceased Desh Raj had also consumed liquor. He has stated that they all took liquor on the marriage day including accused persons. He has stated that he does not know that deceased Desh Raj died due to fall on the Manyoga hillock under the influence of liquor.

10. Statements of accused persons recorded under Section 313 Cr.P.C. Accused persons have stated that they are innocent and they have been falsely implicated in present case. Accused persons did not lead any defence evidence.

(1)Last seen theory not sufficient to convict accused persons

11. Submission of learned Additional Advocate General appearing on behalf of the State that accused persons be convicted on the basis of last seen theory in present case is rejected being devoid of any force for the reasons hereinafter mentioned. It is the case of prosecution that on dated 9.7.2006 the deceased went to village Manyoga to attend the marriage ceremony and thereafter he did not come back to his house. It is the story of prosecution that deceased was lastly seen in the company of accused persons on dated 09.07.2006. It is proved on record that FIR was recorded on dated 12.7.2006 at 8.15 AM. It is proved on record that dead body of deceased was found in the open place on dated 12.7.2006. It is well settled law that last seen theory comes into play only when time gape between the point of time when accused and deceased were seen together and dead body of deceased found is so small that possibility of any person other than the accused being the author of crime becomes impossible. ***(See AIR 2008SC 2819 titled Kusuma Ankama Rao Vs. State of A.P.)*** It is well settled law that in order to convict the accused on the concept of last seen theory intervention of third person should be ruled out beyond reasonable doubt. In present case accused persons and deceased were lastly seen together on dated 9.7.2006 and thereafter dead body of deceased was found in open place on dated 12.7.2006. We are of the opinion that intervention of possibility of third person from dated 9.7.2006 to 12.7.2006 could not ruled out in present case in the open place where dead body of deceased was found. In view of above stated facts we hold that it is not expedient in the ends of justice to convict the accused persons on last seen theory.

(2) Circumstantial evidence is not sufficient to convict the accused persons in the present case

12. Another submission of learned Additional Advocate General appearing on behalf of the State that accused be convicted on the basis of circumstantial evidence in present case is rejected being devoid of any force for the reasons hereinafter mentioned. In order to convict the accused on the circumstantial evidence, the prosecution is

under legal obligation to prove (i) That circumstances from which conclusion is drawn should be fully proved (ii) That circumstances should be conclusive in nature (iii) That all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence (iv) That circumstance should, to a moral certainty exclude the possibility of guilt of any person other than the accused. ***(See AIR 1992 SC Court 2045 titled State of U.P. Vs. Dr. Ravindra Prakash Mittal, See AIR 1952 SC 343 Hanumant Govind Nargundkar and another Vs. State of Madhya Pradesh, See AIR 2010 SC Court 762 titled Musheer Khan @ Badshah Khan and another Vs. State of Madhya Pradesh, See AIR 2009 SC 56 titled Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra, See AIR 1979 Apex Court 1410 titled State of Maharashtra Vs. Annappa Bandu Kavatage, See AIR 1979 Apex Court 826 titled S.P. Bhatnagar and another Vs. The State of Maharashtra, See AIR 1989 SC 1890 titled Ashok Kumar Chatterjee Vs. State of Madhya Pradesh, See AIR 1992 SC 758 titled Sakharam Vs. State of Madhya Pradesh, See AIR 1975 SC 241 titled Dharm Das Wadhwani Vs. The State of Uttar Pradesh, See AIR 1954 SC 621 titled Bhagat Ram Vs. State of Punjab.)*** It is also well settled law that in order to convict the accused in circumstantial evidence five golden principles should be proved (i) That circumstances from which the conclusion of guilt is to be drawn should be fully established and the accused must be and not merely may be guilty (ii) That facts so established should be consistent only with the hypothesis of the guilt of the accused (iii) That circumstances should be of a conclusive nature and tendency (iv) That they should exclude every possibility of innocence of accused (v) That there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. ***(See 2013 Cri.L.J. 2040, titled Prakash Vs. State of Rajasthan (DB).***

13. In present case accused persons were lastly seen in the company of deceased on dated 9.7.2006 and thereafter dead body of deceased was found in open place on dated 12.7.2006 after a gap of three days and there is no evidence on record in order to prove that place where dead body of deceased was found remained non-accessible to any third person. It is well settled law that in an open place accessibility of any third person cannot be ruled out. Dead body of deceased was found in open place and open place was accessible to third person. In present case circumstantial evidence is not sufficient to convict the accused persons.

(3) Extra judicial confession of accused person is not sufficient to convict the accused persons in present case

14. Submission of learned Additional Advocate General appearing on behalf of the State that on the basis of extra judicial confession of co-accused Kewal Ram accused persons be convicted is

also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that there are two types of confessions in Criminal law. (1) Judicial confession (2) Extra judicial confession. As per Section 24 of Indian Evidence Act, confession in criminal case caused by inducement threat or promise is irrelevant confession. It is well settled law that confession in criminal case should be voluntarily in nature and should be free from any pressure. PW13 Baldev Ram when he appeared in witness box did not state that co-accused Kewal Ram had given extra judicial confession voluntarily. The word 'voluntarily' is missing in testimony of PW13 Baldev Ram qua extra judicial confession of co-accused Kewal Ram. In absence of word 'voluntarily' qua confession in the testimony of PW13 Baldev Ram it is not expedient in the ends of justice to convict the accused persons on the concept of extra judicial confession.

(4) Disclosure statement given by co-accused Chanalu under Section 27 of Indian Evidence Act is not helpful to prosecution in present case

15. Learned Additional Advocate General appearing on behalf of the State submitted that in view of disclosure statement of co-accused Chanalu Ram under Section 27 of Indian Evidence Act accused persons be convicted in present case is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the disclosure statement given by co-accused Chanalu under Section 27 of Indian Evidence Act. As per Section 27 of Indian Evidence Act stone was recovered as per disclosure statement of co-accused Chanalu. The prosecution story that stone was recovered as per disclosure statement of co-accused Chanalu under Section 27 of Indian Evidence Act is not connected with weapon of offence because no finger prints of accused persons were found upon the stone and no blood of deceased was found upon the stone in order to prove beyond reasonable doubt that murder of deceased was committed with stone which was recovered at the instance of co-accused Chanalu Ram.

(5) Chemical Analysis report Ext.PW11/L is also not helpful to the prosecution

16. As per Chemical Analysis report no human blood was found upon the stone, shirt of co-accused Piar Singh, pant of co-accused Piar Singh, pant of co-accused Chanalu Ram and shirt of co-accused Chanalu Ram. In absence of any human blood upon the stone, upon the above stated shirts and pants worn by accused persons at the time of incident it is not expedient in the ends of justice to convict the accused persons in the present case.

(6) Photographs placed on record are also not helpful to the prosecution

17. Submission of learned Additional Advocate General appearing on behalf of the State that accused persons be convicted on the basis of photographs placed on record along with negatives is also

rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the photographs placed on record along with negatives. Photographs are Ext.PX/1 to Ext.PX/8 and negatives are Ext.PX/9 to Ext.PX/18. The photographs placed on record proved beyond reasonable doubt that dead body of deceased was found in an open pasture place which was approachable to the general public. In view of the fact that place where dead body was found was approachable to the general public it is not expedient in the ends of justice to convict the accused persons because in present case possibility of intervention of third person in criminal case could not be ruled out. It is not proved on record beyond reasonable doubt by prosecution that place where dead body of deceased was found was not approachable to any third person except the accused persons.

18. Submission of learned Additional Advocate General appearing on behalf of the State that as per oral as well as documentary evidence placed on record accused persons be convicted in present case is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that suspicion however strong cannot take place of proof. ***(See 2005)9 SCC SC 765 (DB) titled Anjlus Dungdung Vs. State of Jharkhand)*** It is well settled law that Court must guard against the danger of allowing conjecture or suspicion to take place of legal proof. ***(See: AIR 1967 SC 520 titled Charan Singh Vs. The State of UP See: AIR 1971 SC 1898 titled (1) Gian Mahtani and (2) Budhoo and others Vs. State of Maharashtra).*** It was again held in case ***AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon*** that suspicion however grave cannot take place of proof. ***(also see AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra***, ***See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. the State of Gujarat See: AIR 1985 SC 1224 titled State of U.P. Vs. Sukhbasi and others)*** It is well settled principle of law that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the learned trial Court. ***(See (2013)2 SCC 89 titled Mookkiah and another Vs. State See 2011(11) SCC 666 titled State of Rajasthan Vs. Talevar***, ***See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan*** , ***See 2012(1) SCC 602 State of Rajasthan Vs. Shera Ram @ Vishnu Dutta.)*** It is also well settled principle of law (i) That Appellant Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal Appellant Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable. (iii) That Appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That appellate Court is entitled to consider whether in arriving at findings of fact learned trial Court took into consideration non-admissible evidence. ***(See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of U.P., See (2002)3 SCC***

57, titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003)1 SCC 398 Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P. Vs. Ram Veer Singh and others, See AIR 2008 SC 2066 (2008) 11 SCC 186 S. Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2009)10 SCC 206 titled Arulvelu and another Vs. State, (2009)16 SCC 98 Perla Somasekhara Reddy and others Vs. State of A.P. and (2010)2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh.)

19. In view of above stated facts we hold that judgment passed by learned trial Court is in accordance with law and is in accordance with proved facts placed on record. Judgment passed by learned trial Court is affirmed. Appeal filed by State is dismissed. Pending miscellaneous application(s) if any also stand disposed of.

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

Anil Kumar ....Applicant
Vs.
State of H.P. ....Non-applicant

Cr.MP(M) No. 1110 of 2014
Order Reserved 22.9.2014
Date of Order 24.9.2014

Code of Criminal Procedure, 1973- Section 438- FIR was registered against the petitioner for the commission of offence punishable under Sections 376, 354-A, 406, 506 IPC- held, that the Court has to consider the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- further held, that the offences of rape were increasing in society and the Court should be sensitive while dealing with such cases- the Court has to presume that prosecutrix had not consented to the sexual intercourse- the Court should not decide whether the offence was committed at the time of granting bail or not and it would not be expedient to release the petitioner on bail till the testimony of the prosecutrix is recorded during the trial.

Cases referred:

Gurcharan Singh Vs. State, AIR 1978 Apex Court 179 DB
State Vs. Captain Jagjit Singh, 1962 Apex Court 253 Full Bench

For the Applicant: Ms. Archna Dutt, Advocate.

For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General and Mr. Pushpender Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in FIR No. 193/14 registered on 14.9.2014 at Police Station Ghumarwin, Tehsil Ghumarwin, District Bilaspur under Section 376, 354-A, 406, 506 IPC.

2. It is pleaded that applicant is innocent and the applicant has been falsely implicated in the case. It is further pleaded that any condition imposed by the Court will be binding upon the applicant. It is further pleaded that investigation is complete and custodial interrogation of the applicant is not required. It is further pleaded that the age of the prosecutrix is 35 years and prosecutrix is married woman and is having a son. It is further pleaded that applicant and prosecutrix are known to each other for more than one year. It is further pleaded that allegations for taking Rs.15,00,000/- (Rupees Fifteen Lacs) and commission of rape are false and prayer for acceptance of the bail application sought.

3. Per contra police report filed. As per police report FIR No. 193/14 dated 14.9.2014 was registered under Section 376, 354A (1), 406 and 506 IPG registered in Police Station Ghumarwin, District Bilspur, H.P. There is recital in the police report that prosecutrix was married with Sh. Rajesh Kumar resident of Adilabad Andhra Pradesh. There is further recital in the police report that prosecutrix has one son aged 7 years. There is further recital in the police report that applicant brought the prosecutrix to Ghumarwin on the pretext that he would marry the prosecutrix. There is further recital in the police report that prosecutrix resided in the house of applicant for three months. There is further recital in the police report that prosecutrix also sold her vehicle and plot and earned Rs.15,00,000/- (Rupees Fifteen Lacs). There is further recital in police report that Rupees Fifteen lacs earned from sale of vehicle and plot by prosecutrix handed over to applicant for preparation of FDR in favour of minor son of prosecutrix. There is further recital in the police report that applicant told the prosecutrix that he would prepare FD of Rs.15,00,000/- (Rupees Fifteen Lacs) in the name of son of the prosecutrix. There is further recital in the police report that when prosecutrix enquired about Rs.15,00,000/- (Rupees Fifteen Lacs) from the applicant then applicant told prosecutrix that he had spent Rs.15,00,000/- (Rupees Fifteen Lacs) for his personal use. There is further recital in the police report that applicant did not prepare the FD in favour of son of the prosecutrix. There is further recital in the police that on 11.9.2014 applicant entered into the residential house of the prosecutrix and forcibly committed rape upon her. After registration of

the case site plan was prepared and videography of the spot was also conducted and bed sheet and torn shirt of the prosecutrix also took into possession vide seizure memo. There is further recital in police report that intensive investigation is required qua fifteen lacs of amount from accused. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of non-applicant and also perused the entire record carefully.

5. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and did not commit any offence cannot be decided at this stage. Same fact will be decided when case will be decided on merits by the learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the applicant that applicant will abide any condition imposed by the Court and on this ground anticipatory bail application be allowed is rejected being devoid of merit for the reason hereinafter mentioned. Following factors are to be considered while granting the bail: (i) Nature and seriousness of offence; (ii) Character and behavior of accused; (iii) Circumstances peculiar to the accused; (iv) Reasonable possibility of securing the presence of the accused at the trial and investigation; (v) Reasonable apprehension of the witnesses being tampered with; (vi) Larger interest of the public and State. (***See AIR 1978 Apex Court 179 DB, titled Gurcharan Singh vs. State and also see 1962 Apex Court 253 Full Bench titled State Vs. Captain Jagjit Singh***). In the present case allegations have been leveled against the applicant that the applicant committed offence under Section 376, 354 A(1), 406 and 506 IPC. Offences of rape are increasing in the society day by day and offence of rape is stigma upon the society. It is well settled law that Court should be sensitive while dealing with sexual molestation cases. Allegation against the applicant is that on 11.9.2014 applicant forcibly entered into the residential house of the prosecutrix and committed rape upon her and further allegation against the applicant is that applicant brought the prosecutrix from Adilabad Andhra Pradesh on the pretext that he would marry her and allegation against the applicant is that applicant committed criminal breach of trust qua Rs. 15,00,000/- (Rupees Fifteen Lacs) owned by the prosecutrix. Allegations against the applicant are very heinous and grave in nature. Section 114 (A) of Indian Evidence Act 1872 was incorporated w.e.f. 3.2.2013. As per Section 114 (A) the Court shall presume that prosecutrix did not consent the sexual intercourse when prosecutrix states in the Court that she did not consent the sexual intercourse. Whether offence of rape was committed or not cannot be decided at this stage and the same fact will be decided by the learned trial Court when the testimony of the prosecutrix will be recorded. Court is of the opinion that it is not expedient in the interest of justice to release the applicant on bail till the testimony of the

prosecutrix is not recorded during trial of case. Court is also of the opinion that if the applicant is released on bail then the interest of the State and general public will be adversely affected because investigation is initial stage of case. It is held that custodial investigation of the applicant is essential in the present case in order to recover rupees fifteen lacs from applicant.

7. In view of the above stated facts anticipatory bail application is rejected. My observation made hereinabove is strictly for the purpose of deciding the present bail application filed under Section 438 Cr.P.C. and will not affect merits of the case in any manner. All pending application(s) if any are also disposed of.

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

Joban Dass ...Appellant.
Vs.
State of Himachal Pradesh ...Respondent.

Criminal Appeals No.490 of 2008 a/w Anr.
Reserved on : 16.9.2014
Date of Decision :24.09.2014

Code of Criminal Procedure, 1908- Section 374- Practice and Procedure-In an appeal the Appellate Court is duty bound to appreciate the evidence on record and if two views are possible the benefit of the reasonable doubt has to be extended to the accused. (Para-9)

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 4 kgs of charas- there were contradictions in the testimonies of the prosecution witnesses regarding the manner of arrival at the spot- independent witness had turned hostile- other police officials who accompanied the police party were not examined- there were contradictions regarding the manner of arrival- the version of the police party that motorcycle was seen from the distance was contradicted by the site plan- held, that in these circumstances, accused were entitled to acquittal. (Para-10 to 21)

N.D.P.S. Act, 1985- Section 57- PW-10 stated that the case property was handed over to PW-9- he further admitted that it had come in investigation that case property was produced before PW-6 who denied the same- case property was not re-sealed prior to its deposit with MHC-

there is contradiction regarding the date of the deposit of the case property in the laboratory- held, that in these circumstances, the possibility of tampering with the case property could not be ruled out. (Para-21 & 22)

Case referred:

Lal Mandi Vs. State of W.B., (1995) 3 SCC 603

For the Appellants : Mr. Ajay Kochhar & Mr. Vikas Rathore, Advocates.

For the Respondent : Mr. B.S. Parmar, Mr. Ashok Chaudhary, Additional Advocates General, Mr. Vikram Thakur, Deputy Advocate General, and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since both these appeals arise out of common judgment, rendered by the trial Court, they are being decided as such.

2. Appellants-convicts Joban Dass and Kumbh, hereinafter referred to as the accused, have assailed the judgment dated 28.6.2008/30.6.2008, passed by Special Judge, Shimla, Himachal Pradesh, in Sessions Trial No.1-S/7 of 2008, titled as *State of H.P. v. Joban Dass and another*, whereby they stand convicted of the an offence punishable under the provisions of Section 20 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years each and pay fine of Rs.1,00,000/- each, and in default therefore to further undergo rigorous imprisonment for a period of two years.

3. It is the case of prosecution that on 21.10.2007 at about 10.30 p.m., police party, comprising of ASI Narinder Singh (PW-10), HHC Kulbhushan (PW-9) and HHG Ranu Ram (not examined), left Police Station, Nerwa, in Vehicle No.HP-01-3346 (Taxi), driven by Jatinder Negi (PW-8), for patrol/Nakabandi duty, towards Minus side. To this effect, Narinder Kumar recorded entry (Ex.PW-10/A) in the Daily Diary Register. At 12.30-1.00 a.m., police party set up Naka, at a place known as Rohana and checked vehicles for about 4-5 hours. On 22.10.2007, while the police party was on its way back, midway, at 5.30 a.m., near Durga Mandir, they noticed a motorcycle coming from the opposite direction.

Accused Joban Dass, who was driving the motorcycle, tried to flee away, but however, police party apprehended him. Accused Khumb Dass, who was sitting as a pillion rider, was holding a black coloured bag in his lap. On suspicion that the accused might be possessing some contraband substance, Narinder Singh, after informing Khumb Dass of his legal right, obtained consent, vide Memo (Ex.PW-8/A), for being searched. After giving his personal search, Narinder Singh conducted search of accused Khumb Dass. From the bag, police recovered Charas, which was packed in two blue coloured polythene bags. The contraband substance was weighed and found to be 4 kgs. Two samples of 25 grams each were drawn. Samples as also the remaining bulk parcel were packed and sealed with seal impression 'N', three in number. Memo of seal impression (Ex.PW-8/F) was prepared; NCB form (Ex.PW-10/B) was filled up in triplicate; contraband substance was taken into possession vide memo (Ex.PW-8/D) alongwith the motorcycle. Original seal was handed over to Jatinder Negi (PW-8). Kulbhushan drove the motorcycle and carried Ruka as also the seized contraband substance to the Police Station, for being kept in a safe custody. FIR No.60/07, dated 22.10.2007 (Ex.PW-1/B), under the provisions of Section 20 of the NDPS Act was recorded by Narveer Singh (PW-1), who handed over the file to Kulbhuhan (Pw-9). Information to superior Officer was also sent. Sealed sample was taken by Sadhu Ram (PW-4) for being deposited at the FSL, Junga. Report (Ex.PZ) was obtained by the police, which certified the contraband substance to be Charas. As such, with the completion of investigation, Narinder Kumar handed over the case file to SHO Prem Chand (PW-7), who presented the challan in the Court for trial.

4. Both the accused persons were charged for having committed an offence punishable under the provisions of Section 20 read with Section 29 of the NDPS Act, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 11 witnesses and statements of the accused under provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which they took up defence of denial and false implication.

6. Based on the testimonies of the witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced them as aforesaid. Hence, the present appeal by the accused.

7. We have heard learned counsel for the parties and minutely examined the record.

8. The apex Court in ***Lal Mandi v. State of W.B.*, (1995) 3 SCC 603**, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to an accused.

9. For proving recovery of the contraband substance from the conscious possession of the accused, prosecution heavily relies upon the testimonies of Jitender Negi (PW-8), Narinder Singh (PW-10), Kulbhushan (PW-9) and on the question of link evidence, reliance is sought on the testimony of Narvir Singh (Pw-1) and Sadhu Ram (PW-4).

10. To us, genesis of the prosecution story of having left Police Station, Nerwa, on 21.10.2007, in a vehicle, for the purpose of Nakabandi, appears to be false. Narinder Singh in Memo (Ex. PW-10/A) records that he left the Police Station in a private vehicle. The document does not disclose either the type or the number. Also, name of the driver of the said vehicle is not disclosed. The document also does not record that police had prior intimation of any illegal trafficking of the contraband substance in and around the area and/or that police party left the police Station for detection of such crime. These facts were not necessary, but absence thereof, in view of contradictions, major in nature, which have emerged on record, acquires significance.

11. In Court, Narinder Singh states that before proceeding from the Police Station, vehicle driven by Jitender Negi already stood hired and in the same, police party left the Police Station for Rohana. This witness admits that no fare was paid to Jatinder Negi. He tries to explain that Jatinder Negi used to go to Rohana daily, for carrying the passengers. Thus, police party boarded his vehicle. Suggestion is that they took lift. We do not find such version of his to be correct, for he forgets that search and seizure operations were not carried out at the time when the vehicle was being driven towards Rohana, but on way back. Why would police party, comprising of three police officials, one of whom is an ASI, seek obligation of a private party and that too a taxi driver, has not been explained. It is nobody's case that at Rohana, Jitender Negi did not find any passengers, hence returned to Nerwa with the police party.

12. Version of Narinder Singh, we find to have been contradicted by other witnesses. In fact, Kulbhushan (PW-9) has a totally different version to narrate. He states that police party left Police Station, Nerwa on foot and after spending about 20-25 minutes in the Bazaar, vehicle was hired from there. In fact, he goes on to state that at the time when police party left the Police Station, there were no plans of hiring any vehicle, hence no entry in that regard was made in the record. He is categorical that vehicle hired was a taxi. Jatinder Negi clarifies that he was called to the Police Station, where police obtained his signatures on the documents. He was neither aware nor made known of contents thereof. Thus, this witness contradicts the version of not only Narinder Singh, but also lends credence to the suggestion put by the accused that all documents were prepared by the police party, as an afterthought, in the Police Station.

13. On this issue, when we examine the testimony of Jatinder Negi, we find that a totally different version, with regard to engagement of the vehicle in question has come on record. Significantly, unambiguously and uncontrovertedly, he states that Yudhvir Singh, a

wine contractor, had hired his taxi. At about 9.30 p.m., Yudhvir Singh alongwith his partner Bhimta, ASI Narinder Singh and Kulbhushan went in the vehicle to Rohana. Also, it is the admitted case of Kulbhushan and Nareinder Singh that at the relevant time Yudhvir Singh was a wine contractor at Nerwa.

14. Thus two views have emerged on record, with regard to the police party having left Nerwa, rendering the genesis of the prosecution story to be doubtful.

15. We further find that on the issue of search and seizure operations, two views have emerged on record. Independent witness Jatinder Negi was declared hostile and despite extensive cross-examination, he has stuck to his original version that on their return, near the Mandir, Narinder Singh and Yudhvir Singh asked him to stop the vehicle, as they saw a bag lying abandoned and none was present there. Also, he clarifies that police party reached Nerwa at about 6 a.m. He went home and was called to the Police Station at 11 a.m., where he signed certain papers. Crucially, with regard to presence of Yudhvir Singh, testimony of this witness remains uncontroverted. Now, why would police seek obligation of a wine contractor, has not been explained. The very genesis of the prosecution story stands knocked down.

16. Further, when we examine the testimonies of Kulbhushan and Narinder Singh, we find them not to be inspiring in confidence and witnesses to be reliable and trustworthy. It is in this backdrop, more so, after Jatinder Negi resiled from his original statement, examination of Ranu Ram, a police official, who allegedly accompanied the police party, became necessary, which was not so done.

17. Narinder Singh (PW-10) states that on way back, at about 5.45 a.m., when the police party reached Durga Mandir, they saw one motorcycle coming from the opposite side. Seeing the police party, the motorcyclists tried to flee away, but was apprehended. Accused Joban Dass was driving the motorcycle and accused Khumb Dass, who was setting as a pillion rider, was holding a black coloured bag in his lap. On enquiry, accused told that it contained clothes. He got suspicious of the accused possessing some contraband substance, hence apprised Khumb Dass of his legal right; got his consent vide memo (Ex.PW-8/A); and conducted the search operation. Prior thereto, he also gave his search. From the person of Khumb Dass, nothing incriminating was found, but however, from the bag two blue coloured polythene bags containing Charas were recovered. The same were weighed and found to be 4 kgs. Two samples of 25 grams each, were drawn. Samples as also bulk parcel were sealed with seal impression 'N'. Sample impression (Ex. PW-8/D) of the seal was taken and the seal, after use, was handed over to Jatinder Negi. Ruka(Ex.PW-1/A), prepared by him, was taken by Kulbhushan alongwith the contraband substance to the Police Station on the motorcycle, which was also sized by the police. He prepared site plan (Ex. PW-10/C); arrested the accused after issuing Memos (Ex. PW-10/D and Ex.PW10/E). After registration of the FIR, Kulbhushan brought the

file back to the spot. He prepared Special Report (Ex. PW-2/A), which was sent to the SDPO, Chopal. He recorded statements of the witnesses as per version so narrated by them. He tried to ascertain the ownership of the vehicle and got information vide Memo (Ex. PW-5/A). The vehicle, i.e. motorcycle No.UA-08G-7342, was registered in the name of one Parvesh resident of District Haridwar (UP). Case file was handed over by him to the SHO for presentation of challan. The examination-in-chief part of the statement of this witness, in a parrot-like manner, stands corroborated by Kulbhushan (PW-9), who adds that he handed over Ruka and the case property, alongwith samples of Charas to the MHC.

18. However, when we examine the cross-examination part of their testimonies, we find that there are various contradictions, which in our considered view are material, rendering the prosecution case of recovery of the contraband substance, from the conscious possession of the accused, to be further doubtful. Contradiction with regard to police party having left in a vehicle already stands dealt with. Narinder Singh states that from the Police Station, police party straightway proceeded towards Rohana and it did not halt anywhere on the way. Now, this version stands materially contradicted by Kulbhushan, according to whom police party stopped in the Bazaar at Nerwa for 20-25 minutes and thereafter also stopped at Gumma, a place before Rohana, where also checking was done in the Bazaar for more than 15-20 minutes.

19. Further, according to Narinder Singh, police party saw the motorcycle from a distance of 50 metres, whereas according to Kulbhushan, the distance was approximately 200 metres. Contradiction when viewed with contemporaneous record, i.e. spot map (Ex. PW-10/C), acquires significance and belies the ocular version of the witnesses. Also, in the spot map, it be noticed, the place where Durga Mandir is situate, there is a blind curve and the vehicle coming from Gumma side is not visible to a person coming from Rohana side. Narinder Singh states that as per the spot, he correctly prepared the site plan. But then he contradicts the same by stating that on the spot, there was no curve and road was straight. Further, Narinder Singh states that there was no light near Durga Mandir and it was dark at the time when motorcycle was first noticed, and that police party stopped the vehicle after the motorcycle was seen. However, Kulbhushan states that at the time when motorcycle came, police party had alighted from the vehicle, which was stopped at Durga Mandir.

20. Intriguingly, we find that no consent of accused Joban Dass was sought prior to carrying out search and seizure operations. This fact stands admitted by the police officials present on the spot. But why so? it remains unexplained. Now, if police had apprehension of both the accused carrying the contraband substance, and in fact when both of them were searched, then why is it that the said accused was not informed of his legal right, in accordance with the provisions of Section 50 of the Act and consent obtained. In fact, when we look into the documents prepared on the spot, we find that in the Memos (Ex.PW-8/A,

8/B, 8/C & 8/F), there is no reference of accused Joban Dass at all. These are documents pertain to search and seizure operations. Signatures of Joban Dass are there only on seizure Memo (Ex. PW-8/D) and arrest Memo (Ex. PW-10/D), execution whereof on the spot, to our mind, appears to be doubtful. These omissions remain unexplained on record, probablizing the defence of false implication, and the accused being taken by the police from the Bus Stand to the Police Station, for if both the accused were present together, then their consent had to be obtained. After all, Joban Dass was driving the vehicle and police suspected both of them of being in possession of the contraband substance. Also, there is nothing on record to reveal complicity of accused Joban Dass in the crime. Hence, presumption of Section 29 of the Act cannot be drawn.

21. There is yet another mitigating circumstance in favour of the accused persons. Narinder Singh (PW-10) states that he handed over the case property to Kulbhushan (Pw-9). He admits that it had come in his investigation that the case property was produced before Dhaninder Singh (PW-6), who denies and states that the same was never presented before him but handed over to the MHC. Witness admits not to have resealed the case property in this case. When we examine the testimony of MHC Narveer Singh (PW-1), we find his admission to the effect that the case property was not resealed before it was deposited with him, which means that after Narinder Singh put his seal impression 'N', the same was not resealed at the Police Station either by the SHO or the MHC. We find that FIR (Ex.PW-1/B) is signed by the SHO. Now, if he was available there, then why is it that the case property was not resealed. We find there is major contradiction in the testimony of Narinder Singh and Dhaninder Singh, with regard to whom the case property was entrusted in the Police Station. Narinder Singh states that it had come in his investigation that the case property stood produced before Dhaninder Singh, who categorically states that "it was never presented to me and it was handed over to M.H.C.". Possibility of the same being tampered with or mixed up cannot be ruled out. In our considered view, infraction of Section 57 of the NDPS Act, in the given facts and circumstances, is fatal. This we say so, for we have doubts as to whether sample analysed by the FSL [vide report (Ex.PZ)] pertains to the case in hand or not, for according to Narveer Singh, sample was handed over to Sadhu Ram on 23.10.2007 to be deposited at the FSL, Junga. Road Certificate (Ex. PW-1/D) reveals the same to have been deposited on 24.10.2007. Sadhu Ram is categorical that it was deposited by him in the laboratory, the very same day/date on which it was handed over to him, which means it was deposited by him on 23.10.2007 itself. Thus, which of the witnesses has stated the truth is not clear. Be that as it may, Narveer Singh admits that sealed sample (case property) of FIR No.54/2007 dated 26.9.2007 was also sealed with seal impression 'N'. Thus, to our mind, even by way of link evidence, it cannot be said that the prosecution has been able to prove its case, beyond reasonable doubt. Possibility of the sample being mixed up cannot be ruled out and there is no explanation as to why the same was not resealed at the Police Station. On this issue,

we must also observe that NCB form (Ex. PW-10/B) also does not bear the name or signatures of any police official/Officer official other than Narinder Singh. Simply because the form did not contain a column, where the SHO/Incharge was to append his signatures, that fact alone would not render the statutory provisions of Section 57 of the NDPS Act to be negatory.

22. It has also come in the testimony of Narveer Singh that there is no entry of NCB form being deposited alongwith the case property. Significantly, Sadhu Ram does not state NCB form, which was submitted in the laboratory pertained to the case in hand.

23. In the given facts, we also find that there was no compliance of Section 42 of the NDPS Act, for it is the case of Kulbhushan that "When ASI asked the accused Kumb Dass as to what is there in the bag on his reply that there is nothing in the bag except the clothes, the ASI told him that you take our search, we want to search you. Then Kumb Dass took search of the police party. Then the memo qua the same was prepared." It has come in the uncorroborated testimony of Kulbhushan that "ASI told that he had information of the contraband being transported and that is why the kit was taken".

24. We are also doubtful as to whether search and seizure memo (Ex. PW-8/D) was prepared prior to the police party having searched the accused.

25. There is nothing on record to show that the IO Kit containing weights and scale was issued in favour of any one of the police officials. The matter acquires significance, more so when both of them have deposed that the kit was having weights of 2 kgs, 1 kg and 50 grams. If that were so, then how is that police party drew two samples of 25 grams each, for it is not their case either that one sample of 50 grams was drawn, which was divided into two and then sealed as separate parcels.

26. In the uncorroborated testimony of Jatinder Negi, it has come on record that there are houses near the Durga Mandir. Thus, documents have not been prepared correctly. Also, police has not examined the wine contractor present on the spot.

27. Also, we find there is uncorroborated testimony of Jatinder Singh to the effect that police party, on return, reached Nerwa at 6 a.m., whereas according to Narinder Singh, it was at 1.30 p.m. Significantly, no document to such effect was either placed or proved on record.

28. In view of the fact that two views have emerged on record, with the independent witnesses not supporting the prosecution and the testimonies of police officials being contradictory on material fact and are not supported by any corroborative (oral or documentary evidence), in our considered view, in the given facts and the circumstances, benefit of doubt has to be given to the accused persons.

29. Recovery of motorcycle, in view of the contradictions on record, cannot be said to have been conclusively established. In any case, no effort was made by the Investigating agency, after obtaining report (Ex. PW-5/E), to prove that the same stood either entrusted to or sold to any one of the accused persons by the original owner. Testimony of Narinder Singh is evidently clear to the effect that none of the accused were owner of the vehicle.

30. We are not in agreement with the findings of the Court below that in the event of prosecution case having been proved through the testimonies of Kulbhushan and Narinder Singh, testimony of Jatinder Negi pales into significance, in view of our aforesaid discussion, wherein we have found major and material contradictions even in the testimonies of relevant police officials.

31. We are also of the view that police, in view of major contradictions on record, ought to have linked the accused to the vehicle. After all, through the testimony of Jatinder Negi, it has come on record that no motorcycle was found on the spot, in the manner the prosecution wants the Court to believe.

32. We are also not in agreement with findings returned by the Court below that contradictions in the testimonies of the police officials and the documentary evidence are not material, significant or relevant, for we have already discussed the genesis of the prosecution case to be doubtful, if not false.

33. Finding of the Court below that there was no requirement, in law or on fact, to comply with the provisions of Section 42, in the given facts and the circumstances, is also legally untenable, in view of our aforesaid discussion.

34. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

35. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, 28.6.2008/30.6.2008, passed by Special Judge, Shimla, Himachal Pradesh, in Sessions Trial No.1-S/7 of 2008, titled as *State of H.P. v. Joban Dass and another*, is set aside and both the accused persons are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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

School Managing Committee, Government High School, Mahog, Tehsil Theog, District Shimla. …… Petitioner.

Vs.

State of H.P. & anr. ….. Respondents

CWP No. 5512 of 2014-B

Judgement reserved on: 22.9.2014

Date of decision: 24.9.2014

Constitution of India, 1950- Article 226- The Petitioner, a School Managing Committee, filed a writ petition against the transfer of Respondent No. 3 with the prayer to set aside the same- held, that the matter of transfer and posting are purely administrative matters and the Court should not interfere with them unless the decision is arbitrary, discriminatory, malafide or actuated with bias- The Government has unfettered power to effect transfer and to decide as to how, when, where and why a particular employee is required to be posted- the courts should not substitute their own decision in transfer-the aggrieved person should approach the higher authorities than rushing to the courts. (Para-5 and 15)

Cases Referred:

E.P.Royappa vs. State of Tamil Nadu (1974) 4 SCC 3

Shilpi Bose (Mrs.) and others vs. State of Bihar and others 1991 Supp (2) SCC 659

Union of India and others vs. S.L.Abbas (1993) 4 SCC 357

State of M.P. and another vs. S.S. Kourav and others (1995) 3 SCC 270

Union of India and others vs. Ganesh Dass Singh 1995 Supp. (3) SCC 214

Abani Kanta Ray vs. State of Orissa and others 1995 Supp. (4) SCC 169

National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash (2001) 8 SCC 574

Public Services Tribunal Bar Association vs. State of U.P. and another (2003) 4 SCC 104

Union of India and others vs. Janardhan Debanath and another (2004) 4 SCC 245

State of Haryana and others vs. Kashmir Singh and another (2010) 13 SCC 306

State of U.P. and others vs. Gobardhan Lal (2004) 11 SCC 402

For the petitioner : Mr. Sanjeev Bhushan, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. V.S.Chauhan, Mr. Romesh Verma, Addl. A.Gs. and Mr. J.K. Verma, Dy. A.G. for respondents No. 1 and 2.
Ms. Sunita Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered**:**

Tarlok Singh Chauhan, Judge.

This petitioner has approached this court for grant of following substantive relief:-

> An appropriate writ or order may very kindly be issued and order dated 24.7.2014 may kindly be quashed and set aside and in the alternative the respondents may kindly be directed to immediately provide a substitute as TGT (Non-Medical) in Government High School, Mahog, Tehsil Theog, District Shimla, H.P. and till that time the respondentNo.3 may not be relieved.

2. The petitioner claims itself to be a School Managing Committee of Government High School, Mahog, constituted under the provisions of Right to Education Act. It is alleged that the school had only one TGT (Non-Medical) respondent No.3, who is teaching about 147 children who are studying mathematics from Class 6th to Class 10th. In the month of July, the official respondents issued transfer order of respondent No. 3 to a nearby school, which is around 20-25 kilometers from the present school. That school is Middle School, which has been recently upgraded. It is further averred that there are only 6-7 children studying in that school and by posting respondent No. 3, the career of 147 children have been put on stake. It is further claimed that respondent No. 3 is in hurry to join and therefore her transfer order dated 24.7.2014 be quashed and set-aside.

3. The official respondents No. 1 and 2 have filed the reply, wherein they have raised preliminary submission to the effect that transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service and the transfer policy is in the nature of administrative guidelines for regulating transfers and these guidelines cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest or in exigencies of service and transfer order made even in transgression of administrative guidelines cannot be interfered with as they do not confer any legally enforceable right unless shown to be vitiated by malafides or having been made in violation of any statutory provision. On merits, it is averred that there are seven teachers including respondent No. 3 posted in the Mahog school, whereas in Govt. Middle School, Annu u/c GSSS Kelvi where respondent No. 3 was ordered to be transferred has only one teacher. It

is further averred that transfer of respondent No. 3 was to ensure that this newly upgraded school becomes functional.

4. Respondent No. 3 filed a separate reply wherein preliminary submissions regarding locus-standi, suppression of material facts by the petitioner were raised. On merits, it was averred that respondent had been transferred against vacancy as there was no teacher available in Govt. Middle School, Annu to teach Class 6th to Class 8th. The services of respondent were required more in that school, as the students were required to pass the subject of math and science. The vacancy position existing in government high School, Kalvi was placed on record and it was also submitted that it was wrong on behalf of the petitioner to contend that there was only one TGT (Non-medical), because even the Head-teacher posted there is TGT (Non-Medical) and one more teacher TGT (Science) was posted there. It was further contended that transfers and postings of teachers were the sole prerogative of the employer and therefore, the petitioner had no locus or cause of action to file and maintain a writ petition.

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

5. The law regarding transfer is well settled. The matters of transfers and postings are purely administrative matters and the Courts must not ordinarily interfere in such matters unless and until administrative policy decision is arbitrary, discriminatory, malafide or actuated with bias. The Government must have free hand in settling the terms of its policies. It must have reasonable play in its joints as necessary concomitant for an administrative body in an administrative sphere. It is for the government to decide as to how, when where and why a particular person is required to be posed so long as the transfer has been effected in public interest after taking into consideration the public interest as a paramount consideration, it has unfettered power to effect the transfer, subject of-course to certain disciplines. It is for the State to decide as to how, when, where and why a particular employee is required to be posted so long, as this exercise is undertaken after taking into consideration the administrative exigencies and public interest.

6. Having observed as above certain binding precedents on the subject may be noticed. In **E.P.Royappa** vs. **State of Tamil Nadu (1974) 4 SCC 3,** the Hon'ble Supreme Court held that "*the government is the best judge to decide how to distribute and utilize the services of its employees*".

7. In **Shilpi Bose (Mrs.) and others** vs. **State of Bihar and others 1991 Supp (2) SCC 659** the Hon'ble Supreme Court has held to the extent that even if the transfer orders have been passed in violation of executive instructions or orders even then courts ordinarily should not interfere with the order as this would amount to interference in the administration which would not be conducive to public interest. The Hon'ble Supreme Court has held:

"*Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest."*

8. In **Union of India and others** vs. **S.L.Abbas (1993) 4 SCC 357,** the Hon'ble Supreme Court held that it was for the appropriate authority to decide as to who should and where he should be transferred and the court did not sit as an appellate authority sitting in judgement over the orders of transfer and the court cannot substitute its own judgement for that of the authority competent to transfer. It was held:

> *"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.*
>
> *8. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Art. 226 of the Constitution of India in service matters. This is evident from a perusal of Art. 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Art. 323-A. (We find it all the more surprising that the learned single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction). The Administrative Tribunal is not an Appellate Authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority)."*

9. This position of law was reiterated by the Hon'ble Supreme Court in its subsequent decision in **State of M.P. and another** vs. **S.S. Kourav and others (1995) 3 SCC 270** in the following terms:-

> "*The Courts or Tribunals are not appellate forums to decide on transfer of officers on administrative grounds. The wheels of administration should be allowed to run smoothly and the Courts or Tribunals are not expected to interdict the working of the administrative system by transferring the officers to proper places. It is for the administration to take appropriate decision and such diecisions shall stand unless they are vitiated either by mala fides or by extraneous consideration without any factual background foundation. In this case we have seen that on the administrative grounds the transfer orders came to be issued. Therefore, we cannot go into the expediency of posting an officer at a particular place."*

10. Thereafter this has been the settled position of law and repeatedly reiterated and restated by the Hon'ble Supreme Court in **Union *of India and others vs. Ganesh Dass Singh 1995 Supp. (3) SCC 214, Abani Kanta Ray vs. State of Orissa and others 1995 Supp. (4) SCC 169, National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash (2001) 8 SCC 574*** and ***Public Services Tribunal Bar Association vs. State of U.P. and another (2003) 4 SCC 104*** *and* ***Union of India and others vs. Janardhan Debanath and another (2004) 4 SCC 245.***

11. It is otherwise settled law that matters of transfer are purely administrative matters and the Courts must not ordinarily interfere in administrative matters and should maintain judicial restraint. The Hon'ble Supreme Court in ***State of Haryana and others vs. Kashmir Singh and another (2010) 13 SCC 306*** held as under:

> *"12. Transfer ordinarily is an incidence of service, and the courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, we are of the opinion that transfer and postings of policemen must be left in the discretion of the State authorities concerned which are in the best position to assess the necessities of the administrative requirements of the situation. The administrative authorities concerned may be of the opinion that more policemen are required in any particular district and/or another range than in another, depending upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and it is well settled that courts must not ordinarily interfere in administrative matters and should maintain judicial restraint, vide Tata Cellular v. Union of India (1994) 6 SCC 651."*

12. The petitioner is School Managing committee and has no locus-standi to file this petition particularly when it has not chosen to approach the appropriate authorities. In no event can the petitioner seek the relief as claimed for in the writ petition since the matters of postings and transfers are essentially of an administrative nature. The courts will not ordinarily interfere and take over the reins of administration.

13. In **State of U.P. and others** vs. **Gobardhan Lal (2004) 11 SCC 402** the Hon'ble Supreme Court was dealing with a case of transfers, where Division Bench of Allahabad High Court after holding that there were disputed questions of fact involved as to whether the transfer orders were due to political pressure or not, went on to observe as under:-

> *"Hence, in such cases it is better for the Government servant to approach the Chief Secretary, U.P. Government, and this internal mechanism will be better for this purpose. The Chief Secretary is a very senior Government Officer with sufficient maturity and seniority to withstand political or other extraneous pressure and deal with the issue fairly and we are confident that he will do justice in the matter to civil servants. This will also avoid or reduce the floodgate of litigation of this nature in this Court. As regards Class-I Officers, the Civil Service Board shall be constituted for dealing with their transfers and postings (as already directed by us above)."*

14. On the question of transfers, the Hon'ble Supreme Court reiterated that a challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders and it was further held that reasons for this was that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State. But what is relevant is the observations made by the Hon'ble Supreme Court with respect to the courts' interference with the orders of transfer. The Hon'ble Supreme Court observed:-

> *"9. The very questions involved, as found noticed by the High Court in these cases, being disputed questions of facts, there was hardly any scope for the High Court to generalise the situations based on its own appreciation and understanding of the prevailing circumstances as disclosed from some write-ups in journals or newspaper reports, conditions of service or rights, which are personal to the parties concerned, are to be governed by rules as also the in-built powers of supervision and control in the hierarchy of the administration of State or any Authority as well as the basic concepts and well-recognised powers and jurisdiction inherent in the various authorities in the hierarchy. <u>All that cannot be obliterated by sweeping observations and directions unmindful of the anarchy which it may create in ensuring an effective supervision and control and running of</u>*

administration merely on certain assumed notions of orderliness expected from the authorities affecting transfers. Even as the position stands, avenues are open for being availed of by anyone aggrieved, with the concerned authorities, the Courts and Tribunals, as the case may be, to seek relief even in relation to an order of transfer or appointment or promotion or any order passed in disciplinary proceedings on certain well-settled and recognized grounds or reasons, when properly approached and sought to be vindicated in the manner known to and in accordance with law. No such generalised directions as have been given by the High Court could ever be given leaving room for an inevitable impression that the Courts are attempting to take over the reigns of executive administration. Attempting to undertake an exercise of the nature could even be assailed as an onslaught and encroachment on the respective fields or areas of jurisdiction earmarked for the various other limbs of the State. Giving room for such an impression should be avoided with utmost care and seriously and zealously Courts endeavour to safeguard the rights of parties."

15. In case the submissions of the petitioner are tested on the touchstone of exposition of law laid down by the Hon'ble Supreme Court in the aforesaid decisions, then the petitioner has nothing much to say, since the matters of posting and transfer are matters of administrative policy, where the courts should be loathe to interfere. The courts and tribunals, as warned by the Hon'ble Supreme Court, are not appellate forums to decide on the question of transfers and postings and therefore the writ petition is totally misconceived. The petitioner would have been well advised to approach the higher authorities rather than rushing to this court.

16. For all the reasons aforesaid, there is no merit in this petition and the same is accordingly dismissed.

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

Smt. Sukanya Devi ..... Appellant.

Vs.

Smt. Karmi Devi &ors. ..... Respondents

LPA No. 384 of 2012.

Judgement reserved on: 8.9.2014.

Date of decision: 24.9.2014.

Constitution of India, 1950- Article 226- Petitioners and one 'K' appeared before the Interview Board for the post of Anganwari worker- 'K'

was given appointment- Petitioner filed an appeal before the Deputy Commissioner who held that neither the petitioner nor 'K' was eligible for appointment and directed to conduct fresh interviews - An appeal was preferred before the Deputy Commissioner and the post was given to one 'S'- Petitioner preferred a writ petition- The matter was remanded to the Deputy Commissioner who called for the report of the Naib Tehsildar and rejected the appeal filed by the petitioner- Further appeal preferred before the Deputy Commissioner was also rejected- The petitioner filed a writ petition before the Hon'ble High Court, which was allowed and the selection was quashed- 'S' filed an LPA against the order of the Hon'ble High Court- Held that Petitioner had not even laid any claim to the post before the Sub- Divisional Magistrate and she had staked her claim to the post before the Hon'ble High Court for the first time- the fact that the petitioner had not laid any claim to the post earlier would show that she had abandoned her right and she could not have raised the claim for the first time in the writ petition. (Para- 8 to 11)

Constitution of India, 1950- Article 226-The High Court has jurisdiction to quash the decision or orders of Tribunals and statutory authorities passed in violation of the principles of natural justice- The High Court cannot convert itself into a court of appeal and cannot examine the correctness of the decisions and decide what is the proper view to be taken or order to be made- it cannot substitute its order in place of the order of the tribunal or authority, unless the order is shown to be passed on no evidence. (Para-13)

Cases Referred:

Ravi Kant vs. Bhupender Kumar AIR 2008 HIMACHAL PRADESH 31

Gowardhandas Rathi v. Corporation of Calcutta and another, AIR 1970 Calcutta 539

M.P. Shreevastava v. Mrs. Veena, AIR 1967 SC 1193

Shanbhagakannu Bhattar v. Muthu Bhattar and another, 1972(4) SCC 685

Chevalier I.I. lyyappan and another v. The Dharmodayam Co., Trichur, AIR 1966 SC 1017

Karpagathachi and others v. Nagarathinathachi, AIR 1965 SC 1752

Mohammed Seraj v. Adibar Rahaman Sheikh and others, AIR 1968 Calcutta 550

Velayudhan Gopala Panickan v. Velumpi Kunji, 2nd Plaintiff, AIR 1958 Kerala 178

The Sales Tax Officer, Banaras and others v. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135

For the appellant : Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

For the respondents : Mr. Vinod Thakur, Advocate, for respondent No.1.

Mr. Romesh Verma and Mr. V.S. Chauhan, Additional Advocate Generals, with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The respondent is the writ petitioner, who had filed the writ petition claiming therein the following reliefs:-

a) That a writ in the nature of certiorari may kindly be issued for quashing Annexure P-6 dated 4.3.2011, Annexure P-7 dated 29.03.2011 & Annexure P-8 dated 11.08.2011 passed/issued by the respondents no. 6,3 & 2 respectively keeping in view the facts and circumstances of the present case, particularly contents of para 8(iii) to (vi), in the interest of law and justice.

b) That a writ in the nature of Mandamus may also be issued directing the Respondents No. 1 to 5 to appoint the present petitioner as Anganwari worker in Anganwari Centre Bajwa Tehsil Bhoranj Distt. Hamirpur with all consequential benefits including back wages and seniority and further to treat the petitioner as having been in the service throughout from the date of judgment dated 11.2.2008 passed by the respondent No. 3."

2. The official respondents conducted interview for the post of Anganwari Workers for Anganwari Centre, Bajwa, Tehsil Bhoranj, District Hamirpur, wherein the writ petitioner, appellant and one Smt. Kamla Devi wife of Karan Singh appeared on 7.8.2007. Appellant was selected and given appointment. The writ petitioner filed an appeal before the Deputy Commissioner, who vide his order dated 17.8.2008 held that neither the writ petitioner nor the appellant nor Smt. Kamla Devi were eligible for appointment and directed the respondent No. 4 to hold fresh interviews by 31.3.2008. The appellant aggrieved by the aforesaid order filed an appeal before the Divisional Commissioner, Mandi, who vide his order dated 25.6.2008 accepted the appeal and set-aside the order of Deputy Commissioner and the appellant, who had been selected for the post of Anganwari Worker was permitted to continue.

3. Against this order, the writ petitioner preferred CWP No. 1844 of 2008, which came to be allowed by this court and the matter was remanded back to the Deputy Commissioner. The Deputy Commissioner

while deciding the case called for the report of Naib Tehsildar, who held an inquiry and thereafter based on this report he vide his order dated 29.3.2011 rejected the appeal preferred by the writ petitioner. The writ petitioner thereafter again approached the Divisional Commissioner by filing an appeal, who rejected the same vide his order dated 11.8.2011.

4. The writ petitioner thereafter filed CWP No. 11699 of 2011-J before this court and the learned single Judge vide judgement dated 20.7.2012 was pleased to partly allow the writ petition by upholding the income certificate issued in favour of the appellant, but at the same time held her selection to be illegal and invalid and consequently the selection of the appellant was quashed and set-aside and the official respondents were directed to initiate the process afresh for filling up the post strictly as per the guidelines and also the law laid down by this court in CWP No. 925 of 2010 titled Smt. Jasbir Kaur vs. State of Himachal Pradesh and others and CWP No. 1096 of 2010 titled Raksha Devi vs. State of H.P.

5. The learned single Judge for arriving at such conclusion had accorded the following reasons:

> "22. No doubt, as held hereinabove, the income certificate produced by the 5th respondent is genuine and otherwise also she is eligible for being considered for appointment as Anganwari Worker. However, the act on the part of the Selection Committee in not awarding any marks to the petitioner for personal interview is neither legally or factually sustainable for the reasons recorded hereinabove. In my considered opinion, as already observed, had the requisite document(s) been not produced by the petitioner alongwith the application, her candidature should have been cancelled and not called for interview. However, when interviewed, she is legally entitled to the award of marks on account of personal interview. The selection of the 5th respondent in such a situation cannot be said to be legal and valid and the Appellate Authority should have quashed and set aside the same. Her selection, however, has been upheld only on the ground that the income certificate produced by her is genuine. Grievance of the petitioner against not awarding marks to her for interview is erroneously brushed aside and not entertained at all. In such a situation, I find the present a fit case where the appointment of the 5th respondent deserves to be quashed and set aside, on this score and the process to fill up the post in question should be initiated afresh.
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> 23. In view of all the reasons hereinabove, the report Annexure P-6 submitted by the 6th respondent being in accordance with factual position is absolutely legal and as such deserves to be upheld. The orders Annexures P-7 & P-8 to the extent of the same are based upon the report are also legal and valid, however to the extent of not contain any discussion or findings qua the grievance of the

petitioner that is, not awarding any marks to her for personal interview are bad in law and as such deserves to be quashed and set aside.

24. Consequently, this writ petition partly succeeds and the same is accordingly allowed. Since due to non-award of marks to the petitioner for personal interview, the entire selection process is vitiated, therefore, the appointment of the 5th respondent as Anganwari Worker in Anganwari Centre, Bajwa, Tehsil Bhoranj, Distt. Hamirpur is hereby quashed and set aside, however, with a direction to respondents No. 1 to 4 to initiate the process afresh for filling up the said post strictly as per guidelines and also the law laid down by this Court in CWP No. 925 of 2010 titled Smt. Jasbir Kaur vs. State of Himachal Pradesh and others & CWP No. 1096 of 2010, titled Raksha Devi Vs. State of H.P. cited supra by inviting fresh applications from the desirous candidates including the petitioner and the 5th respondent within two weeks from the date of production of a copy of this judgment by the petitioner before them and make selection within two months thereafter. Till then the 5th respondent shall continue as Anganwari Worker at Anganwari Centre, Bajwa."

6. Aggrieved by the orders passed by the learned single Judge, the appellant has approached this court by way of the present appeal and has challenged the orders on various grounds set out in the memo. We need not delve in detail on those grounds in view of the legal submissions made by the appellant to the effect as to whether it was open to the writ petitioner to have challenged the orders passed by the two authorities below by contending that they have not taken into account her eligibility and suitability to the post which ground in fact had not been taken or agitated either before the Deputy Commissioner or the Divisional Commissioner and had been abandoned.

7. The writ petitioner has placed on record, copies of appeal preferred by her after the case had initially been remanded by the Divisional Commissioner vide order dated 25.6.2008. Now in case the appeal filed before the Sub Divisional Magistrate, Bhoranj is perused, nowhere has the writ petitioner made mention of her eligibility and as a matter of fact she did not even lay her claim for the post in question. After setting out the case history, the appeal preferred before the Sub Divisional Magistrate only contains the following averments:-

"3. That the A.C. IInd Grade Bhoranj has not properly inquired about the income certificate nor tender the documents on record and sent a false report to D.C. Hamirpur in result of this the petition of the appellant was dismissed by the D.C. Hamirpur.

4. That the respondent falsely obtained a income certificate and shown her income Rs.11,500/- per

annum which is not correct. In fact at the time of obtaining the income certificate the respondent concealed the actual facts before the concerned authority and only shown the income of her property, whereas, the husband of respondent is working as a contractor in HPPWD and I&PH Departments and also licence holder to carry on the business of seed dealer and also doing the work of Doctor at place Tikkar Khatrian for the last 10 years and the husband of respondent also installed a P.C.O. from where his income during the year 2006-2007 is 215.75/- per month and in the year 2007-08 his income is Rs.212.16/- per month which comes Rs.2848/- in 2006-07 and Rs.2031/- in 2007-08 and the total income stands Rs. 13581/- per annum, and the income of the respondent exceeds to Rs.12000/- per annum. All documents in this regard are enclosed herewith for the kind perusal of this Hon'ble court.

5. *That the lower court has wrongly taken into consideration the case and not cancelled the income certificate of the respondent, hence the order of lower court is not sustainable in the eyes of law.*

6. *That more submissions will be submitted before this Hon'ble Court at the time of final arguments.*

7. *That the lower court has passed the impugned order on dated 8.3.2011 and the appellant applied for the copy of order on 5.4.2011 which supplied to him on 8.4.2011, hence the appeal of the appellant is within the period of limitation.*

It is, therefore, respectfully prayed that keeping in view the submissions made above the after hearing the parties and calling for the record of the case the appeal of the appellant may kindly be accepted and the income certificate obtained by the respondent fraudulently by concealing the actual income may kindly be cancelled and justice be done."

8. Even in the appeal filed thereafter before the Divisional Commissioner, the writ petitioner did not lay claim to the post in question nor did she even make a whisper regarding her eligibility. The appeal contains the following averments:-

"4. That the appellant filed an application before D.C. Hamirpur for the rejectment of appointment of respondent No. 1 on the ground that at the time of selection of respondent No.1 she produce a false income certificate before the respondent No. 2 and has got the job on the basis of false income certificate.

5. *That the respondent No. 1 has shown her income Rs.11,500/- per annum in her income certificate, whereas her income is more than Rs.12000/- per annum, hence the income shown by the respondent No. 1 is wrong and obtained the certificate on false statement and concealed the actual income.*

6. *That in fact the husband of the respondent No. 1 is working as contractor in HPPWD and I&PH Departments. He is licence holder of seed trader and also working as Doctor at place Tikkar Khatrian and also installed a P.C.O. on his name. The copies of documents are attached for the kind perusal of this learned Court.*

7. *That the documents clearly shows the P.C.O. on the name of husband of the respondent No. 1 and he earned Rs.215-75/- and Rs.212.16 in the year 2006-07 and 2007-08 and the total income of the respondent is Rs.2848/- and 2031 per annum from the P.C.O. in the abovementioned years except the contractorship and Doctor work but if this income calculated Rs.11550/- from landed property and Rs.2031/- from P.C.O. then it becomes Rs.13581/- per annum which is exceeds the criteria of income i.e. Rs.12000/- per annum for the selection of Anganwari worker and the respondent does not fall in the criteria of income for the selection of Anganwari worker as lay down by the Child Development Department.*

8. *That at the inquiry even the Naib Tehsildar not properly calculated the income of respondent No.1 nor the Deputy Commissioner, Hamirpur tender this document on record and reached on wrong conclusion, hence this appeal.*

9. *That more submissions will be made at the time of final arguments before the Hon'ble Court.*

10. *That the lower Court decided the case on 29.3.2011 and the copy of impugned order supplied to the appellant on 8.4.2011, hence the appeal is well within the period of limitation.*

It is, therefore, respectfully prayed that keeping in view the submissions made above after calling for the record and hearing the parties and admitting the documents on record submitted by the appellant, properly assess the income of respondent No.1 which exceed Rs.12000/- per annum and cancel the income certificate of respondent and also the appointment of respondent No.1 be cancelled and the appeal of the

appellant may kindly be accepted in the interest of justice and justice be done for which the appellant shall ever pray."

9. However, when the writ petition was filed, the writ petitioner staked her claim to the post in question, which hitherto before had never been claimed by her as the writ petitioner only kept on questioning the income certificate issued in favour of the appellant.

10. A point having been abandoned in pleadings and inviting a judgement on the strength of the record as it is before the two authorities below cannot be allowed to be re-agitated for the first time in writ petition. A similar issue came up before this court in **Ravi Kant** vs. **Bhupender Kumar AIR 2008 HIMACHAL PRADESH 31** wherein it was held as follows:-

"12. The matter can be considered from another angle. A point having been abandoned in pleadings and inviting a judgment on the strength of the record as it is before the trial Court cannot be allowed to be re-agitated in appeal.

13. In Shaikh Tufail Ahmad v. Mt. Umme Khatoon and others, AIR 1938 Allahabad 145, the High Court of Allahabad has held:

"It is argued on behalf of the defendant that the plea of Marz-ul-maut which was entertained and given effect to by the learned District Judge had not been raised in the pleadings or at any stage before the trial Court. It is also argued that the learned Judge has taken an erroneous view of what Marz-ul-maut is according to Mahomedan law. It is quite correct to say that the point was taken for the first time in appeal. It involves a question of fact and the defendant must have been prejudiced by the plea being take at a late stage. The judgment of the trial Court does not show that this aspect of the case was discussed before it. The plaintiffs themselves produced no evidence to show that the lady was suffering from Marz-ul-maut ..... We think that the plea should not have been entertained at that stage."

14. To similar effect, in Gowardhandas Rathi v. Corporation of Calcutta and another, AIR 1970 Calcutta 539, the Hon'ble High Court of Calcutta held :

"21.....In support of that assumption, however, there are no materials on the present record and no such contention appears to have been raised in the court below, either in the pleading or in the argument there....."

15. The Hon'ble Supreme Court in M.P. Shreevastava v. Mrs. Veena, AIR 1967 SC 1193, has held that a plea abandoned before the Courts below, cannot

be allowed to be raised in appeal before this Court. It was held :-

"4. It was never argued on behalf of the appellant in the Court of First Instance and the High Court that attempts proved to have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court."

16. Similarly, in Shanbhagakannu Bhattar v. Muthu Bhattar and another, 1972(4) SCC 685, it is held:-

"4. The matter was taken in second appeal to the High Court. Kailasam J. has stated in unequivocal terms in his judgment that the only question that was argued before him on behalf of the plaintiff was that the will and the gift were invalid because pooja rights and inam rights were inalienable except to the immediate heir and that too without consideration. As by the gift the properties were not given to the immediate heir the gift was not valid. The learned Judge discussed mainly the various decisions of the Madras High Court and upheld the decision of the first appellate Court that the gift deed was valid. An appeal was filed under clause 15 of the letters Patent to a Division Bench by the plaintiff. Before the Division Bench the plaintiffs counsel sought to raise a new point that the alienation relied upon, though termed as a deed of gift, was in fact an alienation for consideration and therefore invalid within the well established principles. This point was permitted to be raised because it was considered that the determination of the question did not depend upon the decision as to, facts which were in dispute..... The bench came to the conclusion that by reason of the discharge of the encumbrance the donee relieved from the encumbrance properties other than those which were the subject-matter of the gift. It was consequently held that the alienation evidenced by ext. B-9 which purported to be a deed of gift was for consideration. The real question on which the litigation had been fought in all the courts was decided because of the above conclusion."

"5. We are wholly unable to appreciate how on any principle or authority the Division Bench had, in an appeal under the Letters Patent, allowed a point which involved not only law but also facts to be agitated when that point had never been taken even in the plaint or before the trial Court, the first appellate Court and the High Court in second appeal. It had not been raised even in the memorandum of appeal at any stage..... It was never pleaded, asserted or claimed by the plaintiff that any consideration

had passed for the properties which were the subject matter of the gift by Parvathiammal in favour of Duraiswami. In such a situation it was not open to the Division Bench of the High Court to allow the question of consideration to be raised for the first time and that also without any amendment of the pleadings being allowed and without the defendants having a proper opportunity to meet the case.

(Emphasis supplied)

17. In Chevalier I.I. lyyappan and another v. The Dharmodayam Co., Trichur, AIR 1966 SC 1017, the Hon'ble Supreme Court has held:

"8. The appellant in this Court has mainly relied on the plea that he had been granted a licence and acting upon the license he had executed a work of a permanent character and incurred expenses in the execution thereof and therefore under Section 60(b) of the Indian Easements, Act, 1882 (5 of 1882), hereinafter referred to as the 'Act'), which was applicable to the area where the property is situate and therefore the license was irrevocable. Now in the trial Court no plea of license or its irrevocability was raised but what was pleaded was the validity of the trust tin Exhibit X. In the judgment of the trial Court no such question was discussed. In the grounds of appeal in his appeal.....Now it is not open to a party to change his case at the appellant stage because at the most the case of the appellant in he trial Court was what was contained in paragraph 11 of the Written Statement where the question of estoppel was raised and the plea taken was that the respondent company was estopped from claiming any right to the building after accepting the offer of the appellant pursuant to which the appellant had expended a large amount of money."

18. In Karpagathachi and others v. Nagarathinathachi, AIR 1965 SC 1752, the Hon'ble Supreme Court has held :-

"4. The second contention of Mr. Viswanatha Sastry must also be rejected. A partition may be effected orally. By an oral partition, the two widows cold adjust their diverse rights in the entire estate, and as part of this arrangement, each could orally agree to relinquish her right of surviorship to the portion allotted to the other. In the trial Court, the suit was tried on the footing that the partition was oral, and that the two partition lists were merely pieces of evidence of the oral partition, and no objection was raised with regard to their admissibility in evidence. In the High Court, the appellants raised the contention for the first time that the two partition lists were required to be registered. The point cold not be decided without further investigation into questions of fact, and in the circumstances, the High Court rightly ruled that this new contention could not be raised for the first time

in appeal. We think that the appellants ought not to be allowed to raise this new contention."

19. The principle of abandonment of an issue has been considered in Mohammed Seraj v. Adibar Rahaman Sheikh and others, AIR 1968 Calcutta 550, where the High Court of Calcutta held that once an issue is not pressed before the trial Court, it is not open to the party to agitate it before the appellate Court. It has been held :

"16..... Now, once an issue is not pressed before the trial Court, it is not open to the party doing so, to agitate it over again the court of appeal....."

(Emphasis supplied)

20. A Full Bench of Kerala High Court considered the matter in Velayudhan Gopala Panickan v. Velumpi Kunji, 2nd Plaintiff, AIR 1958 Kerala 178, holding that:

"8. The next aspect to be considered is whether the appellants who had given up their objections to the maintainability of the suit when it came up for hearing, are entitled to agitate the matter again in the appellate Court. The lower appellate Court answered the question in favour of the appellants. The two reasons which weighed with that court for taking up such a stand are: (1) that the contentions raised by defendants 63 and 64 related to a question of law, and (2) that their counsel had no authority to give up that contention.

These reasons do not appeal to us. No abstract question of law is involved in the objection to the maintainability of the suit. As we have already explained the Court was bound to go into the question of the maintainability of the suit only if the contesting defendants persisted in their objection to the plaintiffs' claim for compulsory partition. It was perfectly open to these defendants to agree to the plaintiffs getting their shares and going out of the tarwad in case they succeeded in making out their claim as members of the common tarwad.

At the stage of the hearing of the suit, the contesting defendants chose to adopt such a course, as is obvious from paragraph 57 of the trial Court judgment. There it is stated that the objection that the suit is not maintainable under the Ezhava Act was not pressed at the time of arguments. It has to be presumed that the defendants' counsel gave up that contention as per instructions from them. There is nothing to show that the counsel acted on his own responsibility in that matter. No such complaint appears to have been raised before the lower appellate Court by defendants 63 and 64 while preferring their appeal against the trial Court's decree....."

> *21. Lastly, the decision of the Hon'ble Supreme Court in The Sales Tax Officer, Banaras and others v. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135, may be noticed. In this case, the Hon'ble Supreme Court was seized of an appeal against the judgment and order of the High Court. The points sought to be urged in support of the appeal had been abandoned before the High Court. In these circumstances, the Hon'ble Supreme Court held that they could not be raised or agitated in appeal.*
>
> *22. The record of the trial Court shows a clear and unequivocal abandonment of the issue available to the defendant-appellant. No foundation having been laid in the amended written statement which was filed after the death of defendant No. 2, no right claimed on behalf of the defendant, nor any foundation laid for the proposition that the suit was bad for non-joinder of necessary parties, maintainability of the suit and that it must fail and that decree passed would be a nullity because of insufficient representation of the estate of the deceased; no evidence having been led on this point, the appellant cannot now be allowed to raise this point."*

11. We have referred to the pleadings of writ petitioner before the learned authorities below only to show that petitioner at no point of time had laid claim to the post in-question and had thereby abandoned her right. Therefore, having abandoned her claim, the writ petitioner could not have raised the same for the first time in the writ petition.

12. Now, in case the findings as contained in paras-22 to 24 recorded by the learned writ court are perused, it would be seen that selection of the appellant has been quashed and set-aside only on the ground that writ petition had not been awarded marks for personal interview. But, then this was not even the ground raised by her in the appeal preferred by her initially before the Sub Divisional Magistrate and thereafter before the Divisional Commissioner and the same was only an afterthought and surreptitiously introduced for the first time in the writ petition.

13. Under Article 226 of the Constitution, the High has jurisdiction to quash the decision or orders of subordinate Tribunals and statutory authorities entrusted with precise judicial functions, if they act without jurisdiction or in excess of it or in violation of the principles of natural justice or if there is an error apparent on the face of the record. The jurisdiction of the High Court is though wide, yet it is limited as it exercises supervisory jurisdiction over the subordinate tribunals, courts or authorities and it does not exercise appellate jurisdiction. However, extensive the jurisdiction may be it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or order to be made. The court cannot substitute its own opinion for that of the subordinate tribunal or authority, unless

the order is shown to be passed on no evidence or if the findings are arbitrary and so capricious that no reasonable person can come to those findings.

14. Indisputably while adjudicating upon the writ petition the writ court was exercising the powers of judicial review, the scope of which in the given facts and circumstances was extremely narrow and was required to be determined on the basis of the pleadings and evidence led before the learned authorities below. In no event could the pleas which had been abandoned before the authorities below be permitted to be raised for the first time in the writ petition. Once the writ petitioner had not laid any claim based on her eligibility before the authorities below, their orders could not have been interfered with on this score. The writ court could have tested the correctness of the decision rendered by the authorities below only on the basis of the plea set up and the material placed before these authorities. Not only this, nothing extraneous that too without leave of the court could have been introduced in the writ petition. In fact the ground of eligibility of the writ petitioner was impermissible and could not have been raised by her since she had already forsaken this claim.

15. Since the income certificate issued in favour of the writ petitioner has been found to be in order even by the learned single Judge, and writ petitioner had never set up a claim regarding her eligibility before the two authorities below, therefore, the findings recorded by the learned single judge upholding the claim of the writ petitioner are not sustainable and are accordingly set-aside. Resultantly, the appeal is allowed, leaving the parties to bear their own costs.

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

Sunil Kumar Negi .....Petitioner.

Vs.

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

CWP No. 9053 of 2012.
Date of decision: 24.9.2014.

Constitution of India, 1950- Article 226- The Petitioner applied for the job under the policy of project affected area- No job was offered to him, consequently he filed a writ petition- The petition was disposed of with the direction to the Deputy Commissioner to look into the representation made by the petitioner- The petitioner was called by the Deputy Commissioner and representatives of the company were asked to look into the matter, however, the claim of the petitioner was rejected on the

ground that he was offered the post of Supervisor and he absented- held, that as per the attendance register the petitioner was appointed as Supervisor- However, the petitioner absented giving rise to an inference of voluntarily abandonment of service- Petition dismissed. (Para- 9 to 13)

Cases Referred:

Vijay S. Sathaye vs. Indian Airlines Limited and others (2013) 10 SCC 253

Jeewanlal (1929) Ltd., Calcutta v. Its Workmen, AIR 1961 SC 1567

Shahoodul Haque v. The Registrar, Co-operative Societies, Bihar & Anr., AIR 1974 SC 1896

State of Haryana v. Om Prakash & Anr., (1998) 8 SCC 733

Buckingham and Carnatic Co. Ltd. v. Venkatiah & Anr., AIR 1964 SC 1272

G.T. Lad & Ors. v. Chemicals and Fibres India Ltd., AIR 1979 SC 582

Syndicate Bank v. General Secretary, Syndicate Bank Staff Association & Anr., AIR 2000 SC 2198

Aligarh Muslim University & Ors. v. Mansoor Ali Khan, AIR 2000 SC 2783

V.C. Banaras Hindu University & Ors. v. Shrikant, AIR 2006 SC 2304

Chief Engineer (Construction) v. Keshava Rao (dead) by Lrs., (2005) 11 SCC 229

Regional Manager, Bank of Baroda v. Anita Nandrajog, (2009) 9 SCC 462

For the petitioner : Mr. A.K.Gupta, Advocate.
For the respondents : Ms. Meenakshi Sharma, Additional Advocate General with Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 & 2.
Mr. Anand Sharma, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

The petitioner has approached this court for grant of the following relief:-

> That the order Annexure P-2 passed by respondent No.2 may be quashed and respondent No. 2 may further be ordered to verify the facts and further he may be ordered

that the petitioner may be appointed in the Company against the suitable vacancy with immediate effect.

2. According to the petitioner he belongs to an area which was affected by setting up of Hydro Project by Jaiprakash Power Ventures Limited (earlier known as Jaypee Karcham Hydro Corporation Ltd.). He applied for job under the policy of "Project Affected Area", as many of the similarly situated persons have been granted job by the company. The company did not offer him job despite his repeated requests, which constrained him to approach this court by way of CWP No. 6274 of 2011, which was disposed of on 9.8.2011 with a direction to the Deputy Commissioner to look into the representation already made by the petitioner.

3. The petitioner claims that he was called by the Deputy Commissioner, Kinnaur and the representatives of the company were also asked to look into the matter and as per order dated 30.11.2011, the claim of the petitioner had been rejected on the ground that he was offered post of Supervisor and he absented. The petitioner has disputed the stand of the respondent-company and claims that they misled the Deputy Commissioner in passing the said order. It was also claimed that Deputy Commissioner did not hold an inquiry into the matter and believed the version of the company. The petitioner was never appointed as Supervisor and the respondents should be put to strict proof in this behalf. The petitioner further claims that he can be appointed as teacher in some school owned by the company in the area and that recently the Jay Jyoti School owned by the company has been upgraded to plus two level, where the petitioner can conveniently be appointed.

4. The respondent-company filed its reply wherein it was averred that petitioner had not applied for a job under the policy of "Project Affected Area", but in fact had applied for the post of supervisor vide application dated 6.8.2007. It is further alleged that as the petitioner belonged to the project affected area/ village, he was immediately offered employment as a supervisor on daily wage basis with effect from 7.9.2007 as a special case. The petitioner reported for duty on 7.9.2007, but then absented himself till 18.9.2007. He again reported for duty on 19.9.2007 and worked for a very short duration and thereafter again absented himself and never came back. Respondents in support of this submission have annexed the copy of attendance register.

5. In so far as the claim of the petitioner with respect to his claim regarding appointment in the school is concerned, the respondents have stated that though the petitioner had applied for the post of teacher/ clerk in the said school vide his application dated 3.3.2008, but he was not found fit for the job due to the following reasons:-

(a) not eligible for the post of teacher because he did not hold B.Ed qualification

(b) no vacancy of clerk was available.

6. It is further averred that petitioner had applied for the post of teacher in the year 2008 while he passed B.Ed examination only in the year 2009. It was further averred by the respondents that father and brother of the petitioner have already been employed in the company.

7. The Deputy Commissioner, who has been arrayed as respondent No. 2 in the petition, has filed a separate reply, wherein he has also categorically submitted that though the petitioner was appointed as supervisor on daily wage basis on 7.9.2007 as a special case, but he absented himself till 18.9.2007. He thereafter though did report for duty on 19.9.2007 for a very short duration, but thereafter he continuously absented himself and did not resume duty thereafter.

8. The petitioner has filed rejoinder to the reply of the respondents, wherein a common stand has been taken to the effect that he was never offered job of supervisor and had thereafter never abandoned the same.

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

9. The petitioner though claims that he was never appointed as supervisor by the respondents, but the said fact is belied from the attendance register annexed with the reply of respondent No. 3, wherein it has been reflected that petitioner was in fact appointed as a supervisor with the respondent-company. At this stage, it may be noticed that in the attendance register it is not only that the name of the petitioner alone that has been reflected but there are number of employees whose names find mentioned therein.

10. The learned counsel for the petitioner would then contend that respondent No. 3 should be put to strict proof in proving that petitioner in fact had abandoned the job and should place on record copy of notice if any served upon him asking him to join back the duties.

11. I am afraid I cannot agree to such submission as the absence of the petitioner is for a very long period giving rise to an inference of voluntarily abandonment of service. The abandonment and relinquishment of service is always a question of intention and in this case it is established on record that petitioner had voluntarily abandoned the service.

12. In **Vijay S. Sathaye** vs. **Indian Airlines Limited and others (2013) 10 SCC 253,** the Hon'ble Supreme Court has considered the entire aspects in the following terms:-

> *"12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality,*

the bonds of service come to an end automatically without requiring any order to be passed by the employer.

13. *In M/s. Jeewanlal (1929) Ltd., Calcutta v. Its Workmen, AIR 1961 SC 1567, this Court held as under:*

"6.....there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

(See also: Shahoodul Haque v. The Registrar, Co-operative Societies, Bihar & Anr., AIR 1974 SC 1896).

14. *For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as 'retrenchment' from service.*

(See: State of Haryana v. Om Prakash & Anr., (1998) 8 SCC 733).

15. *In Buckingham and Carnatic Co. Ltd. v. Venkatiah & Anr., AIR 1964 SC 1272 while dealing with a similar case, this Court observed :*

"5.....Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf."

A similar view has been reiterated in G.T. Lad & Ors. v. Chemicals and Fibres India Ltd., AIR 1979 SC 582.

16. *In Syndicate Bank v. General Secretary, Syndicate Bank Staff Association & Anr., AIR 2000 SC 2198; and Aligarh Muslim University & Ors. v. Mansoor Ali Khan, AIR 2000 SC 2783, this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he should be treated to have resigned and ceases to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities. A similar view has been reiterated in V.C. Banaras Hindu University & Ors. v. Shrikant, AIR 2006 SC 2304; Chief Engineer (Construction) v. Keshava Rao (dead) by Lrs., (2005) 11 SCC 229; and Regional Manager, Bank of Baroda v. Anita Nandrajog, (2009) 9 SCC 462."*

13. Thus taking into consideration the aforesaid exposition of law coupled with the facts proved on record to the effect that petitioner after having joined as a supervisor with respondent No. 3 company on 7.9.2007 did not report for duty uptil 18.9.2007 and thereafter reported for duty on 19.9.2007 for a very short duration and thereafter again absented himself and did not resume duty.

14. The cumulative effect of the aforesaid discussion is that there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Suren Pal ...Appellant.

Vs.

State of H.P. ...Respondent.

Criminal Appeal No.353 of 2008
Reserved on : 12.8.2014
Date of Decision : 24.09.2014.

Indian Penal Code, 1860- Section 302- Deceased went towards the pond where accused were sitting- all the accused asked the deceased ' son how are you'- deceased objected to the same as he was elder to them, on which accused abused and tried to assault the deceased- deceased was rescued by the persons present at the spot- when the deceased tried to leave the pond, the accused came and gave a blow with Khukri due to which he died- held, that accused had provoked the deceased without any reason-when the deceased had tried to leave the pond, accused came from behind and gave a blow with the sharp edged weapon on the back of the deceased- accused was conscious of the weapon he was using and the part of the body where the blow was inflicted was vital- his conduct in running away from the spot revealed his intention- case falls within Section 300 and the accused was rightly convicted for the commission of offence punishable under Section 302 IPC. (Para- 13 to 21)

Cases referred:

Surendra Singh alias Bittu Vs. State of Uttranchal, (2006) 9 SCC 531

State of U.P. Vs. Hari Om, (1998) 9 SCC 63

Tholan Vs. State of T.N., (1984) 2 SCC 133

Subramani Vs. S.H.O. Odiyansali, (2011) 14 SCC 454

For the Appellant : Mr. Anup Chitkara & Ms Divya Sood, Advocates.

For the Respondent: Mr. B.S. Parmar, Additional Advocate General, Mr. Thakur & Mr. Puneet Rajta, Deputy Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Suren Pal, hereinafter referred to as the accused, has assailed the judgment dated 30.4.2008, passed by the Presiding Officer, Fast Track Court, Hamirpur, Himachal Pradesh, in Sessions Trial No.12 of 2007, titled as *State of H.P. v. Suren Pal and another,* whereby he stands convicted of the offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.25,000/- and in default thereof to further undergo rigorous imprisonment for two years.

2. It is the case of prosecution that on 20.12.2007 at about 7.30 p.m., Pardeep Kumar (deceased) alongwith Suresh Kumar @ Bittu came to the shop of Pawan Kumar (PW-2), where Sanjay Kumar (PW-1) was sitting with his brother Bachhittar Singh. After shaking hands with him, Suresh Kumar and Pardeep Kumar left the shop from the back door and went towards the pond, where, Sunil Kumar @ Sillu, Vikram Singh @ Mouni, Virender Kumar (PW-4) @ Dimpy and accused Suren Pal were sitting. Deceased shook hands with all, except for accused Suren Pal. At that accused asked the deceased "son, how are you". Deceased objected to the manner in which he was addressed and advised to speak in a decent manner, as he was elder in age, at which accused abused and tried to physically assault the deceased. Accused pounced upon the deceased and also scratched his body. However, deceased was rescued by the persons present on the spot. After some time deceased left the pond towards the shop of Pawan Kumar. However, from behind, accused came and gave a blow with a Khukhri (Ex. P-7) on the vital part of the deceased. Also, Pawan Kumar, Sanjay Kumar, Surinder (PW-3) and Virender (PW-4) saw the accused, after giving blow with a Khukhri, fleeing away from the spot. Leela Devi (PW-6), mother of the deceased, was informed. With the help of persons present on the spot, she took the deceased in a vehicle, driven by Raj Kumar (PW-7), to the hospital, where he was declared having brought dead.

3. Police was informed about the incident and DD Entry (Ex.PW-14/A) recorded. Investigating Officer Guler Chand (PW-24) reached the spot, where he recorded statement (Ex.PW-1/A) of Sanjay Kumar (Pw-1), under the provisions of Section 154 of the Code of Criminal Procedure, which was carried by police official Vinod Kumar (PW-18), on the basis of which Fauza Singh (PW-19), recorded FIR No.312, dated 20.7.2007 (Ex. PW-19/A), under the provisions of Section 302 of the Indian Penal Code, at Police Station Hamirpur, District Hamirpur, Himachal Pradesh. Postmortem of the dead body was got

conducted from Dr. Rajiv Sood (PW-21), who issued postmortem report (Ex. PW-21/D) and opined the deceased to have died on account of lung injury leading to excessive haemorrhage and shock. The opinion was based on the report (Ex.PW-15/C) obtained from the Forensic Science Laboratory, Junga, issued by Dr. Gian Thakur (PW-20). Disclosure statement made by the accused (Ex. PW-8/A), recorded in the presence of independent witnesses Desh Raj (PW-8) and Roshan Lal (PW-9), led to recovery of weapon of offence (Ex.P-7) from the truck of Roshan Lal, also an employer of the accused, in the presence of the Investigating Officer as also HC Charanjeet Singh (PW-13). Investigation was conducted on the spot in the presence of Sanjeevan Patial (PW-11), Shiv Prakash (PW-22). Photographs of the spot of crime were taken by Shiv Prakash (PW-22). Investigation also revealed that immediately after the incident, from the cell phone belonging to Kamal Kumar (PW-5), accused had telephonic conversation with one Sonu, admitting having stabbed the deceased. With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. Accused Suren Pal and his co-accused Pankaj were charged for having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 24 witnesses and statements of accused Suren Pal and his co-accused Pankaj, under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of false implication.

6. Believing the testimonies of eye-witnesses and the material on record, trial Court convicted accused Suren Pal (present appellant) of an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced him as aforesaid. Hence, the present appeal by accused Suren Pal. Accused Pankaj stands acquitted as is evident from order dated 30.4.2008, so passed by the trial Court.

7. Assailing the judgment, Mr. Anup Chitkara, learned counsel for the accused, has made limited submission. According to him, case for conviction falls under the provisions of Section 299, punishable under Section 304 of the Indian Penal Code and not Section 300, punishable under Section 302 of the Indian Penal Code. With this limited submission, so made at the Bar, we proceed to examine the prosecution case.

8. Identity of the deceased is not in dispute. Presence of the accused, deceased and the witnesses on the spot has not been disputed before us. That deceased died on account of blow given with a Khukhri (Ex. P-7), by accused, is also not disputed before us.

9. Dr. Rajiv Sood (PW-21), who conducted the post-mortem and issued post-mortem report (Ex. PW-21/D), on physical examination, found following injuries on the body of the deceased:

> "There was 4 cm long and 0.5 cm superficial lacerated wound extending from left ear towards left cheek. Another lacerated wound near left eye brow 2 cm and 0.5 cm deep irregular with everted edges with dark brown blood. GTemperature of the body was equal to surroundings. Cadaveric lividity seen on the extensor surface of upper limbs and flexer surface of lower limbs. Rigor mortis in the larger joints.
>
> There was deep sharp incised wound measuring 4 cm long and 2 cm broad 8 cm below the C7 cervical spine towards right side 3 cm lateral to the spine. It was examined with the help of magnifying glass, showing sharp clean edges with inversion of edges to inside showing entry point with clotted and semiclotted blood around the edges and blood had also accumulated on the table around 1 litre of blood dark brownish semiclotted blood on the table. On opening the chest cavity, the entry wound was becoming narrow and had cut mark on the 4th rip and had punctured the pleura and lung. There was 2.5 cm long and 1.5 cm broad wound in the lung in the middle segment which was 5 cm deep. All muscles including skin showed sharp edges."

Pleural and chest cavity containing dark brownish blood semiclotted (quantity around 2.5 litres). No foreign body seen. Heart and pericardian was normal. It was injury in the pulmonary vessels. Left lung was normal.

Cause of death is opined to be long injury leading to excessive haemorrhage and shock. In the opinion of the doctor, weapon of offence, i.e. Khukhri (Ex. P-7) is dangerous and injury caused with the same was sufficient to cause death in the ordinary course of nature. The doctor opined the cut marks on the clothes (Ex.P-3 and Ex. P-4) of the deceased to be corresponding with the injury sustained by the deceased. According to the doctor, lungs are vital part. Significantly, we find this witness not to have been cross-examined on vital points.

10. Thus, according to the doctor, injury was on the vital part of the body, which was fatal and led to the death of the deceased.

11. Virender Singh (PW-4), who witnessed occurrence of the crime, has deposed that on 20.7.2007 at about 7.30 p.m., he alongwith accused Suren Pal, Sunil Kumar and Vikram Singh was sitting on the stairs of the pond, which is situated behind the shop of Pawan Kumar (PW-2), where deceased and Surinder Kumar (PW-3) came from the back door of the shop. They shook hands with all, but however, accused did not shake hands with the deceased. Accused asked the deceased "son, how are you", at which, deceased told the accused to speak in a decent manner, as he was elder to him. Accused abused the deceased in a filthy language and pounced upon him and scratched his face. Thereafter, both deceased and the accused caught each other from the neck but

were separated by the persons sitting there. After some time, when Surinder Kumar started returning to the shop, accused again started quarrelling with the deceased and tried to catch hold of him, however, deceased managed to escape and cried "save me save me". Hearing the same Sanjay Kumar (PW-1), who was sitting in the shop came out. Accused ran after the deceased and after giving blow with the weapon ran away. When deceased was about to fall, Sanjay Kumar and Surinder Kumar caught him. Mother of the deceased was informed. She came and with the help of Surinder Kumar and Patwari took the deceased to the hospital.

12. We find version of Virender Singh (PW-4) to have been materially corroborated by Sanjay Kumar (PW-1), who states that when Pradeep (deceased) reached near him, accused Suren Pal gave him a blow from behind. This witness as also the other witnesses present on the spot, initially supported the deceased and ensured prompt medical treatment. His testimony evidently reveals the criminal intent and conduct of the accused of having given a blow, with a sharp-edged weapon, from behind, on a vital part of the body, and thereafter having run away from the spot. Evidently, after the deceased returned from the pond, there was no provocation of any sort from his side. These facts also stand corroborated by witnesses, namely Pawan Kumar (PW-2) as also Surinder Kumar (PW-3). In fact Surinder Kumar further clarifies that accused uttered filthy language at the deceased. He does state that an altercation took place between the accused and the deceased, but then clarifies by stating that "thereafter accused paunced (sic: pounced) upon the deceased and gave a scratch blow with hand on his face and the deceased received bruises/abrasions on his face". The witness clarifies that after giving blow from behind, with a sharp-edged weapon, accused ran away from the spot.

13. We are of the firm view that initially it was the accused, who provoked the deceased, without any sufficient cause. It appears, he came prepared with a predetermined mind. Thus, he said "son how are you". Some altercation may have taken place between the parties, but nevertheless matter stood settled. Only when deceased left the pond, accused came from behind, and without any provocation or sufficient cause, gave a blow with a sharp-edged weapon, on the back of the deceased. This act and conduct of the accused, purely establishing his criminal intent, cannot be said to have been committed on the spur of the moment. None of the witnesses have deposed about any provocation on the part of the deceased. Accused was conscious of the weapon he was using and the part of the body, which was vital, where he gave the blow. He was conscious of the consequences of his action. Not only that, his subsequent conduct of fleeing away from the spot only reveals his intent of committing the crime, which he stands charged for.

14. Further, from the testimony of Kamal Kumar (PW-5), it is evident that accused made a call and informed that he had stabbed someone.

15. Mother of the deceased, Leela Devi (PW-6) has only corroborated the version of Surinder Kumar (PW-3) and the spot witnesses with regard to assault.

16. Further, we find that accused also took away the weapon of offence from the spot of crime and hid it in the Truck owned by Roshan Lal (PW-9). Based on his disclose statement (Ex. PW-8/A), so witnessed by Desh Raj (PW-8), police effected recovery thereof, in the presence of the said witness as also the accused.

17. We need not discuss testimonies of other police officials, in view of limited submissions made on behalf of the accused, save and except, that the Investigating Officers (PW-23 and PW-24) have proved the prosecution case of having conducted the investigation on the spot, collected incriminating material during the course of investigation and presented challan, evidencing guilt of the accused.

18. Sections 299 & 300 of the Indian Penal Code, reads as under:

> **"299. Culpable homicide.**
>
> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
>
> Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
>
> Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.**"**
>
> **"300. Murder**
>
> Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> Secondly

If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly

If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly

If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception I-When culpable homicide is not murder-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :--

First-That the provocations not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly-That the provocations not given by anything done in the lawful exercise of the right of private defence.

Explanation-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

We do not find the present case to fall under any one of the exceptions.

19. To us, it is a case of preplanned and premeditated murder. It is not the case of any of the parties that deceased had gone to the pond, carrying any weapon with himself, with an intent of picking up a quarrel or fight, with the accused or for that matter anyone else. He went unarmed, shook hands with everyone. On the other hand, accused misbehaved with him; abused him; fought with him; and attacked him with a sharp-edged weapon. The fact that accused was carrying a weapon with himself is also reflective of his criminal intent. It has come

on record that the weapon (Ex. P-7) of offence was 10.5 inches long. Blow was given on the vital part of the body.

20. Thus, the Court below rightly appreciated the evidence and the material so placed on record, while holding the accused guilty of the charged offence and sentencing him to undergo imprisonment, in accordance with law. There is neither any illegality nor any perversity with the same. Thus, holistically viewing the entire circumstances, we are also of the firm view, he rightly stands convicted for the charged offence and deserves no leniency.

21. In the given facts and circumstances, we find that prosecution has been able to establish, beyond reasonable doubt, the guilt of the accused, in relation to the charged offence. Contention so raised on behalf of the accused that case does not fall under any of the clauses of Section 300 of the Indian Penal Code, is untenable on facts and law. The intent, act and conduct of the accused is evidently clear. To contend that accused was not aware of the vital part of the body or the consequences of the blow which he had given, considering the age and the background from which he comes, cannot be accepted. Clearly, intention was to cause death, with full preparation and the act cannot be said to have been performed on the spur of the moment.

22. To contend that accused was not prevented by either of the persons present on the spot, to say the least is misconceived, for it is case of all the witnesses that after the deceased had left the pond, without any provocation, accused came and gave a blow from behind with a sharp-edged weapon.

23. Our attention is invited to the decisions rendered by the apex Court in ***Surendra Singh alias Bittu v. State of Uttranchal,*** **(2006) 9 SCC 531,** ***State of U.P. v. Hari Om,*** **(1998) 9 SCC 63;** ***Tholan v. State of T.N.*****, (1984) 2 SCC 133; and** ***Subramani v. S.H.O. Odiyansali,*** **(2011) 14 SCC 454**.

24. It is a settled principle of law that each case has to be considered on the given fact and circumstances. Facts of *Tholan (supra)*, are squarely distinguishable, unlike the instant facts, where accused had no quarrel or dispute with the deceased. It was an incident, which took place on the spur of the moment. Thus, in the given facts and circumstances, considering the accused to have given a single blow, the judgment of conviction and sentence was modified to that of culpable homicide not amounting to murder.

25. Similarly in *Surendra Singh* (*supra*), the apex Court was dealing with a case where two accused persons stood acquitted and the blow was given by the convict at the spur of the moment. Also it has come on record that scuffle took place on the spot between the parties.

26. In *Hari Om (supra)*, the Court was of the view that the situs of injury could not have been fixed by the accused so as to infer conclusively of his intent to cause injury which had actually been caused. Also, there was some property dispute between the parties.

27. Decision in *Subramani (supra)* is not relevant in the given facts and circumstance, as the accused was charged and convicted for homicide not amounting to murder.

28. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative, in the shape of recovery of weapon of offence.

29. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Varinder Singh ...Appellant

Vs.

State of HP & ors ...Respondents.

LPA No. 201 of 2011
Reserved on 10.9.2014
Decided on: 24.9.2014

Constitution of India, 1950- Article 226- The Petitioner, a postgraduate in Hindi, was appointed as Lecturer in a private College- The State Government decided to take over the College- The services of the petitioner were taken over as Lecturer School cadre, while the petitioner claimed that his services should have been taken over as Lecturer College cadre- Held that as per the notification the services of only those qualified teachers could have been taken over who had been appointed one year prior to the issuance of notification- Since, the petitioner had put in five months of service; therefore, his services could not have been taken over in terms of notification-petition dismissed. (Para- 5 & 6)

Constitution of India, 1950-Article 14**-** cannot be used for perpetuating any illegality as it does not envisage negative equality - it can only be used when equals similarly circumstanced are discriminated without any rational basis. (Para- 10)

Cases Referred:

Sneh Prabha etc. Vs. State of U.P & anr, AIR 1996 SC 540

Yogesh Kumar & ors Vs. Government of NCT Delhi & ors, AIR 2003 SC 1241

State of West Bengal Vs. Debasish Mukherjee, AIR 2011 SC 3667

Priya Gupta Vs. State of Chhattisgarh and & ors (2012) 7 SCC 433

For the Appellant : Mr. B.C. Negi, Advocate.

For the Respondents : Mr.Shrawan Dogra, Advocate General, with Mr. Romesh Verma and Mr. V.S. Chauhan, Addl.AGs and Mr. J.K. Verma & Mr. Kush Sharma, Dy. AGs .

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

This Letters Patent Appeal is directed against the judgment passed by the learned Single Judge in CWP No. 1581 of 2010, whereby the writ petition filed by the petitioner-appellant has been ordered to be dismissed.

2. The facts, in brief, may be noticed. The petitioner is a Post Graduate in Hindi having obtained 58.75 % marks. He also qualified M.Phil in the year 2004 and came to be appointed as a Lecturer on 3.7.2006 in the subject of Hindi in Chander Dhar Guler College, Haripur (Guler), which at that time was a private college. The State Government took a decision to take over this college vide notification dated 20.4.2007 and the services of the petitioner was also taken over as a lecturer 'school cadre'. His grievance before the writ court was that his services ought to have been taken over as a Lecturer, 'college cadre' on contract basis as per the notification dated 3.4.2010.

3. The appellant had only served the college with effect from 3.7.2006 to November, 2006 i.e. about five months only. The appointment letter was not available in the office record and even his joining report was neither available nor supplied to the Departmental Committee.

4. The terms and conditions for taking over privately managed colleges are governed by the notification dated 25.8.1994 and it would be apt to re-produce clause 7 thereof which reads as under:

> **"The services of only qualified teaching and non teaching staff appointed one year earlier who fulfill prescribed departmental recruitment and promotion rules, conditions prevalent at the time of taking over will be considered for taking over subject to the approval of the State Public**

Service Commission or Departmental Screening Committee from the date of taking over. The services of the Principal will be taken over only as Senior most Lecturer in the college concerned subject to the above mentioned proviso. The Government scales in respect of the respective categories shall be permissible to them after the take over."

5. It is evident from a bare perusal of clause-7 that services of only those qualified teachers could have been taken over who had been appointed 'one year earlier' to the issuance of notice of taking over. In the present case, as observed earlier, appellant had barely put in five months of service, therefore, in terms of clause 7 of the notification dated 25.8.1994, services of the appellant could not have been taken over.

6. Indisputably, the appointment of the appellant is to be reckoned from the date when he actually came to be appointed i.e. 3.7.2006 and cannot be reckoned from the academic session i.e. April/May, 2006 and, therefore, his appointment has rightly not been approved by the H.P. University.

7. The appellant then claims that one Smt. Kavita Sharma, lecturer, Commerce was engaged by the erstwhile private college on 7.6.2003. However, her services were terminated on 1.12.2006 and then she was re-appointed on 27.3.2007 and yet her services were taken over and therefore, the petitioner being similarly situate like Ms. Kavita Sharma, his services too were required to be taken over on the same analogy.

8. No doubt, Ms. Kavita Sharma was appointed on 7.6.2003 and terminated on 1.12.2006 and thereafter re-appointed on 27.3.2007, but then she had been regularly appointed on 7.6.2003 and her appointment had also been approved by the H.P University. Her services were though terminated w.e.f. 1.12.2006, but the same were restored vide order dated 27.3.2007 with the remarks "to be considered as a regular lecturer from the date of initial appointment, i.e. 7.6.2003".

9. The DPC, while recommending the case of Ms. Kavita Sharma, had placed a rider that in case the record of service establishes that her services were actually restored before 20.4.2007, then her case could be considered for taking over her service. A definite finding of fact has been recorded by the learned Single Judge that Ms.Kavita Sharma had established on record that her services were restored before 20.4.2007 and, therefore, in these circumstances, her services were taken over as a lecturer (college cadre).

10. Even for argument sake, if it is assumed that Ms.Kavita Sharma was not eligible, even then the moot question would be as to whether the appellant could have filed the case basing his claim on negative equality. Article 14 of the Constitution does not envisage negative equality and it cannot be used for perpetuating any illegality.

The doctrine of discrimination based upon the existence of an enforceable right under Article 14 would hence apply, only when invidious discrimination is meted out to equals similarly circumstanced without any rationale basis or to relationship that would warrant such discrimination *(refer Smt. Sneh Prabha etc. Vs. State of U.P & anr, AIR 1996 SC 540, Yogesh Kumar & ors Vs. Government of NCT Delhi & ors, AIR 2003 SC 1241, State of West Bengal Vs. Debasish Mukherjee, AIR 2011 SC 3667 and Priya Gupta Vs. State of Chhattisgarh and & ors (2012) 7 SCC 433).*

11. The cumulative effect of the discussion made here-in-above is that there is no merit in the appeal, the same is accordingly dismissed.

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

Sh. Mohit Saini .....Petitioner.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. MP(M) No. 966 of 2014
Decided on 25.09.2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Section 376, 504 and 506 of I.P.C.- some recoveries were to be effected, the report from FSL was awaited but other investigation was complete- Held, that Prosecutrix was aged 35 years and as per the allegations the accused had sexualrelations with her for 1-1 ½ years- This shows that the Prosecutrix was a consenting party- No complaint was ever made by her to any relative, hence prima facie the allegations against the accused did not constitute any offence- Bail granted. (Para- 4, 5)

For the petitioner : Mr. Arvind Sharma, Advocate.

For the respondent : Mr. Tarun Pathak and Mr. Vivek Singh Attri, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. *(Oral):*

The instant bail application has been filed under Section 438, Cr. P.C. by the bail applicant. He apprehends his arrest for his having allegedly committed offences under Sections 376, 504 and 506 of

I.P.C., in pursuance to the lodging of FIR bearing No. 98/14 of 17.08.2014 at Police Station Sadar Nahan, District Sirmaur, H.P.

2. Previously numerous opportunities were afforded to the Investigating Officer to complete the investigation. Today, the Investigating Officer has disclosed to this Court that certain recoveries, inasmuch as, a cheque, an affidavit, besides three mobile phones remain unrecovered at the instance of the bail applicant. The lack of effectuation of recoveries aforesaid, if any, at the instance of the bail applicant, would not deter this Court to proceed to adjudicate this bail application as in the event of the bail applicant/accused misutilising any of the aforesaid items, it is open to the complainant to launch separate criminal proceedings against the bail applicant.

3. At this stage, the Investigating Officer, SI Vivek Sharma, Police Station Sadar Nahan, has apprised this Court that except the receipt of the report of the FSL, the entire investigation into the offences allegedly committed by the bail applicant stands concluded. However, at this stage, while prima facie, imputing credibility to the allegations leveled by the prosecutrix against the bail applicant and their's divulging the fact of the bail applicant/accused having subjected the prosecutrix to forcible sexual intercourse, hence this Court does not deem it fit, that awaiting the report of the FSL, a decision by this Court on the bail application, be deferred.

4. Now, the preeminent fact which necessitates adjudication is whether as alleged by the prosecutrix, the bail applicant/accused subjected her to forcible sexual intercourse or not. The fact of the prosecutrix being a widow aged 35 years and having a child aged 14 years, as also when portrayed to be running the business of a Beauty Parlour acquire significance in testing whether the alleged forcible sexual intercourse perpetrated on her person by the bail applicant was consensual or compulsive or whether as a matter of fact, the victim prosecutrix, as alleged by her succumbed to the sexual overtures of the bail applicant under a false pretext or a false promise to marry her, or also whether such coaxing or allurements meted by the bail applicant to her to make her succumb to his sexual overtures, hence constitute an offence. The duration of the sexual intercourse inter se the bail applicant/accused and the victim is also significant, inasmuch as, both the bail applicant and the victim prosecutrix had for an inordinately prolonged duration stretching over a period of 1 and ½ years continued to indulge in repeated sexual intercourses, besides both have been divulged by the Investigating Officer to have had sexual intercourse both at the house of the victim prosecutrix as well as, elsewhere. Cumulatively given the fact of the sexual intercourses inter se the bail applicant and the victim prosecutrix stretching over a period of more than 1 and ½ years., prior to which the victim prosecutrix omitted to complain either to her relatives or to the police qua the factum of the accused bail applicant subjecting her to forcible sexual intercourse, both significantly and overwhelmingly unbare the factum of the alleged pretextual sexual intercourse perpetrated upon the person of the victim by the bail

applicant/accused, of its vestment of compulsiveness and pretextuality, as also, strips off the effect of the falsity of the initial promise of marriage meted by the bail applicant to the victim and its begetting capitulation of the victim. In other words, the duration of the sexual intercourse inter se both, also deprive the factum of the initial promise of marriage, if any, meted by the bail applicant/accused to the victim/prosecutrix which purportedly seduced or allured her to succumb to the purported sexual intercourses perpetrated on her person by the bail applicant/accused, from acquiring any tinge of pretextuality, rather the effect of any pretextuality or allurement meted by the bail applicant to the victim for subjugating her to his sexual desires gets waned, smothered as well as condoned, by the subsequent repeated succumbing of the victim prosecutrix, to the sexual overtures of the bail applicant, both at her house and elsewhere.

5. In other words, assuming that the initially perpetrated sexual intercourse inter se the bail applicant/accused and the victim was under an allurement meted by the accused/bail applicant to marry her, from which he ultimately reneged, yet the further factum of the victim aged 35 years and also disclosed to be running the business of a Beauty Parlour at Nahan, hence empowered with concomitant intelligibility to fathom at the initial stage the falseness of the pretext or of the allurement of marriage meted by the bail applicant to her, she having continued to prolong her sexual intercourse with the accused as also having continued to succumb to the sexual overtures of the accused, renders open no other inference than that of the initial sexual intercourse though, may be under a false pretext, its effect having come to be overcome as well as waned. Consequently, prima facie, at this stage, this Court is of the view that these allegations do not constitute any offence.

6. Accordingly, the petition is allowed and the order of 20.08.2014, rendered by this Court is made absolute, subject to the compliance by the applicant with the following conditions:

(i) that the bail applicant shall join the investigation as and when required by the Investigating Agency;

(ii) that the bail applicant shall nor 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; and

(iii) that the bail applicant shall not leave India without prior approval of this Court and is also directed to deposit his passport, if any, with the Station House Officer concerned.

7. In view of the above, the petition stands disposed of. However, it is made clear that the findings recorded hereinabove shall not have any bearing on the merits of the case.

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

Nirmla and others .....Review Petitioners/appellants.

Vs.

Financial Commissioner (Appeals) and Ors. .....Respondents.

RP No.4100 of 2013
Reserved on: 18.09.2014.
Pronounced on: September 25, 2014.

Code of Civil Procedure, 1908- Section 115- Review- power of review is to be exercised sparingly on the ground of error apparent on the face of the record- the error should be such as can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning- held, that there was no error apparent on the face of the record- the plea that order is illegal can be taken by filing appeal before the Appellate Court and not by filing the review petition.

(Para- 9 and 10)

Cases referred:

Khushi Ram and others vs. State of H.P. and others, 1997(2) Sim.L.C. 215 Mehar Chand and others vs. Rakesh and others, 2007(1) Shim.L.C. 64

Woodland Society, Andretta vs. Smt.Pinki Devi and others, Latest HLJ 2010 (HP) 1404

Kanta Devi vs. Durga Singh, Latest HLJ 2012 (HP) 886

N.Anantha Reddy vs. Anshu Kathuria and others, 2014 (1) Shim.L.C.367

Inderchand Jain (deceased by L.Rs.) vs. Motilal (deceased by L.Rs.), 2009 AIR SCW 5364

Haryana State Industrial Development Corporation Ltd. vs. Mawasi & Ors. Etc. Etc., 2012 AIR SCW 4222

Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526

Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174

Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389

Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170

Parsion Devi v. Sumitri Devi (1997) 8 SCC 715

Lily Thomas v. Union of India (2000) 6 SCC 224

Haridas Das v. Usha Rani Banik (2006) 4 SCC 78

State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612

Akhilesh Yadav v. Vishwanath Chaturvedi & Ors., 2013 AIR SCW 1316

For the Petitioners: Mr.G.D. Verma, Senior Advocate, with Mr.B.C. Verma, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan, Addl.A.Gs., Mr.J.K. Verma and Mr.Kush Sharma, Dy.A.Gs. for respondent No.1.

Mr.Bhupender Gupta, Senior Advocate, with Mr.Janesh Gupta and Ms.Charu Gupta, Advocates, for respondents No.2 to 6.

Nemo for respondent No.7.

Respondent No.8 ex-parte.

The following judgment of the Court was delifered**:**

Mansoor Ahmad Mir, C.J.

By the medium of this Review Petition, the petitioners have sought review of the judgment and order, dated 6th September, 2013, passed by a Division Bench of this Court, whereby Letters Patent Appeal No.114 of 2013 came to be dismissed.

2. Respondents filed objections and resisted the same.

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

4. it is averred by the review petitioners that respondents No.2 to 7 in the Writ Petition i.e. CWP No.1312 of 2007, out of which LPA No.114 of 2013 had arisen, filed a revision petition before the Financial Commissioner (Appeals), Himachal Pradesh, after 27 years from the date of passing of the order in the said revision petition. The Financial Commissioner (Appeals) condoned the delay in filing the revision petition and set aside the order passed by the Assistant Collector on 30th November, 1979 and the matter was remanded to the Land Reforms Office, Shimla for conducting inquiry into the matter. Feeling aggrieved, the petitioners questioned the said order of the Financial Commissioner by way of Writ Petition, being CWP No.1312 of 2007, was dismissed, vide judgment and order, dated 3rd January, 2013. The writ petitioners thereafter questioned the same by way of Letters Patent Appeal (LPA No.114 of 2013), was also dismissed, vide order, dated 6th September, 2013.

5. Mr.G.D. Verma, learned Senior Counsel for the review petitioners, argued that the Writ Court i.e. the learned Single

Judge as well as the Division Bench have fallen in error in dismissing the writ petition and the Letters Patent Appeal for the reason that the civil courts i.e. the court of the Sub Judge Ist Class and the Additional District Judge have already determined the issue. Thus, the order of remand passed by the Financial Commissioner was bad in law.

6. The learned Senior Counsel for the review petitioners tried to carve out a case on the ground that the judgments made by the civil courts i.e. by the Sub Judge Ist Class and by the Appellate Court have not been discussed. The learned Senior Counsel for the review petitioners was asked to show whether any mistake is apparent on the face of record, which can be detected without making long drawn discussions. Instead, the learned Senior Counsel argued that the Financial Commissioner had wrongly condoned the delay after a gap of 27 years and the order of remand is also illegal. The Writ Court in the writ petition and the Appellant Court in the Letters Patent Appeal have also not disturbed the said findings of the Financial Commissioner, thus, the order passed by the Writ Court as well as by the Appellate Court are illegal. It was further submitted that the findings of the Civil Court are in favour of the review petitioners.

7. During the course of hearing, the learned Senior Counsel for the review petitioners has relied upon the decisions in **Khushi Ram and others vs. State of H.P. and others, 1997(2) Sim.L.C. 215, Mehar Chand and others vs. Rakesh and others, 2007(1) Shim.L.C. 64, Woodland Society, Andretta vs. Smt.Pinki Devi and others, Latest HLJ 2010 (HP) 1404,** and **Kanta Devi vs. Durga Singh, Latest HLJ 2012 (HP) 886,**

8. On the other hand, Mr.Bhupender Gupta, learned Senior Counsel for respondents No.2 to 6, while supporting the judgment under review, has relied upon the judgment in **N.Anantha Reddy vs. Anshu Kathuria and others, 2014 (1) Shim.L.C. 367,** wherein it was held that the review jurisdiction is very limited and unless there is mistake apparent on the face of record, the order/judgment does not call for review. He, therefore, prayed that the Review Petition may be dismissed.

9. It is beaten law of the land that the power of review has to be exercised sparingly and as per the mandate of Section 114 read with Order 47 Rule 1 CPC. A reference may be made to Section 114 CPC and Order 47 Rule 1 CPC hereunder:

> **"114. Review. -** Subject as aforesaid, any person considering himself aggrieved,—
>
> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed by this Court, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

"ORDER XLVII

REVIEW

1. Application for review of judgment. – (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree on order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of

such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. I, as a Judge of the Jammu and Kashmir High Court, while sitting in Division Bench, authored a judgment in case titled **Muzamil Afzal Reshi vs. State of J&K & Ors., Review (LPA) No.16/2009, decided on 29.3.2013,** in which it was laid down that

power of review is to be exercised in limited circumstances and, that too, as per the mandate of Section 114 read with Order 47 CPC. It was further held that the review petition can be entertained only on the ground of error apparent on the face of the record. The error apparent on the face of record must be such which can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning.

11. The Division Bench of this Court has also laid down the similar principle in **Review Petition No.4084 of 2013**, **titled M/s Harvel Agua India Private Limited vs. State of H.P. & Ors., decided on 9th July, 2014**, and observed that for review of a judgment, error must be apparent on the face of the record; not which has to be explored and that it should not amount to rehearing of the case. It is apt to reproduce paragraph 11 of the judgment herein:

> **"11.** The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgement is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality."

12. The Apex Court in case **Inderchand Jain (deceased by L.Rs.) vs. Motilal (deceased by L.Rs.), 2009 AIR SCW 5364,** has observed that the Court, in a review petition, does not sit in appeal over its own order and rehearing of the matter is impermissible in law. It is apt to reproduce paragraph 10 of the said decision hereunder:

> "10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be

altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order. Review is not appeal in disguise. In Lily Thomas v. Union of India [AIR 2000 SC 1650], this Court held:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise.""

13. The Apex Court in case **Haryana State Industrial Development Corporation Ltd. vs. Mawasi & Ors. Etc. Etc., 2012 AIR SCW 4222,** has discussed the law, on the subject in hand, right from beginning till the pronouncement of the judgment and laid down the principles how the power of review can be exercised. It is apt to reproduce paragraphs 9 to 18 of the said judgment hereunder:

"9. At this stage it will be apposite to observe that the power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908 which reads as under:

"Order 47, Rule 1:

1. Application for review of judgment.-

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some

mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case of which he applies for the review.

Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In S. Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595, this Court referred to the judgments in Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai AIR 1941 FC 1 and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 and observed:

"Review literally and even judicially means re-examination or re- consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by

the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground

to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

11. In Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

"It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See Chhajju Ram v. Neki AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in Hari Shankar Pal v. Anath Nath Mitter AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed (Para 11):

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

13. In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe (Para 3):

"But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

14. In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed (Para 8):

".....it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made

the following observations in connection with an error apparent on the face of the record:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

15. In Parsion Devi v. Sumitri Devi (1997) 8 SCC 715, the Court observed:

"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC…….. A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16. In Lily Thomas v. Union of India (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words (Para 15):

"Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In Haridas Das v. Usha Rani Banik (2006) 4 SCC 78, the Court observed (Para 13):

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not

possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed (Para 14):

"At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision.""

14. The Apex Court in a recent judgment in case **Akhilesh Yadav v. Vishwanath Chaturvedi & Ors., 2013 AIR SCW 1316**, has held that scope of review petition is very limited and submissions made on questions of fact cannot be a ground to review the order. It was further observed that review of an order is permissible only if some mistake or error is apparent on the face of the record, which has to be decided on the facts of each and every case. Further held that an

erroneous decision, by itself, does not warrant review of each decision. It is apt to reproduce paragraph 1 of the said judgment hereunder:

> "Certain questions of fact and law were raised on behalf of the parties when the review petitions were heard. Review petitions are ordinarily restricted to the confines of the principles enunciated in Order 47 of the Code of Civil Procedure, but in this case, we gave counsel for the parties ample opportunity to satisfy us that the judgment and order under review suffered from any error apparent on the face of the record and that permitting the order to stand would occasion a failure of justice or that the judgment suffered from some material irregularity which required correction in review. The scope of a review petition is very limited and the submissions advanced were made mainly on questions of fact. As has been repeatedly indicated by this Court, review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case as an erroneous decision by itself does not warrant a review of each decision. In order to appreciate the decision rendered on the several review petitions which were taken up together for consideration, it is necessary to give a background in which the judgment and order under review came to be rendered."

15. We have gone through the judgment made by the learned Single Judge and the judgment under review. The Financial Commissioner made the order of remand. The question whether the Financial Commissioner had the power to condone the delay or otherwise, was discussed by the Writ Court and the writ petition was dismissed. The Appellate Court also held that the issue pertains to land laws, therefore, the question raised can be determined and answered by the Tenancy Authority.

16. Thus, applying the tests to the instant case, there is no mistake/error apparent on the face of record. The ground that the order is illegal can be taken by way of filing appeal before the Appellate Court and not before the Review Court.

17. Having said so, the review petition merits to be dismissed and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. & HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Pawan Kumar and others .....Petitioners.

Vs.

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

CWP(T) No.15584 of 2008.

Judgment reserved on 11th September, 2014.

Decided on: 25th September, 2014.

Constitution of India, 1950- Article 226- The Petitioners working as Fishermen had challenged the order of the State Government providing Matriculation as minimum qualification for promotion to the post of Fisheries Field Assistants- According to the petitioners there was no qualification in the un-amended 1986 Rules for promotion- Nature of duty of Field Assistants and Fishermen were similar, and the order of the State Government providing for Matriculation as qualification was wrong, arbitrary- Held that framing of Rules prescribing the mode of selection including the qualification for a particular post is within the domain of the Executive/ Rule making authority- Courts and Tribunals cannot prescribe the qualification nor can they interfere with the qualification prescribed by the employer- Courts cannot direct the authority to make appointment by relaxing the rules- Since the petitioners are not eligible as per the rules therefore, the petition is not maintainable.

(Para- 14 & 15)

Cases Referred:

P.U. Joshi and others vs. Accountant General, Ahmedabad and others, (2003) 2 SCC 632

State of J&K v. Shiv Ram Sharma and others, (1999) 3 SCC 653

V.K. Sood v. Secretary, Civil and Aviation and others, 1993 Supp (3) SCC 9

Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh v. Usha Kheterpal Waie and others, (2011) 9 SCC 645

State of Gujarat and others v. Arvind Kumar T. Tiwari and another (2012) 9 SCC 545

For the petitioners : Ms. Ranjana Parmar, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, V.S. Chauhan, Additional Advocates General, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocates General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Petitioners working as Fishermen in the Department of Fisheries, Government of Himachal Pradesh, aggrieved by providing matriculation as minimum qualification for promotion to the post of Fisheries Field Assistants in Recruitment and Promotion Rules Annexure A-2 from their category have initially filed this petition in the erstwhile HP State Administrative Tribunal and on its abolition stands transferred to this Court.

2. By means of this petition, the petitioners have claimed the following relief:

> "That the impugned Rules Annexure A-2, promotion order dated 3.7.2007 Annexure A-5 and order dated 8.7.2007 rejecting the representation of the applicants may be quashed and set aside and respondents may be permitted to promote the applicants from the date their juniors were promoted with all consequential benefits in the interest of justice and fair play".

3. Annexure A-2, which has been sought to be quashed and set aside, is the Recruitment and Promotion Rules meant for filling up the posts of Fisheries Field Assistants. These rules have repealed the Himachal Pradesh Fisheries Department's Fisheries Field Assistant Class-IV (Non-Gazetted) Recruitment and Promotion Rules, 1986. The Rules Annexure A-2, called as the Himachal Pradesh Fisheries Department, Fisheries Field Assistant Class-IV (Non-Gazetted), Recruitment and Promotion Rules, 2006, came into force from the date of its publication in HP Rajpatra, i.e., 30th December, 2006. The post of Fisheries Field Assistant is Class-IV and non-selection. As per these Rules, the appointment to the service can be made from two different sources, i.e. $66^{2}/_{3}\%$ by direct recruitment and $33^{1}/_{3}\%$ by promotion from amongst the Fishermen having matriculation as qualification.

4. As noticed at the outset, the petitioners are aggrieved by making provision of matriculation as qualification for appointment to the post of Fisheries Field Assistant by way of promotion from their category, therefore, it is deemed appropriate to make reference to the relevant provisions in the Rules which govern the procedure to be followed for appointment to the post of Fisheries Field Assistant by way of promotion. Rule 11 reads as follows:

11. In case of recruitment by promotion,	By promotion from amongst the Fishermen who are matriculate and also possess 5 years	Provided further that where a person becomes ineligible to be considered for promotion on account

deputation, transfer, grade from which promotion/ deputation transfer is to be made	regular service or regular combined with continuous ad hoc service rendered, if any, in the grade. For filling up the posts, following roster shall be followed: 1st post: By promotion from Fisherman, 2nd post: By Direct recruitment. 3rd post: by direct recruitment. The roster will be rotated after every 3rd post till the representation to all the categories is achieved by the given percentage and thereafter, vacancy is to be filled up amongst the categories which vacate the post. (1) In all cases of promotion, the continuous adhoc vacancies in Himachal State Technical Services)Rules, 1985 and having been given the benefit of seniority thereunder (2) Similarly in all cases of confirmation continuous adhoc service rendered in the feeder post, if any, prior to the regular appointment against	of the requirement of the preceding proviso, the person(s) junior to him shall also be deemed to be ineligible for consideration for such promotion. EXPLANATION;- The last proviso shall not render the junior incumbents ineligible for consideration for promotion if the senior ineligible person happened to be ex-servicemen recruited under the provisions of Rule-3 of Demobilized Armed Forces Personnel (Reservations of vacancies in Himachal State Non-Technical Services) Rules, 1972 and having been given the benefit of seniority thereunder or recruited under the provision of Rule-3 of Ex-servicemen (Reservations of Contract appointee so selected under these Rules will not have any right to claim regularization or permanent absorption in Govt. job. (II) EMOLUMENT PAYABLE: The Fisheries Field

	such posts shall be taken into account towards the length of service, if the adhoc appointment/promotion had been made after proper selection in accordance with the R&P rules. Provided that inter-se seniority as a result of confirmation after taking into account adhoc service rendered as referred to above shall remain unchanged.	Assistant appointed on contract basis will be paid consolidated contractual amount @ Rs. 4230/- (initial of pay scale + dearness pay) per month. An amount of Rs. 100/- as per amount increase in emoluments for the second and third years respectively will be allowed if contract is extended beyond one year. (III) APPOINTING/ DISCIPLINARY AUTHORITY: Director-cum-Warden of Fisheries, H.P. will be the appointing and disciplinary authority. (IV) SELECTION PROCESS: Selection for appointment to the post in the case of Contract Appointment recruitment will be made on the basis of viva-voce test or if considered necessary or expedient by a written test or practical test the standard/syllabus etc. of which will be determined by the Selection Committee prescribed under these Rules. (V) COMMITTEE FOR

		SELECTION OF CONTRACTUAL APPOINTMENTS: As may be constituted by the Government from time to time….

5. The grouse of the petitioners in a nutshell is that in the un-amended 1986 Rules no qualification was prescribed for making appointment to the post of Fisheries Field Assistant from amongst Class-IV employees on the establishment of the Department. They have pressed into service office order dated 27.9.2004 Annexure A-9 in order to draw support qua this part of their case. As per their further case, the information Annexure A-8 (Colly.) was received under the Right to Information Act, wherein it is revealed that the nature of duty of Field Assistant/ Fisherman is identical. Therefore, according to them, when the Fishermen and Fisheries Field Assistants are discharging the same and similar duties, prescribing matriculation as minimum qualification for promotion to the post of Fisheries Field Assistant is arbitrary and violative of Article 14 of the Constitution of India.

6. Challenge is also to the order dated 3.7.2007 (Annexure A-5), whereby persons junior to them in the cadre of fishermen have been promoted as Fisheries Field Assistants by following the amended Rules (Annexure A-2). They further canvassed that rejection of representations Annexures A-3, A-4 and A-6, which were made by one of them, i.e. Parkash Chand, petitioner No.2, vide order dated 31.7.2007 (Annexure A-7), on the ground that matriculation is essential qualification and the representationist being not matriculate could have not been promoted, is also illegal.

7. In response to the case set out by the petitioners in the petition, the stand of the respondent-State is that the posts of Fisheries Field Assistants and fishermen are in different pay scale, i.e., the post of Fisheries Field Assistant carries the pay scale of Rs.2800-4400, whereas that of fishermen Rs.2700-4260. In 1986 Rules, the feeder category for promotion to the post of Fisheries Field Assistant class-IV officials working as Peon, Chowkidar, Cleaner, Chowkidar-cum-Helper, Sweeper and Field-man on the establishment of the Department. The category of fisherman was not the feeder category for promotion to the post of Fisheries Field Assistant. Further, that in the amended Rules (Annexure A-2) the category of fisherman has been included in the feeder category for promotion to the post of Fisheries Field Assistant to the extent of $33^{1}/_{3}$% from amongst matriculate fisherman having five years service in the cadre. Matriculation is said to be prescribed as qualification for promotion to the post of Fisheries Field Assistant because illiterate/under matric officials are unable to grasp technical skill of fisheries, conversation and other fisheries activities viz-a-viz

extending extension programmes, departmental schemes etc. to the public.

8. It is in this backdrop, the parties on both sides have set forth claims/counter claims during the course of arguments.

9. The only issue engages our attention is that prescribing matriculation as qualification for promotion to the post of Fisheries Field Assistant in the Rules by the respondent-State is an arbitrary exercise of powers or violative of Article 14 of the Constitution of India. The law on the point is no more ***res-integra***, as the apex Court in **P.U. Joshi and others** v. **Accountant General, Ahmedabad and others (2003) 2 SCC 632**, has held as under:

> "10.....Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/ posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to

amend, alter and bring into force new rules relating to even an existing service."

10. The apex Court again in **State of J&K** v. **Shiv Ram Sharma and others, (1999) 3 SCC 653,** has held as under:

"6. The law is well settled that it is permissible for the Government to prescribe appropriate qualifications in the matter of appointment or promotion to different posts. The case put forth on behalf of the respondents is that when they joined the service the requirement of passing the matriculation was not needed and while they are in service such prescription has been made to their detriment. But it is clear that there is no indefeasible right in the respondents to claim for promotion to a higher grade to which qualification could be prescribed and there is no guarantee that those rules framed by the Government in that behalf would always be favourable to them. In Roshan Lal Tandon v. Union of India, (1968) 1 SCR 185 : (AIR 1967 SC 1889), it was held by this Court that once appointed an employee has no vested right in regard to the terms of service but acquires a status and, therefore, the rights and obligations thereto are no longer determined by consent of parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. The High Court has also noticed that there was an avenue provided for promotion but the prescription of the qualification was not favourable to respondents. The principle of avoiding stagnation in a particular post will not be with reference to a particular individual employee but with reference to the conditions of service as such. As long as rules provide for conditions of service making an avenue for promotion to higher grades the observations made in T. R. Kothandaraman's case (1994 AIR SCW 4367) (supra) stand fulfilled. In that view of the matter, we do not think the High Court was justified in allowing the writ petitions filed by the respondents."

11. The apex Court in **V.K. Sood** v. **Secretary, Civil and Aviation and others, 1993 Supp (3) SCC 9**, has also held as under:

"6. Thus it would be clear that, in the exercise of the rule making power, the president or authorised person is entitled to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State.

> The rules thus having been made in exercise of the power under proviso to Art. 309 of the Constitution, being Statutory, cannot he impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal. Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law. The rules prescribed qualifications for eligibility and the suitability of the appellant would be tested by the Union Public Service Commission."

12. Similar is the view of the matter taken by the apex Court in **Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh** v**. Usha Kheterpal Waie and others, (2011) 9 SCC 645**, which reads as under:

> "22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of Constitution, statute and Rules. [See J. Rangaswamy vs. Government of Andhra Pradesh - 1990 (1) SCC 288 and P.U. Joshi vs. Accountant General - 2003 (2) SCC 632]. In the absence of any rules, under Article 309 or Statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable."

13. In **State of Gujarat and others** v. **Arvind Kumar T. Tiwari and another (2012) 9 SCC 545**, a case where the petitioner was not eligible for want of qualification for being considered to the post in question, the apex Court has held that such person has no enforceable or legal right to approach the Court for any relief. The apex Court has discussed the power to relax the Rules also in this judgment and has held as under:

> "10. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be

relaxed for this purpose to the extent that, the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible……..

11. The courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof. In State of M.P. & Anr. v. Dharam Bir, (1998) 6 SCC 165, this Court while dealing with a similar issue rejected the plea of humanitarian grounds and held as under:

"The courts as also the tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications, should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the statutory provisions made by the Government under Article 309 of the Constitution."

12. Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of

> eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of 'fair play', 'good conscious' and 'equity'. (Vide: State of J & K v. Shiv Ram Sharma & Ors., AIR 1999 SC 2012; and Praveen Singh v. State of Punjab & Ors., (2000) 8 SCC 436).
>
> 13. In State of Orissa & Anr. v. Mamta Mohanty, (2011) 3 SCC 436, this Court has held that any appointment made in contravention of the statutory requirement i.e. eligibility, cannot be approved and once an appointment is bad at its inception, the same cannot be preserved, or protected, merely because a person has been employed for a long time.
>
> 14. A person who does not possess the requisite qualification cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules is, and would therefore, be void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegibility and not mere irregularity. Such a person cannot approach the court for any relief for the reason that he does not have a right which can be enforced through court. (See: Prit Singh v. S.K. Mangal & Ors., 1993(1) SCC (Supp.) 714; and Pramod Kumar v. U.P. Secondary Education Services Commission & Ors., AIR 2008 SC 1817)."

14. The principles settled in the above precedents amply demonstrate that framing of rules prescribing mode of selection including qualification etc. for a particular post is absolutely within the domain of the executive/rule making authority. The Courts and Tribunals can neither prescribe the qualification nor interfere with the qualification so prescribed by the employer, if it is rational and having nexus with the functions and duties attached to the post or the incumbent is ignored for appointment at the cost of fair play, good conscience and equity.

15. The Courts even cannot direct the competent authority to make appointment in relaxation of rules, of course, the authority competent to relax the rules may do so for justifiable reasons, if it is deemed necessary or expedient to do so.

16. Adverting to the case in hand, in 1986 Rules (Annexure R-1 to the reply filed on behalf of the respondents), the category of the petitioners does not find mention as feeder category for promotion to the post of Fisheries Field Assistant. The feeder category rather is class-IV employees in the rank of Peon, Chowkidar, Cleaner, Chowkidar-cum-Helper, Sweeper and Fieldman. In the amended Rules (Annexure A-2) in force there are two different sources of recruitment to

the post of Fisheries Field Assistant, i.e., direct recruitment and by way of promotion from the category of petitioners, i.e., fisherman. As per the Rules, matriculation is essential qualification for promotion to the post in question. The petitioners admittedly are not matriculate. They have, therefore, rightly been ignored for promotion to the post in question being not qualified.

17. The law laid down and discussed hereinabove makes it crystal clear that the petitioners being not eligible for promotion to the post of fishermen, have no legal right to approach the Court with a grouse that the rules having been framed to their detrimental are not sustainable for the reason that as per the ratio of the judgments cited supra framing of rules and prescribing qualification for a particular post is within the domain of the executive/rule making authority. The petitioners, therefore, have no legal right to question the promotion of those fishermen eligible and in the zone of consideration as per recruitment and promotion rules framed and circulated vide Annexure A-2. The representations Annexures A-3, A-4 and A-6 made by petitioner No.2 Parkash Chand have also been rightly rejected by the competent authority by a speaking order Annexure A-7. The petitioners, therefore, cannot be said to have any grouse on this score also.

18. Be it stated that in the Rules Annexure A-2, there exists relaxation clause, which reads as follows:

> "Where the State Government is of the opinion that it is necessary or expedient to do so, it may, by order for reasons to be recorded in writing and in consultation with HPPSC relax any of the provisions of these rules with respect to any class or category of persons or posts."

19. We take note of the seniority list (Annexure A-1) of fishermen on the establishment of Fisheries Department as on 31st March, 2007, which reveals that as against 40 members of service maximum have matriculation or above as qualification and it is only few of them who are under-matriculate. Maximum of them have been appointed during the period ranging between 1980-2007, i.e., well before the amended Rules (Annexure A-2) came into being. We further take note of the fact that many of them have since retired on attaining the age of superannuation. Therefore before parting, we expect from the competent authority to take into consideration the long service rendered by those under-matriculate fishermen appointed before the Rules Annexure A-2 came into being and grant them one time relaxation, of course strictly in accordance with the principles laid down by the Hon'ble Apex Court in ***Arvind Kumar T. Tiwari's*** case cited supra to save them from stagnation and hardship.

20. This petition, however, fails and the same accordingly dismissed. Pending applications, if any, shall also stand disposed of.

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

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

Vs.

Krishan Kumar S/o Sh Rikhi Ram. .....Respondent.

Cr. Appeal No. 130 of 2009.
Judgment reserved on:5.8.2014
Date of Decision: 25.09.2014.

Indian Penal Code,1860- Sections 420, 467, 468, 471 and 120-B- As per prosecution case, the accused had forged a will to grab the property of the deceased- deceased had also executed a sale deed- report of Director Finger Print Phillaur proved that thumb impression on the sale deed and Will did not tally, which clearly proved that Will was forged - Sale deed was duly proved by the Registration Clerk and by attesting witness- Document Writer stated that the executant was identified by the accused- held, that Trial Court had rightly convicted the accused. (Para- 10 to 16)

Indian Evidence Act,1872- Section 3- Appreciation of evidence- the facts can be proved by the testimony of a single witness- conviction can be sustained on the solitary evidence of the witness in a criminal case if it inspires confidence- the law of evidence does not require any particular number of witnesses. (Para-19)

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- contradiction- testimony of the prosecution witness was recorded after sufficient gap of time - minor contradictions are bound to come in the statements due to lapse of time. (Para-30)

Cases referred:

Jose Vs. State of Kerala, 1973 SC 944

Masalti and others Vs. State of Uttar Pradesh, AIR 1965 SC 202

Vadivelu Thevar Vs. The State of Madras, AIR 1957 SC 614

Lalu Manjhi and another Vs. State of Jharkhand, AIR 2003 SC 854

Bhe Ram Vs State of Haryana, AIR 1980 SC 957

Rai Singh Vs. State of Haryana, AIR 1971 SC 2505

Dalbir Singh and others Vs. State of Punjab, AIR 1987 SC 1328

For the appellant: Mr. B.S.Parmar & Mr. Ashok Chaudhary, Addl. Advocate General with Mr.Vikram Thakur, Dy. Advocate General & Mr.J.S.Guleria, Assistant Advocate General.

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

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge (II) Kangra at Dharamshala in Criminal Appeal No. 14-K/X/2005 titled Krishan Kumar Vs. State of HP decided on 22.9.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that deceased Phola Ram has two daughters namely Samrita Devi and Nisha Devi and one widow namely Smt Kablu Devi. It is further alleged by prosecution that deceased Phola Ram had cordial relations with his wife and daughters during his life time and deceased Phola Ram did not execute any registered Will on dated 3.8.1984. It is further alleged by prosecution that a fictitious Will dated 3.8.1984 was executed by accused Krishan Kumar in order to grab whole property of deceased Phola Ram. It is further alleged by prosecution that accused Krishan Kumar in connivance with Raghu Nath and Harnam Singh fabricated a forged Will. It is further alleged by prosecution that both Raghu Nath and Harnam Singh died. It is further alleged by prosecution that accused signed the Will as an attesting witness and deceased Raghu Nath also signed Will as an attesting witness. It is further alleged by prosecution that a forged Will was executed in order to grab the property of deceased Phola Ram. It is further alleged by prosecution that deceased Phola Ram had also executed a sale deed of his land on dated 8.2.1995 in favour of Nathu Ram. It is further alleged by prosecution that original sale deed was took into possession vide memo Ext PW14/B. It is further alleged by prosecution that thumb impressions of deceased Phola Ram affixed on memo Ext PW16/A were sent to State Forensic Science Laboratory HP Shimla for comparison the thumb impression in sale deed dated 8.2.1995. It is further alleged by prosecution that as per opinion of the expert thumb impressions upon the Will and thumb impressions in the sale deed were of different person and were not of deceased Phola Ram. Charge was framed against accused krishan Kumar and co-accused Harnam Singh under Sections 420, 467, 468, 471 and 120-B of the Indian Penal Code. Accused person did not plead guilty and claimed trial. Accused Harnam Singh died during the pendency of the trial.

3. The prosecution examined as many as eighteen witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Sh Bidhi Singh
PW2	Sh Raj Kumar
PW3	Sh Nathu Ram
PW4	Sh Kartar Chand
PW5	Sh Karam Singh
PW6	Sh Kehar Singh
PW7	Sh Pawan Kumar
PW8	Sh Pritam Singh
PW9	Sh Balbir Singh
PW10	Sh Des Raj
PW11	Sh Man Chand
PW12	Smt Simrita Devi
PW13	Sh Sahib Singh
PW14	Sh Nathu Ram
PW15	Sh Krishan Lal
PW16	Sh Mohinder Singh
PW17	Sh Kailash Chand
PW18	Dr. Meenakshi Mahajan

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

Sr.No.	Description:
Ext PW16/A	Will dated 3.8.1984
Ext PW18/1	Signature of Raghu Nath
Ext	Thumb impression of

PW18/2	deceased Phola Ram
Ext PW18/2 to PW18/17	Specimen signature of Krishan Kumar
Ext PW18/18	Report of Asstt. Documents Examiner Shimla.
Ext PW10/A	Copy of complaint
Ext PW1/A	Seizure memo of Will
Ext PW11/A	Seizure memo of register
Ext PW14/B	Recovery memo of sale deed
Ext PW3/A	Sale Deed
Ext PW5/A	Signature of Karam Singh
Ext PW14/A	Signature of Nathu Ram
Ext PW9/A	Report of Director Finger Print Bureau Phillour
Ext PW7/A	Copy of sale deed
Ext PW9/B	Photographs of thumb impression of Raj Kumar
Ext PW9/CD	Photo copy of thumb impression of deceased Phola Ram
Ext PW8/A	Copy of FIR No.107/2001
Ext PW6/A	Register of deed writer
Ext DX	Copy of judgment dated 3.2.2003

5. The statement of accused was also recorded under Section 313 Cr PC. Accused did not examine any defence witness. Learned trial Court Chief Judicial Magistrate Kangra at Dharamshala HP convicted Krishan Kumar for offence punishable under Section 120-B, 420, 467, 468 and 471 IPC. Thereafter accused Krishan Kumar filed

Criminal Appeal No. 14-K/X/2005 titled Krishan Kumar Vs. State of HP before learned Addl. Sessions Judge Kangra at Dharamshala which was decided on 22.9.2008. Learned Additional Sessions Judge Court No.II Kangra at Dharamshala allowed the appeal filed by Krishan Kumar and set aside the judgment of learned trial Court and acquitted him from all criminal charges.

6. Feeling aggrieved against the judgment of acquittal passed by learned Additional Sessions Judge Court No.II Kangra at Dharamshala State of HP filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the appellant and learned Advocate appearing on behalf of respondent and also gone through the entire record carefully.

8. Question that arises for determination before us is whether judgment of learned trial Court should be affirmed or judgment of learned first appellate Court should be affirmed keeping in view the oral as well as documentary evidence placed on record.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Bidhi Singh has stated that he has joined investigation of the present case. He has stated that on dated 6.2.2002 he visited at Police Station Shahpur. He has stated that co-accused deceased Harnam Singh had produced Will and the same was took into possession vide seizure memo Ext.PW1/A. He has stated that Will was not written by him. He has stated that he is not the marginal witness of the Will.

9.1 PW2 Raj Kumar has stated that he is document writer at Kangra. He has stated that in the year 1984 he has written Will Ext PW2/A. He has stated that testator was not known to him personally. He has stated that he has written the Will as per identification of testator by marginal witness. He has stated that he also recorded entry in the document register. He has admitted that testator was also appeared before the Sub Registrar. He has stated that lamberdar was personally known to him. He has stated that lamberdar has identified the testator. He has stated that he also recorded the entries of Will in the document register.

9.2 PW3 Nathu Ram has stated that he is working as Deed Writer. He has stated that he has executed the sale deed Ext.PW3/A at the instance of testator Phola Ram. He has stated that testator had marked his thumb impressions upon sale deed. He has stated that he is working as a document writer since 1983. He has stated that deceased Phola Ram was not personally known to him.

9.3 PW4 Kartar Chand has stated that he was posted as Registration Clerk since May 2002 in the office of Sub Registrar Kangra and he also brought the summoned record. He has stated that as per

record deceased Phola Ram had executed a Will on dated 3.8.1984. He has stated that Will was also registered before Sub Registrar. He has stated that Photostat copy of Will mark A is correct as per original Will. He has stated that Will was entered in the record of Sub Registrar. In cross-examination he has stated that on dated 3.8.1984 he was not posted as registration clerk.

9.4 PW5 Karam Singh has stated that deceased Phola Ram was personally known to him. He has stated that on dated 8.2.1995 deceased Phola Ram had alienated the land in favour of Nathu Ram measuring 16 bighas 7 biswas. He has stated that sale deed was executed in his presence. He has stated that Nathu Ram executed the sale deed. He has stated that sale deed is Ext PW3/A which bears his signatures Ext PW5/A as marginal witness. He has stated that another marginal witness was ex-pradhan. He has stated that he is lamberdar of village since 30 to 35 years. He has stated that deceased Phola Ram was not resident of his village. He has denied suggestion that deceased Phola Ram did not execute any sale deed in his presence.

9.5 PW6 Kehar Singh has stated that he was posted as Head Constable at Police Station Shahpur since 2002 and he joined investigation of the case. He has stated that Raj Kumar document writer has produced register Ext.PW6/A which was took into possession.

9.6 PW7 Pawan Kumar has stated that he was posted as registration Clerk in sub Tehsil Siunti District Chamba since 1986 and brought the summoned record. He has stated that deceased Phola Ram on dated 8.2.1995 had executed a sale deed Ext PW3/A which is correct as per original record. He has stated that document was written by Nathu Ram. He has stated that sale deed was written by Nath Ram. He has stated that the same has been recorded in the record of Sub Registrar. In cross examination he has stated that in the year 1995 he was not the registration clerk.

9.7 PW8 Pritam Singh has stated that he was posted as Station House Officer at Police Station Shahpur. He has stated that on dated 4.8.2007 an application was received on the basis of which FIR Ext PW8/A was recorded by him. He has stated that after registration of FIR the same was handed over to the Investigating Officer.

9.8 PW9 Balbir Singh has stated that he was posted as finger print expert in the office of Finger Print Bureau Phillaur. He has stated that he has joined the office of Finger Print Bureau Phillaur in the year 1994. He has stated that he New Delhi in the year 1994. He has stated that during the eight years of his service he has compared many cases and had given opinion in civil and criminal cases. He has stated that two documents i.e. sale deed and Will were sent for opinion whether thumb impressions in sale deed dated 8.2.1995 and thumb impressions in Will dated 3.8.1984 belongs to same person or not. He has stated that he had given his opinion Ext PW9/A. He has stated that he took photographs Ext PW9/B, Ext PW9/C and Ext PW9/D. As per opinion Ext

PW9/A placed on record admitted A1 thumb impression and disputed thumb impression question 2 and question 4 are not of same person.

9.9 PW10 Des Raj has stated that he was posted as Investigating Officer in Police Station Shahpur. He has stated that on dated 17.4.2003 he recorded the statement of document writer namely Raj Kumar. He has stated that he thereafter handed over case file to Station House Officer. He denied suggestion that he has recorded the statement of the witness according to his own version.

9.10 PW11 Man Chand has stated that he was posted as Investigating Officer in police station Shahpur. He has stated that he took register into possession from document writer.

9.11 PW12 Samrita Devi has stated that deceased Phola Ram was her father. She has stated that her father was owner of immovable property situated at District Chamba HP. She has stated that immovable property situated at Chamba District was alienated by her father during his life time. She has stated that her deceased father Phola Ram has two daughters and one widow who had died. She has stated that Hernam Singh was not related to deceased Phola Ram. She has stated that her deceased father did not execute any Will qua his property. She has stated that Krishan Kumar is the brother in law of Harnam Singh. She has stated that her father did not disclose about the execution of any Will. She has stated that Raghu Nath is also relative of Harnam Singh. She has stated that her father died in the year 1995. She has stated that her father did not execute any Will during his life time. She has stated that when accused Krishan Kumar threatened her mother then she came to know about execution of forged Will. She has denied suggestion that three suits were filed qua the Will. She has denied suggestion that two suits have been dismissed and one suit is pending. She has stated that mutation has been sanctioned in favour of Hernam Singh. She has denied suggestion that death ceremony of her father was performed by Harnam Singh. She has denied suggestion that her father executed a Will in favour of Harnam Singh.

9.12 PW13 Sahib Singh has stated that he remained pradhan of the Gram Panchayat. He has stated that deceased Phola Ram was known to him. He has stated that deceased Phola Ram has two daughters. He has stated that deceased Phola Ram had executed a sale deed qua immovable property situated in District Chamba. He has stated that he has also signed in the sale deed Ext.PW3/A as marginal witness. He has stated that he does not know that Harnam Singh used to serve deceased Phola Ram during his life time.

9.13 PW14 Nathu Ram has stated that deceased Phola Ram was known to him. He has stated that deceased Phola Ram had executed a sale deed Ext PW3/A in his favour measuring 16 bighas 7 biswas. He has stated that sale deed was executed before the marginal witness. He denied suggestion that deceased Phola Ram was not in a position to move in the year 1994-95. He denied suggestion that thumb

impressions of deceased Phola Ram were not obtained on sale deed Ext PW3/A.

9.14 PW15 SI Krishan Lal has stated that file was handed over to him for investigation. He has stated that Will and sale deed were took into possession. He has stated that thereafter file was handed over to ASI Kailash for further investigation. He denied suggestion that he did not record the statements of the witnesses as per their version.

9.15 PW16 Mohinder Singh has stated that he was posted as SHO in Police Station Shahpur. He has stated that he obtained copy of sale deed Ext PW7/A from the office of Sub Registrar. He has stated that he took into possession register from document writer Ext PW6/A. He has stated that he also obtained hand writing specimen of accused Krishan Kumar from Judicial Magistrate Ist Class Dharamshala and thereafter the same was sent for chemical examination at FSL Shimla. He has stated that after completion of investigation the challan was filed. He has denied suggestion that he did not obtain any document.

9.16 PW17 Kailash has stated that Will Ext.PW6/A and sale deed Ext PW3/A were sent for opinion in the office of Finger Print Bureau Phillaur. He has stated that he recorded the statements of the witnesses as per their version. He has stated that thereafter he handed over the file to ASI Des Raj.

9.17 PW18 Dr. Meenakshi Mahajan Assistant Director Documentary & Photography State Forensic Science Laboratory Shimla HP has stated that she has qualified M.Sc, M.Phil and P.Hd in Chemistry. She has stated that she has examined more than 200 cases and had given opinion in civil and criminal cases. She has stated that investigating agency sent the document i.e. Will for the comparison of signatures of accused Krishan Kumar only.

(A) Report of Director Finger Print Bureau Phillaur is fatal to <u>the innocence of accused.</u>

10. We have carefully perused the report of Director Finger Print Phillaur Ext PW9/A placed on record. Report of Director Finger Print Phillaur Ext PW9/A remains un-rebutted on record. Accused did not prove any counter finger print report. It is proved on record beyond reasonable doubt that admitted thumb impression of deceased Phola Ram is marked as A1 upon the sale deed executed by deceased Phola Ram in favour of Nathu Ram in consideration amount of Rs.52,000/- (Fifty two thousand) qua land 16 Bighas 7 biswas on dated 8.2.1995. In the present case admitted thumb impressions of deceased Phola Ram were sent for comparison with disputed Will. It is also proved on record beyond reasonable doubt that thumb impressions of deceased Phola Ram were obtained upon disputed Will at three places. Thumb impression of deceased Pholo Ram was obtained in the front page of disputed Will by document writer. It is proved beyond reasonable doubt that even Sub Registrar obtained thumb impressions of deceased Phola

Ram when the Will was presented before Sub Registrar for registration at two places in the reverse page of the Will where endorsement certificate was given by Sub Registrar. It is proved on record beyond reasonable doubt that thumb impressions of deceased Phola Ram were also obtained upon register of document writer when entry of disputed Will was recorded in the register of document writer. It is proved on record beyond reasonable doubt that admitted signatures mentioned in sale deed as A1 were sent for Finger Print Bureau opinion with thumb impressions Q1, Q2 and Q3 upon the Will and Q4 upon document register. As per opinion of hand writing expert the thumb impression of testator mentioned in sale deed A1 did not tally with thumb impressions i.e. Q2 and Q4 mentioned in the disputed Will and in the register of document writer. Finger Print Bureau has specifically reported in positive manner that Q2 and Q4 thumb impressions and A1 thumb impression are not of same person but are of different person and qua other questions Finger Print Bureau has specifically mentioned in the report that same were not comparable. In view of positive report given by Finger Print Bureau that admitted thumb impression A1 did not tally with thumb impression Q2 mentioned in the Will presented before Sub Registrar and in view of the positive report of Finger Print Bureau that admitted thumb impression A1 did not tally with the register of document writer who had written the disputed Will. It is held that report of Finger Print Bureau is fatal to innocence of the accused in the present case.

(B) Testimony of PW5 Karam Singh is also fatal to the innocence of accused.

11. PW5 Karam Singh has specifically stated in positive manner that on dated 8.2.1995 deceased Phola Ram had executed a sale deed in favour of Nathu Ram qua 16 bighas 7 biswas of land. He has specifically stated that deceased Phola Ram had marked his thumb impression in his presence before document writer and before Sub Registrar. Testimony of PW5 Karam Singh that deceased Phola Ram had marked his thumb impression in sale deed on dated 8.2.1995 placed on record in his presence is also trustworthy, reliable and inspires confidence of the Court qua factum of admitted thumb impression of deceased Phola Ram. Testimony of PW5 is fatal to the innocence of accused. There is no evidence on record in order to prove that PW5 was any hostile animus against the accused at any point of time.

(C) Testimony of PW7 Pawan Kumar registration clerk is also fatal to the innocence of accused.

12. PW7 Pawan Kumar registration clerk has specifically stated in positive manner that as per record of Sub Registrar on dated 8.2.1995 deceased Phola Ram had executed sale deed in favour of Nathu Ram and same has been entered in the official register of Sub Registrar. Sub Registrar had obtained thumb impression of deceased Phola Ram at

the time of execution of sale deed in discharge of his official duty. Hence the admitted thumb impression of deceased Phola Ram is also proved on record beyond reasonable doubt as per testimony of PW7 registration Clerk. Testimony of PW7 is fatal to the innocence of accused. Testimony of PW7 is also trustworthy, reliable and inspire confidence of Court. There is no evidence on record in order to prove that PW7 has hostile animus against accused at any point of time.

(D) Even testimony of PW9 Balbir Singh is also fatal to the innocence of accused.

13. PW9 Balbir Singh has stated that he has passed finger print expert examination from CFPF/NCRB New Delhi and during eight years of his service he has compared many cases. PW9 has also stated in positive manner that admitted thumb impression of testator deceased Phola Ram A1 did not tally with Q2 obtained by Sub Registrar upon the back portion of the registered Will and also did not tally with Q4 thumb impression obtained by deed writer upon his deed register. Testimony of PW9 Balbir Singh is also trustworthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW9. Testimony of PW9 is fatal to the innocence of accused. There is no evidence on record in order to prove that PW9 has hostile animus against accused at any point of time.

(E) Testimony of PW2 Raj Kumar is also fatal to the innocence of accused.

14. PW2 Raj Kumar document writer has specifically stated that he has written the disputed Will on dated 3.8.1984. He has stated in positive manner that testator was not personally known to him. He has stated that testator was identified by accused Krishan Kumar and lamberdar Raghu Nath Singh. PW2 has stated in positive manner that accused Krishan Kumar had identified deceased Phola Ram in his presence when he had written disputed Will dated 3.8.1984. Testimony of PW2 is fatal to the innocence of accused. There is no evidence on record in order to prove that PW2 has hostile animus against the accused at any point of time. Testimony of PW2 is also trustworthy, reliable and inspire confidence of Court.

(F) Testimony of PW3 Nathu Ram is also fatal to the innocence of accused.

15. Even PW3 Nathu Ram document writer has stated in positive manner that he has executed the sale deed Ext PW3/A as per testator. He has stated that testator had marked his thumb impression in his presence. PW3 has admitted that deceased Phola Ram had marked his thumb impression in his presence during his life time when he executed sale deed dated 8.2.1995 in favour of Nathu Ram. PW3 Nathu Ram has also proved the factum of admitted thumb impression of

testator deceased Phola Ram. Testimony of PW3 is also trustworthy, reliable and inspires confidence of the Court and there is no reason to disbelieve the testimony of PW3 Nathu Ram. There is no evidence on record in order to prove that PW3 Nathu Ram has hostile animus against accused at any point of time. Testimony of PW3 is hostile to the innocence of accused.

(G) Recovery of sale deed, recovery of disputed Will and recovery of register of document writer proved beyond reasonable doubt.

16. In the present case recovery of sale deed, recovery of disputed Will and recovery of register of document writer proved on record beyond reasonable doubt as per testimony of PW1 Bidhi Singh. Recovery of disputed Will is proved as per testimony of PW1 Bidhi Singh. Recovery of register of document writer is proved by way of testimony of PW6 Kehar Singh and recovery of sale deed is proved as per testimony of PW13 Sahib Singh. Testimony of recovery witnesses are also trustworthy, reliable and inspire confidence of the Court. There is no reason to disbelieve the testimony of recovery witness. Accused did not adduce any defence witness in order to prove that recovery witnesses have hostile animus against accused person at any point of time. Testimonies of recovery witnesses are also fatal to the innocence of accused.

17. Submission of learned Advocate appearing on behalf of accused person that civil litigation is pending inter se the parties and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that civil proceedings and criminal proceedings are independent proceedings. Learned Advocate appearing on behalf of accused did not place on record any judgment and decree of the civil Court. It is well settled law that sub-judice of civil proceedings are not sufficient to drop criminal proceedings unless final adjudication is given by civil Court qua the genuineness of the Will in dispute.

18. Submission of learned Advocate appearing on behalf of accused that report of Finger Print Bureau is not sufficient to convict the accused in the present case is rejected being devoid of any force for the reason hereinafter mentioned. Director Finger Print Bureau has specifically stated in positive manner that admitted thumb impressions of testator deceased Phola Ram in sale deed dated 8.2.1995 did not tally with the thumb impression of testator mentioned in Q2 and Q4 in the disputed Will. Director Finger Print Bureau has further specifically stated that thumb impression mentioned at A1 and thumb impressions mentioned at Q2 and Q4 are of different person and are not of same person. It is well settled law that ridge characteristic of human being did not tally with each other. It is well settled law that finger print science is a perfect science. Thumb impression of deceased Phola Ram mentioned at Q2 was obtained by Sub Registrar when disputed Will was presented before Sub Registrar for registration and Sub Registrar has given certificate to this effect in discharge of his official duty and the same is

relevant fact under Section 35 of the Indian Evidence Act 1872. Disputed thumb impressions of testator were also obtained by document writer when he had entered the disputed Will in his document register i.e.Q4.

19. Submission of learned Advocate appearing on behalf of accused that the testimony of prosecution witness is not sufficient to convict accused Krishan Kumar is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that facts can be proved by way of testimony of a single witness. It is also well settled law that conviction can be sustained on the solitary evidence of the witnesses in a criminal case if testimony of witness is trustworthy, reliable and inspires confidence of the Court. (See **1973 SC 944 titled Jose Vs. State of Kerala. Also See AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh. And also see AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madra**s). Even as per Indian Evidence Act 1872 facts can be proved by way of oral evidence or by way of documentary evidence. Even as per Section 134 of the Indian Evidence Act no particular numbers of witnesses shall be required for the proof of any fact. It was held in case reported in **AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand** that law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. It was held by Hon'ble Supreme Court of India that Court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly un-reliable (3) Neither wholly reliable nor wholly unreliable. When the testimony of witness is wholly reliable then conviction could be sustained on the testimony of single witness if testimony of single witness is trustworthy, reliable and inspires confidence of the Court. It was held in case reported in 1997 (2) Crime 175 titled Raja Vs. State that reliance can be placed on the solitary statement of a witness if the Court comes to the conclusion that the said statement is true and is correct version of the case of the prosecution. It was held that Courts are concerned with the merit of the statement of a particular witness and Courts are not concerned with the number of witness examined by the prosecution.

20. Another submission of learned Advocate appearing on behalf of the accused that there are material contradictions in the testimony of prosecution case and on this ground appeal filed by the State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. Learned Advocate appearing on behalf of the accused did not point out any material contradiction which goes to the root of the case. It is proved on record that complaint was filed before the Chief Judicial Magistrate Kangra at Dharamshala and thereafter FIR No. 107/2001 was registered on dated 4.8.2001 and the statement of the prosecution witnesses were recorded in Court on dated 12.9.2003, 15.9.2003, 16.9.2003, 17.9.2003, 14.10.2003, 15.10.2003, 13.11.2003 and 5.8.2004 after a sufficient gap of time. It is well settled law that if testimony of the prosecution witness is recorded after a gap of sufficient time then minor contradictions are bound to come in a criminal case. It is well settled law principle of falsus in uno falsus in omnibus is not

applicable in criminal trials. (See **AIR 1980 SC 957 titled Bhe Ram Vs State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana**). It was held in case reported in **AIR 1987 SC 1328 titled Dalbir Singh and others Vs. State of Punjab** that there is no hard and fast rule which could be laid down for appreciation of evidence and it was held that each case should be decided as per proved facts. In the present case it is proved on record that beneficiary of the alleged Will is Harnam Singh and it is also proved on record beyond reasonable doubt that accused Krishan Kumar is real brother in law of Harnam Singh who is beneficiary of disputed Will dated 3.8.1984.

21. Submission of learned Advocate appearing on behalf of accused that specimen signatures of accused Krishan Kumar were obtained by learned trial Court and thereafter specimen signatures of accused Krishan Kumar and disputed will were sent for the opinion of hand writing expert and hand writing expert did not express any definite opinion and in view of the testimony of PW18 Dr Meenakshi Mahajan Assistant Director Documentary & Photography State Forensic Science Laboratory Shimla HP appeal filed by the State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the report submitted by PW18 Dr. Meenakshi Mahajan. The report submitted by Dr. Meenakshi Mahajan and the testimony of PW18 are not helpful to accused Krishan Kumar because accused Krishan Kumar has admitted in his statement recorded under Section 313 Cr PC in question No.3 that he has signed the disputed Will as a marginal witness. It is well settled law that facts admitted need not be proved as per Section 58 of the Indian Evidence Act 1872.

22. In view of the above stated facts we accept the appeal filed by State of HP and we affirmed the judgment and sentence passed by learned trial Court in criminal Case No.2-II/04/03 dated 7.11.2005 & 10.11.2005 and we set aside the judgment passed by learned first appellate Court dated 22.9.2008 announced in criminal appeal No.14-K/X/2005. The judgment and sentence passed by learned trial Court be executed forthwith in accordance with law. Records of the Courts below be sent back forthwith. Pending application(s) if any are also disposed of.

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

State of Himachal Pradesh .....Appellant.

Vs.

Sanjay Kumar & Others .....Respondents.

Cr. Appeal No. 345 of 2008
Reserved on: 18.9.2014
Decided on : 25.9.2014

Indian Penal Code, 1860- Section 498-A, 306 read with Section 34- The deceased was married to accused - accused ill-treated the deceased for her shortcomings in performing the household chores and for not bringing sufficient dowry-she committed suicide by jumping into a well - Held that, no specific allegations of cruelty constituting instigation to the deceased to commit the suicide were proved- Father of the deceased had deposed about generalized complaints made to him by his deceased daughter, no time or other details were given- He also deposed that the deceased and her husband had stayed in his house during Kala Mahina and Karwachauth, which shows that the relationships were not sour- PW-1 had not narrated the incident of ill-treatment to any person- PW-3 and PW-4 also made generalized allegations and had not given any specific detail- Testimony of PW-5 that the deceased had told him that she would not return to her matrimonial home as she was being ill-treated cannot be accepted as it was not deposed by PW-2- In these circumstances, the conclusion of the Trial Court that the Prosecution had failed to prove its case beyond reasonable doubt was duly supported by evidence- Appeal dismissed. (Para- 22, 23)

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

For the Respondents: Mr. Ramesh Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of acquittal, rendered on 31.12.2007, by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P., in Session Case No.49-G/VII/06, whereby the respondents have been acquitted for theirs

having committed offences punishable under Sections 498-A, 306 read with Section 34 of the Indian Penal Code.

2. Brief facts of the case, are, that, on 8th December, 2004, marriage of Rachna with accused Sanjay was solemnized as per Hindu rites. Other accused are stated to be her matrimonial relations. It has been alleged that the accused ill-treated Rachna by taunting her for her shortcomings in performing the household chores and hers not bringing sufficient dowry. She was not even permitted to move anywhere. She had been complaining all this, yet, every time she was pacified on the assurance of accused that in future the things would improve, but of no result. Thereafter on the intervening night of 23rd of October, 2005, she was being fed up with the ill-behavior of her in-laws, had committed suicide by jumping in the well. On receipt of intimation the parents of Rachna rushed to the Jawalamukhi Hospital, whereby they found her daughter dead. Statement of the father of the deceased was recorded. On the basis of which FIR was registered and investigation into the offence was commenced. During investigation, it was found that accused being her husband, father-in-law, mother-in-law, brother-in-law and sister-in-law had been ill-treating her and on such ill-treatment and maltreatment having been meted out by the accused to the deceased, she committed suicide by jumping in the well.

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

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

5. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They chose to lead evidence in defence and examined one Shri Kulbhushn as DW-1.

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

7. The State of H.P., is, aggrieved by the judgment of acquittal, recorded by the learned trial Court, in, favour of the accused/respondents. The Learned Assistant Advocate General has concertedly, and, vigorously contended, that, the findings of acquittal, recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction, and,

concomitantly an appropriate sentence, be also imposed upon the accused/respondents.

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

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

10. The first witness, who stepped into the witness box, in, proof of the prosecution case, is, PW-1, Dr. Puran Chand, who has proved the post mortem report comprised in Ex. PW-1/D. In his opinion the deceased had died owing to Antemortem drowning.

11. PW-2 Kashmir Singh, the father of the deceased deposes that the marriage of his deceased daughter with the accused Sanjay was solemnized on 8.12.2004. He further deposes that when she visited her maternal home after two months, she complained about the ill treatments being meted out to her by the accused. He Continues to deposes that his deceased daughter disclosed to him that the accused taunted her on account of shortcomings in performing the household work, besides he deposes that they also taunted her for not bringing sufficient dowry. He continues to depose that the deceased was not even permitted to visit any relation or to go out of the house. He deposes that when she visited her maternal home and stayed there for one month, accused Sanjay also accompanied her for 15-16 days. At that time, on advice having been meted to accused Sanjay and on her assuring that things were improved, they both left for matrimonial home. However he deposes that he was telephonically informed by his deceased daughter that there is no improvement in the behaviors of the accused and all of them are behaving in the same manner. He deposes that On 19.10.2005 he visited her daughter and on that date only sister-in-law as well as grand mother of the husband of the deceased were present in the house. When accused Sanjay and his mother had returned home after about one hour, they did not have any conversation with him.

He deposes that accused Sanjay assured him that the things would not be repeated whereas other refused to talk to him. On 23.10.2005 at about 12-12.30 a.m., accused Rachna has been deposed by this witness to have informed him telephonically that Rachna has fell down from the stairs and her condition is serious. Thereafter he made telephonic call by 12.30 a.m. and accused Ramesh told him that his daughter had fallen in the well and is in Civil Hospital Jawalmukhi. He further deposes that then they proceeded to the Hospital where they found their daughter lying dead on a cemented bench. His statement comprised in Ex. PW-2/A was recorded by the police. He deposes that he had also affixed his signatures on the inquest papers. In his cross-examination he deposes it to be correct that this marriage was arranged

by Joginder son of his sister-in-law. It is also admitted to be correct by this witness that in those days Joginder was posted in Police Station, Jawalamukhi. It is also stated to be correct that during the stay at my house accused Sanjay and his daughter visited the house of Jginder to participate in some birthday function. It is also admitted to be correct that when he visited his daughter on the eve of karwa chauth, he had taken some items to his daughter. It is also admitted to be correct that he had his lunch at the house of the accused. He further stated it to be incorrect that he was told by the accused that deceased visited Mandir by 8.00 p.m. and on returning home got photo snapped alongwith her husband at Jawalaji Bazar. It is correct that when he arrived at the Hospital, police was already there. It is admitted to be incorrect that his statement was recorded by the police after 9.00 a.m. at the instance of Joginder. He further deposes that he was not aware that the people from the house of accused used to go by the well to answer the call of nature. It is stated to be wrong that this occurrence took place by 8.45-9.00 p.m and within half an hour, he received the information telephonically. It is stated to be correct that after death of his daughter talks regarding return of dowry articles also took place. It is stated to be wrong to suggest that none of the accused has ill-treated his daughter.

12. PW-3 Pushpa Devi deposes that she had arranged the marriage of Rachna with accused Sanjay. She continues to depose that after marriage, all the accused started ill-treating the deceased Rachna on petty matters. She further deposes that when they used to give some money, the mother-in-law and sister-in-law of deceased used to take the same away. She further deposes that the accused used to taunt the deceased for bringing insufficient dowry. She further deposes that she had advised the deceased to settle in the house of in-laws and in case the ill-treatment is not stopped, the matter will be reported to the police. In her cross-examination she deposes that her statement was recorded after death of Rachna. She further deposes that she had stated before the police that the accused used to ask the deceased to come with dowry as and when she visits her parents. She further deposes that the money as was given by us to the deceased were used to be taken by her mother-in-law and sister-in-law (confronted with Ex. DA, wherein it is not recorded). She deposes it to be incorrect that the accused never ill-treated the deceased.

13. PW-4 Joginder Singh deposes that he was working as Home Guard in Police Station, Jawalamukhi. Rachna (deceased) has been deposed to be his cousin. He deposes that the deceased used to tell that accused persons, present in the Court, used to ill-treat her on petty matters. He continues to depose that the deceased apprised him that accused claims that less dowry has been provided. During Kala Mahina, accused Sanjay has been deposed to have stayed in the parental house of Rachna for 15 days. Accused Sanjay has been deposed to have advised to behave properly and no report was made to any authority with a hope that the matter will be settled. He further deposes that there was no improvement in the behavior of the accused. He deposes that Rachna is

not even permitted to talk to any of the relations and accused Sanjay has been deposed to have accompanied her in her all visits. He deposes that deceased was killed by the accused by throwing her in the well. In his cross-examination he stated it to be correct that before and after marriage, he used to visit the house of the accused. It is stated to be incorrect to suggest that after death of Rachna, he was present in the Hospital, when parents of the deceased came there. It is also stated to be incorrect that Rachna never complained to him about the ill treatments being meted out by the accused to her. It is stated to be wrong that the report was made to the police at his instance, on account of which he was making false statement.

14. PW-5 Praveen deposes that he was Pradhan of Gram Panchayat, Dharamshala Mahtan, in the year 2005. Kashmir Singh has been deposed to have asked him to accompany him to the house of his deceased daughter, as she was being ill-treated. He further deposes that on the eve of Chauwarakh of mother of Joginder, Rachna and Sanjay had also come. The deceased has been deposed have told them that she would not return to her matrimonial home as she was being ill-treated there. In his cross-examination he stated it to be incorrect that his statement was recorded after 11 days of the occurrence. He further deposes that he told to the police that he was told by the deceased that her in laws taunt her for brining less dowry.

15. PW-6 Joginder Singh deposes that deceased used to tell about the ill treatments being meted out by the accused to her. He further deposes that he had advised Rachna that things would improve. Rachna has been deposed by this witness to have taunted by the accused for bringing less dowry. He further deposes that on invitation, accused Sanjay and deceased Rachna had come to attend the chuwarkh of his mother. He further deposes that deceased Rachna was refusing to go back to her matrimonial homes as the accused ill-treat her. In his cross-examination he deposes it to be correct that on the eve of Karwachauth his brother had visited the house of Rachna for giving gifts etc. It is stated to be incorrect that they were told that Rachna had fell in the well and was shifted to the Hospital. He deposes that on death of Rachna, he does not visit her matrimonial house, yet he attended the funeral. He feigns ignorance qua the fact of his having told the police of the deceased having told to him about the ill-treatments being meted out to her by the accused on the ground of bringing less dowry.

16. PW-7 Dr. Vivek deposes that he has examined the deceased and on her examination, pulse and B.P was not perceptible. There was no respiration and puples dilated. He deposes that he started cardio-pulmonary prima cort alongwith oxygen inhalation; forty blood was oozing out from her nose. Despite all above measures, patient could not revive and was declared dead. He further deposes that there is no mark of injury on the body of the deceased. The body has been deposed to have handed over to the police for post mortem examination. MLC Ex. PW-7/A has been deposed to have issued by him which bears his signatures. He deposes that death could be caused by drowning in the

17. PW-8 HC Thakru Ram deposes that SHO Ranjeet Singh had deposited viserca parcel with him alongwith another parcel. Both the parcels were sealed with seal SDH of eight seals which were deposited alongwith docket and impression of the seal. He further deposes that entry was made in Register No. 19. He had brought the Malkhana register, viscera alongwith seal impression, docket sent to FSL Junga vide RC No. 180/21 on 26.10.2005 through C Pradeep Kumar, who had deposited the receipt qua the same with him on his return.

18. PW-9 Pradeep kumar deposes that one parcel sealed with seal SDH vide RC No. 180/21 had been deposited by him at FSL, Junga alongwith docket and handed over its receipt to MHC.

19. PW-10 ASI Sansar Chand deposes that on 23.10.2005 Constable Baldev Singh had brought Rukka Ex. PW-2/A, on the basis of which FIR Ex. PW-10/A was registered. On the reverse of Rukka he made endorsement Ex. PW-10/B. Rapat No. 10 dated 22.10.2005 has been deposed to be the correct copy of the original.

20. PW-11 SI Ranjit Singh deposes that a telephonic information was sent by the SHO to the police Station, which was reduced into writing, copy of which has been deposed to have comprised in Ex. PW-10/C. He further deposes that he alongwith police officials proceeded to CH, Jawalmukhi and moved application Ex. PW-7/B to SMO and procured MLC Ex. PW-7/A on 23.10.2005. He continues to depose that Kashmir Singh made statement Ex. PW-2/A at the CHC J/Mukhi, which was sent through C Baldev to the P.S for registration of the FIR. FIR comprised in Ex. PW-10/A was registered. Endorsement on the reverse of Rukka Ex. PW-10/B has been deposed to have made and thereafter he received the case file. Photographs of the dead body were got clicked. Inquest papers Ex. PW-1/B and Ex. PW-1/C were prepared in presence of witnesses. On an application comprised in Ex. PW-1/A, CMO, Dehra had conducted the postmortem of the deceased, report is comprised in Ex. PW-1/D. Site plan comprised in Ex. PW-11/A has been deposed to have prepared by him. Statements of the witnesses were recorded as per their version. He further deposes that the statement of PW Pushpa Devi Ex. DA was recorded as her version. He further deposes that on receipt of PMR viscera was also collected from the CMO alongwith clothes of the deceased. The viscera was sent to FSL which earlier had been deposited with MHC. Report Ex. PW-11/B was received from the FSL. The accused were arrested. He continues to depose that it the investigation it was found that the deceased was ill-treated by her in laws. He further deposes that on the closure of the investigation, he prepared the challan and presented before the Court. In his cross-examination he deposes that Ex. DA and Ex. DB were recorded correctly.

21. The deceased Rachna was married to accused Sanjay on 8.12.2004. She committed suicide by jumping in a well on 23.10.2005. The post mortem report comprised in PW-1/D proved by PW-1 ascribes the demise of deceased Rachna to Ante Mortem drowning. On the strength of the testimonies of the prosecution witnesses unraveling the fact of the deceased Rachna being ill-treated or maltreated by the

accused comprised in theirs taunting the deceased for her purported shortcomings in performing household chores as also hers bringing insufficient dowry hence constituting instigation as well actuation to the deceased to commit suicide as such it is contended that the accused are liable to be convicted and sentenced for the charge framed against them.

22. The forte of the prosecution case is bedrocked upon the testimonies of the prosecution witnesses. The forte would gain vigour only in the event of it having been convincingly established by the prosecution that any or each of the particularized specific acts of cruelty constituting instigation or actuation to the deceased to commit suicide were proximate to the occurrence as also it being satisfactorily proved that each of the purported acts of cruelty constituting actuation to the deceased to commit suicide were of such magnitude, potency and vigour that the deceased had no option but to take her life. In testing whether the prosecution has been able to prove the factum of each of the accused having with specificity in time indulged in the acts of cruelty, sequelling instigation or actuation to the deceased to take her life, an advertence initially is to be made to the testimony of the father of the deceased who appeared in the witness box as PW-2. A reading on his testimony unbares the factum of his having deposed qua generalized complaints having been made to him by his deceased daughter about the ill-treatment having been meted to her by the accused, constituted in their acts of theirs taunting her for her purported shortcomings in performing household chores as also of hers not bringing sufficient dowry. However the said acts attributed to each of the accused, lack disclosure qua specificity in time as also lack pronouncement with exactitude qua their potency and vigour. Moreover, the factum of his having deposed in his cross-examination that for a period of one month falling in the 'Kala Mahina', both his deceased daughter and her husband had stayed in their house as also his having visited the house of his deceased daughter on 'Karwa chauth' in the year in which the fateful incident took place, rather pronounces upon the fact that the relations inter-se the accused and his deceased daughter had not reached a boiling point nor were soured. Consequently, hence, it appears that he is concocting a story qua ill-treatment or maltreatment having been meted out to his deceased daughter by the accused. Preponderantly his having omitted to convey with exactitude or precision in his examination in chief as discussed hereinabove, the date, month and year when the purported acts of ill-treatment or maltreatment were meted to his deceased daughter by the accused as also his having omitted to convey the magnitude of the ill-treatment and it acquiring such propensity which drove the deceased to commit suicide, constrains this Court to conclude that hence occurrences, if any, which took place in the matrimonial home of the deceased, were mere trifles which hence did not constitute any instigation or actuation for the deceased to take her life. Also, the factum of non-revelation in the testimony of PW-1 that in immediate proximity to the fateful incident any purported ill-treatment as meted to the deceased by the accused and was so grave that it constituted actuation to the deceased to take her life, constrains this Court to

conclude that hence, the prosecution has been unable to portray that at a time proximate to the fateful incident the accused had indulged in such acts of ill-treatment or maltreatment to the deceased and in such propensity besides of such magnitude that the deceased was driven to take her life. Rather the factum of the admission of father of the deceased comprised in his cross-examination of his deceased daughter alongwith her husband having stayed at their house in 'Kala Mahina' as also his having visited her daughter on the occasion of 'karwa chauth' and his having had lunch at the house of the accused, to the contrary, conveys that the relations interse the accused and deceased never touched the boiling point, also besides it can also be concluded that the deposition of PW-2 in his examination in chief of the accused ill-treating and maltreating the deceased is smothered by admissions aforesaid made by the witness in his cross-examination. This Court has also scanned the testimonies of PWs 3 and 4, both of whom have taken to corroborate the testimony of PW-2. However theirs testimonies do not acquire any probative value in the face of theirs also like PW-2 having deposed in generalized and nebulous manner qua the facts constituting the purported ill-treatment and maltreatment meted out by the accused to the deceased. Therefore given the generalized allegations against the accused especially when they lack in specifity qua time as also lack in precision qua attribution of specific acts to each of the accused as also omitted to convey that such acts were committed at a time proximate to the fateful incident, obviously then such generalized allegations made by PW-4 and 5 against the accused on the strength of revelations made to them by the deceased cannot, hence acquire the force of potent instigatory factors which led the deceased to commit suicide. Even though, PW-5 has deposed the fact of the deceased on 3.9.2005 on the eve of 'Chawrakh' of the mother of Joginder having apprised him that she would not return to her matrimonial home as she is being ill-treated there, cannot constitute reliable evidence against the accused as the said fact has been omitted to be deposed by PW-2, hence, it appears that it being in contradiction to the testimony of PW-2, its sanctity stands eroded.

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

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

****

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

Mohd. Rashid ...Appellant/plaintiff No.1.

Vs.

Gulsher & Others ...Defendants/Respondents.

RSA No. 332 of 2002
Reserved on: 24.9.2014
Decided on: 26.9.2014

Specific Relief Act, 1963- Section 38- The plaintiff filed a suit for seeking permanent prohibitory injunction restraining the defendants from raising construction over the suit land with the allegations that there was a path on the same and defendants had no right to stop the path or to raise construction thereon – Held that the suit land was recorded as Abadi Deh in the Revenue record, therefore, all the villagers had a right over the suit land- Defendants had a right so possess the suit land as an Abadi Deh- The raising of construction by the defendants was not proved to be over and above the area in excess of their share in the Abadi Deh- The plaintiff had failed to prove the exact location where the actual or threatened invasion of their right was committed- Thus, the plaintiff had failed to prove his case.

(Para- 9)

For the Appellant: Mr.Karan Singh Kanwar, Advocate.

For the Respondents: Mr.G.D Verma, Sr. Advocate with Mr. B.C Verma, Advocate for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment and decree, rendered on 13.6.2002, in Civil Appeal No.99-CA/13 of 2001, by the learned District Judge, Sirmaur at Nahan, H.P., whereby, the learned First Appellate Court while allowing the appeal, preferred by the appellants/respondents, set aside the judgment and decree, rendered by the trial Court on 14.9.2001.

2. Brief facts of the case are that the plaintiffs/appellants have filed a suit for permanent injunction restraining the defendants/respondents from raising any construction in any manner over and upon their land comprised in Khata Khatauni No. 499 min/665, Khasra No. 73 min measuring 1-0 bigha situated in Mauza Devi Nagar, Paonta Sahib, District Sirmaur. It is alleged that there is a path in the aforesaid land and the respondents/defendants have no right title or interest in this land. It is also alleged that the defendants/respondents are trying to raise the construction on the path

aforesaid and are not ready to stop the construction despite repeated requests.

3. The defendants/respondents contested the suit by filing written statement wherein they have admitted the fact that they have no right title and interest over and upon the land in question but however they claim that they are using the path existing thereon . They further denied that they are causing interference in the land in question.

4. The plaintiffs/appellants did not choose to file the replication to the written statement of the defendant/respondent.

5. 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 to the relief of permanent injunction, as claimed? OPP
2. Relief.

6. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants, to the extent that the defendant/respondents were restrained from raising any type of construction over khasra No. 499/665 and over path in the aforesaid Khasra Number. In appeal, preferred before the learned first Appellate Court, against the judgment and decree of the learned trial Court, by the respondents/defendants, the learned first Appellate Court allowed the appeal by setting aside the judgment of the learned trial Court.

7. Now the plaintiff No.1/appellant has 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 25.7.2002, this Court, admitted the appeal, on, the hereinafter extracted substantial questions of law:-

1. Whether the learned District Judge has erred in dismissing the suit of the plaintiffs for permanent prohibitory injunction after holding the plaintiffs have proved their legal rights in the suit land but the plaintiffs have not proved the threatened acts of defendants No. 1 to 5 on the suit land when it is pleaded case of defendants No. 1 to 5 in the written statement that they have right of passage on the suit land?
2. Whether the learned District Judge has misconstrued, mis-interpreted and misapplied the pleadings and evidence on

record in reversing the judgment, decree dated 14.9.2001 of learned Sub Judge and the view taken by the learned District Judge is not possible on the basis of material on record?

Substantial questions of Law No. 1 and 2.

8. The learned counsel appearing for the plaintiff No.1/appellant has contended with force and vigour that the learned first appellate Court while having held that the plaintiffs/appellants are vested with a valid and subsisting right to use the suit land, it, was then legally insagacious, for the learned first appellate Court while reversing the judgment and decree of learned trial Court rendered in favour of the plaintiffs/appellants to hold that for want of proof of actual or threatened invasion qua the rights of the plaintiffs/appellants over/ upon the suit land, the suit of the plaintiffs/appellant necessitated dismissal. He further canvasses that the said reasoning as adopted by the learned first appellate Court to reverse the findings recorded in favour of the plaintiffs/appellants by the learned trial Court too is infirm as a perusal of the testimony of plaintiff No.1/appellant surges forth an inference that hence material and potent proof demonstrative of the factum of the respondents/defendants having indulged in acts of interference over/upon the settled rights of the plaintiff No.1/appellants in the suit land, had emanated.

9. On the other hand the learned counsel appearing for the defendants/respondents has fervently strained himself to canvass before this Court that the judgment and decree rendered by the first appellate Court has both legal force as well as is meritorious, hence necessitates vindication.

10. Preeminently, even if the plaintiffs/appellant may have proven the acts of invasion or threatened invasion, if any, attributed to the defendants/respondents and their resulting in the rights of the plaintiffs/appellants qua the suit land having come to be upsurged, nonetheless the gaze of both the Courts below ought to have centralized or focused upon the fact that the suit land which bears Khasra No. 73 Min. whereupon the acts of invasion or threatened invasion purportedly perpetrated at the instance of the defendants/respondents sequelling accrual of action in favour of plaintiffs/appellants, is recorded in the classification column in Jamabandis for the years 1963-64, 1994-95, to be “Abadi Deh”. In the ownership column of the apposite Jamabandies the entry of “Abadi Deh” exists, hence conveying the fact that the suit property is recorded in the ownership of the village proprietary body. Concomitantly, with the ownership of the suit land vesting in the village proprietary body and when it has not been portrayed or proven by potent evidence that the defendants/respondents did not have a compatible right with the plaintiffs/appellants in commensuration with their rights therein to possess it by rearing a construction thereon. Consequently, omission of above evidence, on record, constrains this Court to conclude

that hence the respondents/defendants too alongwith the plaintiffs/appellants had a right to possess the suit property recorded in the Jamabandis as 'Abadi Deh'. Obviously, when the connotation of the classification column of the Jamabandis apposite to the suit land while depicting it as 'Abadi Deh' is of it hence being the "site of village" or where the villagers have raised their residential houses, as a corollary then the respondents/defendants are to be concluded to have also raised their residential houses thereon. The raising of residential houses on the 'Abadi Deh' by the respondents/defendants has not been proved by the plaintiffs/appellants to be over and upon an area in excess to their share in the 'abadi'. In sequel thereto as such the claim of the plaintiffs of the respondents having invaded or threatened to invade their rights over/upon the suit land gets benumbed. The plaintiffs/appellants too have a right in the 'Abadi Deh' and too appear to have given the aforesaid connotation to the phrase "Abadi Deh" existing in the remark column qua the suit land in the apposite jamabandis, raised their houses thereon. Consequently, the acts of invasion or threatened invasion as attributed to the defendants/respondents by the plaintiffs/appellants while purportedly unsettling their possessory rights over and upon the suit land *de-hors* the fact that the plaintiffs/appellants may have proven the fact of invasion or threatened invasion having taken place at the instance of respondents/defendants in derogation to the rights of plaintiffs/appellant qua their possession in the 'Abadi Deh' too besides necessitated adduction of potent evidence comprised, in adduction into evidence of a Tatima delineating with specificity, exactitude and precision the exact area over and upon which the defendants/respondents had commenced or initiated their intrusion or invasion, either threatened or actual. The aforesaid best evidence as comprised in a Tatima, being appended alongwith the plaint and subsequently proved during the course of the recording of the deposition of plaintiff before the learned trial Court and its adequately demonstrating with precision the area over and upon which the acts of invasion either threatened or actual, at the instance of defendants/respondents commenced, in derogation to the rights of plaintiffs/appellant, hence, necessitating or warranting theirs being thwarted by this Court by rendering a decree of injunction in favour of the plaintiffs/appellants, is wanting. Omission of the aforesaid best evidence constrains this Court to conclude that the plaintiffs/appellants have not been able to prove with exactitude and precision the exact location in the suit land where acts of invasion either actual or threatened were committed or perpetrated by the respondents/defendants. Consequently, for lack thereof, this Court is constrained to dismiss the suit of the plaintiff. In sequel the appeal is dismissed and the impugned judgment and decree are maintained and affirmed. Both the substantial questions of law are answered in favour of the defendants/respondents and against the plaintiffs/appellants. No costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Naresh Verma ...Appellant.

Vs.

The New India Assurance Company Ltd. & others ...Respondents.

FAO No. 22 of 2007
Reserved on : 19.09.2014
Decided on: 26.09.2014

Motor Vehicle Act, 1988- Section 166- The claimants pleaded that the deceased had hired the vehicle for carrying the vegetables to be sold at Junga and to bring the household goods- vehicle owner had not disputed these facts– The Insurance Company pleaded that the deceased was travelling as a gratuitous passenger- however, no evidence was led to prove this fact- Owner admitted in his evidence that the deceased had hired the vehicle and was travelling as an owner of goods- Held, that the person who had hired the vehicle for transporting the goods cannot be said to be travelling as a gratuitous passenger and Insurance company is bound to satisfy the award. (Para – 19 to 27)

Cases Referred:

Sarla Verma & others versus Delhi Transport Corporation & another, AIR 2009 Supreme Court 3104,

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550

National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)

National Insurance Co. Ltd. v. Maghi Ram, 2010 ACJ 2096 (HP)

National Insurance Co. Ltd. v. Urmila, 2008 ACJ 1381 (P&H)

National Insurance Company Limited versus Smt. Teji Devi & others, FAO No. 9 of 2007

For the appellant: Mr. Narender Sharma, Advocate.

For the respondents: Mr. B.M. Chauhan, Advocate, for respondent No. 1.
Mr. R.G. Thakur, Advocate, for respondents No. 2 to 7.
Nemo for respondent No. 8, set ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 31st October, 2006, made by the Motor Accident Claims Tribunal-II, Shimla

(hereinafter referred to as "the Tribunal") in MAC Petition No. 59-S/2 of 2005, titled as Smt. Geeta and others versus Sh. Naresh Verma and others, whereby compensation to the tune of Rs.4,42,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of claimants No. 1 to 5 and the insurer-New India Assurance Company Limited was directed to satisfy the award at the first instance with liberty to recover the same from the owner-insured-appellant (hereinafter referred to as "the impugned award") on the grounds taken in the memo of appeal.

Brief facts:

2. The claimants filed claim petition before the Tribunal for grant of compensation to the tune of Rs. 15,00,000/- as per the break-ups given in the claim petition on the ground that the deceased, namely Shri Devender Kumar, became victim of the motor vehicular accident, which was caused by the driver, namely Shri Maan Singh, while driving the offending vehicle-Pick Up, bearing registration No. HP-51-2118, rashly and negligently on 11th November, 2004, at Kadhiar Nala near Junga at about 1.30 p.m., deceased sustained injuries and succumbed to the injuries.

3. It is averred in para 10 and 24 of the claim petition that the deceased had hired the offending vehicle for carrying vegetables from Damechi to Junga and had to purchase household goods, met with the accident. It is further pleaded that the deceased was earning Rs.16,000/- as a milk vendor and Rs.3,000/- as green grocer.

4. The owner-insured, the driver and the insurer-New India Assurance Company Limited resisted the claim petition on the grounds taken in the memo of objections.

5. The following issues came to be framed by the Tribunal on 6th January, 2006:

> *"1. Whether on 11.11.2004 at 1.30 P.M. at Kadhiar Nala, the respondent No. 2 was driving Pick Up No. HP-51-2118 rashly and negligently and as such caused the death of Sh. Devender Kumar? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether the driver of Pick Up was not holding valid and effective driving licence to drive Pick Up No. HP-51-2118 at the time of the accident? OPR*

4. Whether the owner of Pick UP was not having registration certificate and route permit at the time of accident? OPR

5. Whether the owner of the vehicle had permitted the driver to carry gratuitous passenger in the Pick Up in violation of the policy condition? OPR

6. Relief."

6. The parties have led evidence and placed on record various documents in support of their case. After scanning the evidence, oral as well as documentary, the claim petition came to be granted in terms of impugned award.

7. The claimants, the driver and the insurer-New India Assurance Company Limited have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

8. The appellant-insured has questioned the impugned award to the effect whereby right of recovery has been granted to the insurer-New India Assurance Company Limited to recover the amount from the owner-insured.

Issue No. 1:

9. The Tribunal has held that the driver of the offending vehicle had driven the vehicle rashly and negligently and had caused the accident. The owner-insured and the driver have not questioned the findings returned on issue No. 1. Thus, the findings returned on issue No. 1 are upheld.

10. Before I deal with issue No. 2, I deem it proper to determine issues 3 and 4.

Issue No. 3:

11. The insurer-New India Assurance Company Limited has failed to prove that the driver of the offending vehicle was not having the effective and valid driving licence to drive the same. The insurer-New India Assurance Company Limited has not questioned the findings returned on this issue. Even the appellant-owner-insured has not questioned the findings returned on issue No. 3 by the medium of this appeal. Accordingly, findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

12. It was for the insurer to plead and prove that the appellant-owner-insured had driven the offending vehicle without route permit and

registration-cum-fitness certificate, failed to do so. Accordingly, findings returned by the Tribunal on issue No. 4 are also upheld.

Issues No. 2 and 5:

13. I deem it proper to decide both these issues together as these are interlinked for the reason that the insurer-New India Assurance Company Limited has been directed to satisfy the award with right to recover the same from the owner-insured-appellant herein.

14. The claimants have proved that the deceased was a milk vendor and green grocer. The Tribunal, after scanning the evidence, oral as well as documentary, held that the deceased was earning Rs.3,000/- per month and the claimants have lost source of dependency to the tune of Rs.2,000/- per month, after making one third deduction towards personal expenses of the deceased.

15. It is pleaded that the age of the deceased was 28 years at the time of the accident. Thus, the Tribunal has rightly applied the multiplier of '18', which is just and proper in view of **Sarla Verma & others versus Delhi Transport Corporation & another,** reported in **AIR 2009 Supreme Court 3104,** upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120**.

16. It is apt to record herein that the appellant-owner-insured and the claimants have not questioned the said findings. Thus, the Tribunal has rightly held the claimants entitled to compensation to the tune of Rs. 2,000/- x 12 = Rs. 24,000/- x 18 = Rs. 4,32,000/- plus Rs.10,000/- conventional charges, needs no interference.

17. The insurer-New India Assurance Company Limited has pleaded that the deceased was travelling in the offending vehicle as a gratuitous passenger. It was for the insurer to plead and prove that the deceased was a gratuitous passenger, has not led any evidence to prove the same.

18. The claimants have specifically pleaded in paras 10 and 24 of the claim petition that the deceased had hired the offending vehicle for carrying vegetables to be sold at Junga and to purchase some household articles, met with the accident. The appellant-owner-insured has not denied the said factum in reply, but has admitted in para 6 of the reply, in reply to para 10 of the claim petition, that the deceased was travelling in the offending vehicle as owner of the goods. The driver has also not denied the said factum and has filed evasive reply, thus, stands admitted.

19. The insurer-New India Assurance Company Limited has specifically averred in para 6 of the reply on merits, in reply to para 10 of the claim petition, that the deceased was travelling in the offending vehicle as gratuitous passenger and was not travelling as owner of the goods, has not led any evidence. However, Shri Kishan Chand, father of

the deceased, has appeared as PW-1 before the Tribunal and has categorically denied the suggestion put to him in his cross-examination on behalf of the insurer that the deceased had taken lift in the offending vehicle, rather has stated that the offending vehicle was hired by the deceased.

20. The appellant-owner-insured has also appeared before the Tribunal as RW-1 on 23rd August, 2006, has admitted that the deceased had hired the offending vehicle and was travelling in the said vehicle as owner of the goods. Further, he has specifically denied the suggestion put to him by the insurer in his cross-examination that the deceased was travelling in the vehicle as gratuitous passenger and has also denied the suggestion that the goods were not carried in the said vehicle at the relevant point of time. It is apt to reproduce the statement of the appellant-owner-insured (RW-1) herein:

> *"Stated that I am owner of Mohindra Pick-up No. HP-51-2118. I have brought the Insurance and R.C. and copies of which are Ex. RA and Ex. RB. Shri Man Singh was the drier of the said vehicle at the time of accident and copy of the driving licence is Ex. RC. The vehicle was hired by Shri Devender Singh from Damechi to Sadhupul and was hired for carrying vegetables. The said vehicle met with an accident near Kadhair (Junga). Shri Devender had hired the vehicle. The accident took place due to fault in the tie rod bend as it was jammed. I have received the O.D. Claim of the vehicle.*
>
> *xxxxxxxxxxxxx*
>
> *(By respondent No. 3)*
>
> *I was not in the pick-up at the time of accident as I was at my residence. The vehicle is commercial and is used for transportation of goods. There were only driver and Devender were in the pick-up at the time of accident. There were goods (vegetables) in the pick-up. We have not maintained goods receipt book about transportation of the goods of the pick-up. I issue only receipt on plain paper if somebody makes demand. I cannot produce any record about transportation of the goods of the pick-up on the aforesaid day. Shri Devender was brother-in-law (Jija) of driver Man Singh. It is incorrect that both of them were using the vehicle for their personal work. It is incorrect that no goods were*

> *being transported in the vehicle. I was given a claim of Rs. 17,435/- by the insurance company as against my claim of Rs. 60,000/-. I cannot say that my entire claim was not paid due to policy violations and deductions were made. It is incorrect that Devender was travelling in the vehicle as gratuitous passenger without goods. I cannot say that the policy did not cover the risk of any other occupant.*
>
> *……."*

21. There is no evidence on the file to the effect that the deceased was travelling in the said vehicle as gratuitous passenger, as discussed hereinabove, he had hired the offending vehicle and was travelling in the said vehicle as owner of the goods. Thus, the Tribunal has fallen in error in holding that the deceased was travelling in the offending vehicle as gratuitous passenger.

22. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

23. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

> *"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in* ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)****wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and*

moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.

9. Learned counsel for the appellant had also relied upon the decision in ***National Insurance Co. Ltd. v. Maghi Ram****, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*

10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in ***National Insurance Co. Ltd. v. Urmila****,* ***2008 ACJ 1381 (P&H)****, wherein it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*

11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and

> *as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."*

24. Applying the test to the instant case, one comes to an inescapable conclusion that the deceased was travelling in the offending vehicle as owner of goods at the time of accident and not as a gratuitous passenger.

25. It was for the insurer to plead and prove that the deceased was a gratuitous passenger, which it has failed to do so.

26. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007** being the lead case, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** decided on 22nd August, 2014.

27. Applying the ratio to the present case, the offending vehicle was hired on the said date by the deceased for carrying vegetables and some household articles. The owner has accepted the request of the deceased and also the fare, but had not surrendered the possession of the vehicle and the same was in his control. Therefore, the Tribunal has fallen in error in granting the right of recovery to the insurer.

28. Thus, it is held that the deceased was travelling in the offending vehicle as owner of the goods, was not a gratuitous passenger, the owner-insured has not committed any breach and the Tribunal has wrongly decided issues No. 2 and 5, which are decided against the insurer and in favour of the appellant-owner-insured.

29. Viewed thus, the appeal is allowed, the impugned award is set aside and modified to the extent of right of recovery and the insurer is saddled with the liability.

30. The insurer-New India Assurance Company Limited is directed to deposit the awarded amount within eight weeks before the Registry and Registry, on deposition of the same, to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Shri Prakash Chand & another .....Appellants
Vs.
Himachal Road Transport Corporation & others ...Respondents

FAO No. 181 of 2007 a/w
Cross-Objections No. 246 of 2007
Decided on : 26.09.2014

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal awarded compensation to the extent of ₹11, 5000/- with interest @ 7.5% per annum from the date of claim petition till realization- The Tribunal had held that the Driver was liable and the accident was outcome of contributory negligence – held, that the compensation was adequate and cannot be said to be excessive, hence appeal dismissed.

(Para – 10)

For the appellants : Ms. Leena Guleria, Advocate vice Mr. G.R. Palsra, Advocate.

For the respondents: Mr. H.S. Rawat, Advocate, for respondents No. 1 & 2.

Mr. Ajay Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The appeal and the cross-objections are directed against the award dated 13th November, 2006, made by the Motor Accidents Claims Tribunal, Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 48 of 2003, titled as Sh. Prakash Chand & another versus Himachal Road Transport Corporation & others, whereby compensation to the tune of Rs.1,15,000/- with interest @ 7½ % per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimants-appellants herein and against respondents No. 1 & 2, i..e Himachal Road Transport Corporation through its Managing Director, Shimla and Himachal Road Transport Corporation Kangra Region, through its Regional Manager, Dharamshala, Distt. Kangra, (for short, the "impugned award".

2. The claimants have questioned the impugned award on the ground of adequacy of compensation.

3. By way of cross-objections, the owner has questioned the impugned award on the ground that the award amount is excessive.

4. Learned Counsel for respondents No. 1 & 2-Himachal Road Transport Corporation was asked to show on what ground he has filed the cross-objections, but he is not in a position to make a whisper.

5. However, I have gone through the cross-objections, are mis-conceived, hence dismissed.

6. I have scanned the evidence available on the file and gone through the impugned award.

7. The Tribunal has held that the driver was liable and the accident is outcome of contributory negligence.

8. The owner of the scooter-offending vehicle has not questioned the impugned award, thus it has attained finality, so far as it relates to him.

9. The claimants are brother and grand mother of the deceased. Parents of the deceased are not before this Court.

10. I am of the considered view that the compensation is adequate, cannot be said to be excessive, in any way. Thus, the impugned award is upheld. The appeal and the cross-objections are dismissed.

11. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

12. Send down the records after placing copy of the judgment on record.

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

CWP No. 9257 of 2011 alongwith CWP No.4499/2012 and CWP No.5076/2012
Reserved on: 24.9.2014
Decided on: 26.9. 2014

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1. CWP No. 9257 of 2011

Ramesh Sharma. ...Petitioner.

Versus

State of Himachal Pradesh and others. ...Respondents.

2. CWP No. 4499 of 2012

Mehar Singh and another. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

3. CWP No. 5076 of 2012

Sonali Purewal. …Petitioner.

Versus

State of Himachal Pradesh and others. …Respondents.

Constitution of India, 1950- Article 226, 25, 26, 48, 48A, 51A- **Prevention of Cruelty of Animals Act, 1960** – The animals sacrifice is not essential part of Hindu religion and is contrary to the basic rights of animal, hence broad directions issued prohibiting animal and birds sacrifices in temples and public places.

(Para- 85)

Cases Referred:

The Commissioner, Hindu Religious Endowments, Madras vrs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282

Davis v. Beason, (1888) 133 US 333

Adelaide Company v. The Commonwealth, 67 CLR 116

Ratilal Panachand Gandhi and ors. vs. State of Bombay and ors., AIR 1954 SC 388

Jamshed Ji. V. Soonabai, 33 Bom 122 (D)

Mohd. Hanif Quareshi and others vs. State of Bihar, AIR 1958 SC 731

Sardar Sarup Singh and others vs. State of Punjab and others, AIR 1959 SC 860

Mahant Moti Dass vs. S.P. Sahi, AIR 1959 SC 942

Durgah Committee, Ajmer and anr. Vs. Syed Hussain Ali and others, AIR 1961 SC 1402

Sardar Syedna Taher Saifuddin Sahib vs. State of Bombay, AIR 1962 SC 853

Tilkayat Shri Govindlalji Maharaj etc. vs. State of Rajasthan and others, AIR 1963 SC 1638

Shastri Yagnapurushdasji and others vs. Muldas Bhundardas Vaishya and another, AIR 1966 SC 1119

Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami etc. vs. The State of Tamil Nadu, AIR 1972 SC 1586

Acharya Jagdishwaranand Avadhuta etc. vs. Commissioner of Police, Calcutta and another, AIR 1984 SC 51

Abdul Jaleel and others vs. State of U.P. and others, AIR 1984 SC 882

Bijoe Emmanuel and others vs. State of Kerala and others, AIR 1987 SC 748

Dr. M. Ismail Faruquui and others vs. Union of India and others, (1994) 6 SCC 360

State of W.B. and others vs. Ashutosh Lahiri and others, (1995) 1 SCC 189

Union of India v. Wood Papers Ltd., (1991) 1 JT (SC) 151 : (AIR 1991 SC 2049)

Novopan India Ltd., Hyderabad v. C.C.E.& Customs, Hyderabad, (1994) 6 JT (SC) 80 : (1994 AIR SCW 3976)

A.S. Narayana Deekshitulu vs. State of A.P. and others, (1996) 9 SCC 548

Sri Adi Visheshwara of Kashi Vishwanath Temple Varanasi and others vs. State of U.P. and others, (1997)4 SCC 606

N.Adithayan vs. Travancore Devaswom Board and others, (2002)8 SCC 106

Commissioner of Police and others vs. Acharya Jagadishwarananda Avadhuta and anr, (2004)12 SCC 770

The Commissioner v. L. T. Swamiar of Srirur Mutt, 1954 SCR 1005

SSTS Saheb v. State of Bombay, 1962 (Supp) 2 SCR 496

Sesharnmal v. State of Tamil Nadu, (1972) 2 SCC 11

State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat and others, (2005) 8 SCC 534

MP Gopalakrishnan Nayar and another vs. State of Kerala and others, (2005)11 SCC 45

Javed and others vs. State of Haryana and others, (2003) 8 SCC 369

State of Karnataka and another vs. Dr. Praveen Bhai Thogadia, (2004) 4 SCC 684

M. Chandra vs. M. Thangamuthu and another, (2010) 9 SCC 712,

Union of India and others vs. Rafique Shaikh Bhikan and another, (2012) 6 SCC 265

N.R. Nair and others etc. etc. vs. Union of India and others, AIR 2000 Kerala 340

Animal Welfare Board of India vs. A. Nagaraja and others, (2014) 7 SCC 547

Abraham Braunfeld vs. Albert N. Brown, 6 L. Ed. 2d 563

Employment Division, Department of Human Resources of the State of Oregon v. Galen W. Black, 99 L Ed 2d 753

Minersville School Dist. Bd. of Ed. V Gobitis, 310 US 586, 594-595, 84 L Ed 1375, 60 S Ct 1010 (1940)

Reynolds v United States, 98 US 145, 25 L Ed 244 (1879)

Visha Lochan Madan vs. Union of India and ors., (2014) 7 SCC 707

For the Petitioner(s): Mr. Inder Sharma, Advocate in CWP No. 9257/2011.

Mr. B.R. Kashyap, Advocate in

CWP No.4499/2012

Ms. Vandana Misra, Advocate and

Mr. Shivank Singh Panta, Advocate

in CWP No. 5076/2012 .

For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. Anup Rattan, Addl. A.G. with Mr. Vivek Singh Attri, Dy. A.G. for the respondent State.

Ms. Seema Guleria, Advocate for respondent No.7 in CWP No. 5076/2012

Mr. Y.K. Thakur, Advocate for respondent No.8 in CWP No. 9257/2011.

Mr. Vivek Thakur, Advocate for respondent-Pollution Control Board.

Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate in CMP No. 14962/2014 & 14963/2014.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in all these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, for clarity sake, facts of CWP No.5076/2012 have been taken into consideration.

CWP No. 5076/2012

2. Petitioner claims that she is working for animal rights for the past ten years through "People for Animals", Kasauli as a State representative. The core issue raised in this petition is about the slaughtering of thousands of animals in the name of religious sacrifice held by devotees throughout the State of Himachal Pradesh. Petitioner has placed on record photographs of the animal sacrifice being performed. The State has not taken any effective steps to prevent the sacrifice of innocent animals. According to the petitioner, this practice is not in conformity with Article 51-A (h) of the Constitution of India. According to the petitioner, this practice is prevalent in Chamunda Devi temple in Kangra District, Hadimba Devi temple in Manali, Chamunda Nandi Keshwar Dham in Kangra, Malana in Kullu District, Dodra Kwar (Mahasu), Shikari Devi temple in Mandi District and Shri Bhima Kali Temple in Sarahan, Ani and Nirmand in Kullu District, Shilai in Sirmaur District and Chopal in Shimla District. Animals are beaten up mercilessly and dragged up to mountain slopes to meet their death. The scenic beauty of the religious places is not maintained. According to the petitioner, it takes 25 minutes to kill a buffalo bull. At times, buffalo runs amuck to save itself. The animals are mercilessly beaten up and chilies are thrown into their eyes. Petitioner has laid great stress for improved scientific and rational thinking by the people, who are indulged in this practice. Petitioner has also filed representation before the Deputy Commissioner, Kullu requesting to prevent sacrifice of animals at Dhalpur Maidan, Kullu. The insensitivity of the administration was highlighted in the newspaper "**The Times of India**" dated 23.10.2010. The larger beneficiaries of this practice are priests and the Mandir Committee, animal breeders and designated butchers community of the temples. Petitioner has sought direction to the State to stop illegal animal slaughtering in the temples and public places. She has also sought direction to the Deputy Commissioners of all the District of Himachal Pradesh to ensure complete ban on animal sacrifices in temples and public places. An action is also sought to be taken against the persons, who are indulging in this practice.

3. Respondents No. 1 to 5 have filed detailed reply. It is averred in the reply that as intimated by Superintendent of Police, Mandi on the application of Mehar Singh for taking legal action against persons, who were scarifying buffalos' calves in **Kamshaha Temple** on the eve of **Ashtami** and on the occasion of **Sharad Navaratars**, the local administration has stopped the evil for the last two years. The

Superintendent of Police, Shimla has informed that in some temples under the jurisdiction of Police Stations, Rampur, Rohru, Kotkhai, Jhakri and Chirgaon, animals, i.e. sheep and goats are offered to the **Devta** by the people of local villages when their wishes are fulfilled. The meat is distributed amongst the people gathered for the occasion. The practice of sacrificing animals in the name of deity at **Chamunda Devi** temple in Kangra District was not prevalent. According to the report of Superintendent of Police, Sirmaur, sacrifice of animals in temples was not prevalent in Sirmaur District for the last many years. However, in Shillai area, goats and sheep are sacrificed during festival season. In some temples of Nirmand and Anni areas of Kullu District animal sacrifice is being done but this tradition has been reduced. "**Bhunda**" and "**Shand**" ceremonies are celebrated after a gap of about 25 to 30 years in which sacrifice of goats and sheep is carried out in mass scale by observing "**Jhatka**". It is also stated in the reply that rituals which take place in the society are having the social sanction behind it. The rituals are attended to by the persons of the vicinity having similar religious faith. There is reference to section 28 of the Prevention of Cruelty of Animals Act, 1960 (hereafter referred to as the "Act" for brevity sake).

4. The Court on 28.9.2012 had directed to issue public notice in two newspapers, i.e. "**Amar Ujala**" and "**Dainik Jagran**" Himachal Pradesh Edition to given an opportunity to all the persons, who wanted to oppose or support the petition. The purpose of notice was to inform the general public that a writ has been filed in this Court challenging the practice of animal sacrifice for religious purposes in temples and other public places in Himachal Pradesh and anybody who wanted to oppose or support the petition could appear in the Court in support of or against the petition. Since a legal question was involved, they were not permitted to be impleaded as parties but they were permitted to intervene in the matter and file documents in support of their cases. In sequel thereto, notices were issued and a number of communications were received by the Court from various persons. These persons were advised to file proper affidavit. It was also made clear on 14.12.2012 that unless a proper affidavit was filed or a person was represented through counsel or appeared personally, no hearing could be given to them. On 18.6.2013 the following order was passed:

> **"We direct the State to place on record the affidavits of Secretary (Home) and the Secretary (Language, Art and Culture) to spell out the stand of the State in the context of the legal issue raised by the petitioner about the impermissibility of mass scale killing of animals in open and for that matter in religious places. If that is impermissible, the State should spell out the proposed regulatory measures that can be adopted by the State to eschew that activity. The affidavits be filed on or before 3rd July 2013. List this matter on 9th July 2913. The office to ensure**

that companion matters being CWP Nos. 9257 of 2011 and 4499 of 2012 shall also be listed on the next date."

5. The Secretary (Language, Arts and Culture) to the Government of Himachal Pradesh filed an application under rule 7 and 13 of Para-C of H.P. High Court (Original Side) Rules, 1997 seeking extension of time of three months to comply with the order dated 18.6.2013. It is averred in para 2 of the application that animal sacrifice practiced in some of the temples of the State is a religious practice that has deep roots in the religious cultural traditions of the community. There is a reference to section 28 of the Act. The deponent has referred the matter to the Advisory Department, i.e. Law Department for opinion and if required a suitable policy would be framed in consultation with the Home Department and other concerned departments. Thereafter, the Secretary (Language, Arts and Culture) filed the affidavit on 29.7.2013. Surprisingly, the Secretary (Language, Arts and Culture) has not proposed regulatory measures that could be adopted by the State to curb the activity. The deponent has placed on record Annexures R-1, R-2, R-3 and R-4 to show that such practices in some districts such as Sirmour, Shimla, Kullu and Lahaul-Spiti were in vogue. These sacrifices are performed at the time of local fairs and festivals. Some sacrifices are held after a gap of 12 – 20 years. Some sacrifices are performed when a local God or Goddess travels from one place to another and such journeys also happen after a gap of several years. There is a tradition of offering an animal to the presiding deity as a mark of respect when wish is fulfilled, which is sanctioned religious practice in some areas of the State. The practice of animal sacrifice has been regulated in several temples at the initiative of local committees and administration. However, it is pointed out that for some people it is a matter of faith, ritualistic worship and continuation of a tradition that are passed down from generation to generation. There are details of Scheduled Temples under Himachal Pradesh Public Religious Institution and Charitable Endowments Act, 1984. The animals are offered to the Gods and thereafter taken as a part of food by the devotees. Man has been a flesh eating animal for most part of the history. Non-vegetarianism is oldest habit that has been imbibed by humans. It is a world wide phenomenon and people belonging to every religion and culture are meat eaters. Thus, the practice of animal sacrifice cannot be seen in isolation. Rather, the rituals attached to the practice reflect the deep and embedded cultural moorings. Any change in the practice of such animal sacrifices must also be voluntary and participatory.

6. Now, as far as Bala Sundari Temple, Trilokpur, Sirmour is concerned, people take the animals as an offering to the Goddess, but these animals are sold by the temple on the same day. As per information received from the concerned district authorities regarding Scheduled Temples, animal sacrifices are not performed in some temples or no entry regarding animal sacrifices has been found in **Wajib-Ul-Arz**. Cultural practices always require deeper understanding. The Slaughter House Rules, 2001 are applicable to the Municipal Areas only. The

issues of cleanliness, safety and health are required to be addressed by the local temple committees.

7. Petitioner has filed detailed rejoinder to the reply filed by respondent No.5. According to the petitioner, section 28 does not sanction animal sacrifice. The stand of the State that this practice is continuous since time immemorial and is a deep rooted cultural trait does not provide any justification for its continuation because it contravenes the very spirit of the Constitution of India and the basic principles of a progressive and civilized society. The issue of vegetarians and non-vegetarians is irrelevant to the present context. Petitioner is not opposed to non-vegetarianism and meat eating, but the ethos behind sacrificing animals before a deity is embedded in superstition and contravenes the constitutional spirit of a scientific temper. Petitioner has also quoted the words of Mahatma Gandhi as under:

> **"The moral progress and strength of a nation can be judged by the care and compassion it shows towards its animals."**

8. The rituals attached to animal sacrifice reflect only cruelty, superstition, fear and barbarism and has nothing to do with either religion or culture. The practices like Sati, female feticide, child marriage, untouchability etc. were continuing since generations and were deeply ingrained in the social milieu, but have been almost eradicated with the education and reformation movements as well as judicial intervention.

9. One Sh. Bhajanand Sharma has filed his affidavit at page 134 of the paper book. According to the averments contained in the affidavit, animal sacrifice is a very cruel and barbaric practice and is far from the spirit of worship and reverence as the deponent has seen many a time goats, sheep and rams suffering in agony and crying out in pain during performance of sacrifice. The animals are sacrificed in the presence of other animals. It fills them with fear and dread and become a very depressing and painful sight of watch. Many villagers of the area avoid going to the temple premises. At such times, it is full of blood and corpses of sacrificed animals that becomes a very pathetic sight to encounter.

10. Sh. Khem Chand has also filed his affidavit at page 135 of the paper book. According to the averments contained in the affidavit, he was a "**Karyakarata**" of "**Devi Mandir Nal"** situated at Tehsil Theog. According to him, animal sacrifice is practiced in full public view in the premises of the temple during various festivals and also on a regular basis throughout the year. The ritual of animal sacrifice involves an unimaginable amount of cruelty towards the sacrificial animal which are often seen lying around in pain and suffering after receiving blows on their necks which usually does not kill them in first go. Sometimes, the animal tries to escape in a fatally wounded condition, which is very painful. He gave up being a "**Karyakarta"** of the temple and decided to

raise his voice for the cause of poor and helpless animals that are killed most mercilessly in the name of religion and God.

11. Sh. Kali Ram has also filed his affidavit at page 136 of the paper book. He has also deposed that animal sacrifice is practiced in the temple at various times throughout the year in full public view. He has seen that the goats, sheep and rams are held by four people and then the head is attempted to be cut off by one other person, which is not always successful in the first attempt as there is no check on the sharpness of the weapon/equipment being used for the sacrifice which may be blunt. At times inexperienced people try and participate in the ritual killing and it is abominable to see that sometimes it may take upto 15 blows to kill the sacrificial animal that keeps struggling in a brutally injured and bleeding condition. He is no more "**Karyakarta**" of the temple.

12. Sh. Mast Ram has filed his affidavit at page 137 of the paper book. He was also a "**Karyakarta**" of "**Shri Devta Kanishwar temple**" situated in village Ghamouri, Gram Panchayat, Mahog. According to him, "Khen Yagyan" is regularly carried out to propitiate the deity. The goats, sheep and rams are sacrificed in full public view. In case any villager avoids going there he is ostracized by the entire community. In the bloody ritual sacrifice more than 100 goats, sheep and rams are sacrificed in full public view without any regard to hygiene or ethical norms. There is no check on the sharpness of the slaughter equipment which is many times blunt and it takes a number of blows to kill the animal which presents a very depressing and traumatizing sight as the animal runs around and cries in pain with blood oozing from the blow. The smell and sight of blood in the temple precinct renders it a horrific sight to many of the villagers like him who dwell there and also to tourists who get shocked by the barbaric sacrifice being carried out in full public view.

13. Sh. Madhu Singh has also filed his affidavit at page 139 of the paper book. He was a "**Karyakarta**" of "**Shadi Devi**" temple situated at Matiana. According to him, animals like goats, sheep and rams are sacrificed in full public view and the whole practice entails a lot of cruelty that spoils the peace and tranquility of the temple. Throughout the year, on one pretext or the other, animals are continuously sacrificed both in the temple and in public places. **Bhunda** ceremony is practiced in their area and the goats, sheep and rams are massacred on a massive scale in the temple premises. "**Khen**" is also practiced in which animals are sacrificed at the home of the person who may have invited a "**Devta**". Animals sacrifice entails unimaginable cruelty and suffering to the animals.

14. Sh. Mathu Ram has also filed his affidavit at page 140 of the paper book. According to him, in "**Deviji Shadi**" temple he was working as "**Karyakarta**". Animal sacrifice is regularly practiced in full public view. The temple remains covered with blood stains and many times, local people who want to exercise their public right of visiting temples and carrying out peaceful worship gets distributed by the

activities of some regressive individuals and priests who carry out the sacrifice. The persons who raise their voice are threatened. "**Bhunda**" is also celebrated in their village after a gap of every five years in which hundred of sheep, goats and rams are killed in full public view. The animals are slaughtered in front of each other and many of them get frightened by their impending death. The open area in which the ritual is practiced is full of blood and stenches and presents a very horrific and unhygienic sight. The practice infuses fear and dread in animals that are sacrificed in the presence of each other. It is completely against the spirit of any religion as every religion teaches "**Karuna**" or compassion.

15. Sh. Nand Lal has also filed his affidavit at page 142 of the paper book. According to him, he was also a "**Karyakarta**" in the "**Shadi Devi Temple**". The sacrifice practiced is so horrific and cruel that most of the people do not even dare to watch the same what to speak of accepting the flesh of the sacrificed animal as **Prasad**. The rope is fastened behind the legs of the goat or sheep as well as to its horns, after which the animal's body is cruelly stretched way beyond its normal limit and is tied up both at the front as well as at the back. After a person gives blows with a weapon to the animal, he was horrified to say that many times inexperience person giving the blow or because of bluntness of the weapon, it takes as many as 15-20 blows to kill the sheep or goats in which the animal cries away in pain and the whole premises is covered with blood. Many times the person sacrificing the animal also drinks the blood which is horrific sight and sends shivers down one's spine about the kind of barbarism that is being practiced under the garb of religion. Animal sacrifice is not a form of worship but is in essence social evil that is based on superstition and violence against the helpless that goes against the spirit of Hinduism which preaches the spirit of "**Ahimsa**" and believes that God resides in every living being. The organizing committee of an ancient temple known as "**Devta Manleshwar**" situated at village Manan, P.O. Manan, Tehsil Theog, District Shimla has taken an appreciable move about 20-25 years ago by banning animal sacrifices in the temple during any religious and social ritual and instead prefer to perform the rituals and **Pujas** as per Vedic culture. According to him, worshipers of "**Devta Manleshwar"**, who are spread over two **Parganas** have neither encountered wrath or fury of the deity nor any natural calamity. He has termed the practice as blot on humanity and according to him the same is shame on the civilized society of the 21st century.

CMP Nos. 14962 of 2014 and 14963/2014

16. One Sh. Maheshwar Singh and Sh. Dot Ram Thakur have filed CMP Nos. 14962 of 2014 and 14963/2014, respectively, for recalling the order dated 1.9.2014. In the applications, there is a reference to "**Kalika Puran"**. According to the averments contained in these applications, animal sacrifice is going from the time immemorial and has taken shape of custom which is valid. Such practice cannot be considered to be either barbaric, inhuman and does not in any manner adversely affect the sentiments of the people at large. No opposition has been made till date by the **Haryans**, i.e. devotees of the deities. Sacrifice

of animals is well recognized even in various religious texts and the "**Balidan**" offering sacrifice at well recognized places in various religious **granths**. The practice of animal sacrifice is prevalent not only in the State of Himachal Pradesh but throughout the country. Animal sacrifice is part of the faith of the people connected with the religious sentiments. According to the applicants order 1.9.2014 is not in consonance with the principles of natural justice as the applicants have been deprived of their fundamental and legal rights.

CWP No. 9257/2011

17. This writ petition has been filed against the issuance of Annexure P-1 dated 1.10.2011 whereby the Sub Divisional Magistrate, Karsog has requested the Tehsildar, Karsog, District Mandi and the Station House Officer, Karsog to take appropriate and immediate steps to stop slaughtering of buffalos in and around "**Kamaksha Temple"** premises during "**Navratras"** and ensure that the law and order situation remains under control. Petitioner is a Wazir/Priest of the temple and is performing all the religious rituals and rights of "**Mata Kamaksha Devi**". Ritual and rights on "**Durga Asthmi**" are being performed by the family of the petitioner since time immemorial. According to him, the State Administration and the private respondents are interfering in the ritual practice performed by him. The respondents have not permitted the devotees to perform the rituals on "**Durga Asthmi**" and the buffalos which the devotees had brought in order to sacrifice were taken out by respondents No. 2,3,4 and 5 from the premises.

18. The Court on 27.10.2011 had directed the Deputy Commissioners of the State to file their separate affidavits after conducting appropriate inquiry as to whether it has come to their notice that animals have been killed in painful manner or whether there has been any sacrifices of animals in connection with any festival, religious or otherwise and whether it is the requirement of such festivals to have sacrifices of animals and if not what steps have been taken under the provisions of the Prevention of Cruelty to Animals Act, 1960 to prevent such unlawful activities. Thereafter, all the Deputy Commissioners have filed affidavits and few of them have given the details of the sacrifices being carried out in their respective jurisdiction.

19. Respondent No.2, i.e. Sub Divisional Magistrate-cum-Sub Divisional Officer (C), Karsog has filed the detailed reply to the petition. He has admitted that buffaloes were prevented from killings/slaughtering by respondent No.2 to 5 on the day of "**Durga Ashtmi/Navmi of Sharad Navratras**" since he was informed by various sections of society about merciless, cruel and painful killings of buffaloes in the **Kamaksha Temple** premises. He has received several representations to stop ill-practice of slaughtering of buffaloes. The Pradhan, Gram Panchayat, Bhanera was also opposed to the killings of buffaloes. He also came to know that buffaloes are killed in a cruel, merciless and painful manner and they would be hit only once with a sharp edged weapon and left to die in the open after inflicting injury. He has justified the issuance of

Annexure P-1. He has held the meeting with the members of the temple committee of **Mata Kamaksha Devi Temple**, Kao (Karsog), **Kardars** of the temple, priests, Pradhan Gram Panchayats, Bhanera, Pradhan Gram Panchayat Bagaila, Pradhan Temple Committee Pundri Naag, Pradhan Temple Committee Naroli Naag, Tehsildar, Karsog and Station House Officer, Karsog on 19.9.2011. Petitioner had also attended the meeting on 19.9.2011. Another round of meeting was also held on 2.10.2011 in the "**Kamaksha Temple"** premises. A meeting was also held on 30.9.2011. He has not interfered in any manner in the performance of rituals in the temple and all religious activities including Pooja except slaughtering of buffaloes. Nobody had opposed their presence in the temple.

20. According to the affidavit filed by Deputy Commissioner, Sirmaur, no painful killing of animals is carried out in District Sirmaur. However, in some areas of Sirmaur District, there are age old traditions of hosting community feasts wherein animal flesh is served and partaken to celebrate certain festivals.

21. According to the affidavit filed by Deputy Commissioner, Kullu during religious festivals, sacrifice of animals like buffalo, goat cock and fish is made as per the wishes of respective God and Goddesses since ancient times as is required by religion and as per report received, no case of painful killing has been reported in District Kullu.

22. Deputy Commissioner, Mandi has filed his affidavit. According to the averments contained in the affidavit, it was found that in **Kamaksha Temple**, Karsog, District Mandi, there had been a practice of slaughtering buffaloes on the day of **Durga Ashthami/Navami** in a painful manner. This practice was opposed by certain sections of the society in the past. He had directed the Sub Divisional Magistrate, Karsog to take sincere and serious efforts to dissuade the people responsible for such unwarranted act. Meetings were convened by the Sub Divisional Magistrate, Karsog with the Pujaris and priests of the temple committee.

23. Deputy Commissioner, Shimla has also filed his affidavit. According to the affidavit filed by him, in Sub Divisions, Chopal and Rohru in some fair like **Jagra Fair, Shand, Bhunda, Bakrid** etc., goats are offered to the local deity as the practice is customary and religious. People gathered from different **Kardaran** and it is mandatory requirement in such fair.

24. In the affidavit filed by the Deputy Commissioner, Chamba, it is stated that it has been reported during the course of inquiry that it has been found that there is requirement of sacrifices of animals on the occasion of traditional fairs and festivals. Some of the festivals are, Salooni, Jatar, Gadasru Mahadev, Khundi Maral, Kali Mandir Dantuin (Baisakhi), Chamunda Temple Devi Kothi (Baisakhi and Jatar) etc. The District Language Officer has informed vide letter dated 28.11.2011 that people occasionally sacrifice animals, i.e. sheep and goats, in the temples

of **Lord Shiva, Naag Devta** and **Kaali Bhagwati**. The people also offer animal sacrifice on the occasions of **Mundan ceremony, Shiv Poojan** and **Jagran** festivals and during **Mani Mahesh Yatra**, **Janamastami** and **Radha Ashthami**, the pilgrims coming from State like Jummu and Kashmir while going to Mani Mahesh sacrifice animals.

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25. Petitioner No.1 is an elected Village President. Petitioner No.2 was member of "**Kamaksha Temple**". According to the averments contained in the petition, he had launched the agitation against the sacrifice of animals in the "**Kamaksha Temple".** Respondents No. 4 to 9 were provoking the people against the petitioner and he was ready to sacrifice his life in order to save the innocent and poor animals. Respondent Nos.4 to 9 were mobilizing the people in their favour to continue with the practice. Petitioner belongs to poor and scheduled caste category. He has made several complaints and representations before the concerned authorities requesting them to intervene in the matter to stop merciless killing of animals in the name of "**Pooja Archana"**. Petitioners have prayed to ensure the safe lives of the poor and innocent animals being killed mercilessly in the name of Pooja.

26. Respondent Nos. 1 to 3 have filed reply. It is admitted in the reply that Mehar Singh has objected the sacrifice of buffalo calf at "**Kamaksha Temple"** during "**Navratras"**. Accordingly, no buffalo calf was sacrificed in the "**Kamaksha Temple"** during last year. It is also admitted that petitioner No.1 has lodged a report under SC & ST Act. It is also stated that if petitioner desires police security, he would be provided police security on his request.

27. Respondents No. 4,5,6,7, 8 and 9 have also filed replies. According to them, as per mythology, Goddess "**Durga"** vanquished "**Mahisasur:**, i.e. a "**demon in the form of buffalo**", and it started a tradition of sacrificing buffalo. The concept of sacrifice comes from basic fundamental fact that you offer any food that you eat to the God before you eat it. Animal sacrifice has been a tradition for a long period. They have neither terrorized nor persuaded the people to carry out animal sacrifice. "**Kamaksha Temple"** is dedicated to Goddess "**Durga**".

28. Ms. Vandna Misra, Advocate, has vehemently argued that the practice of animal sacrifice is against constitutional philosophy and spirit. The animal/bird sacrifice is not an essential part of the religious practice. Thus, it does not violate Articles 25 and 26 of the Constitution of India. She has also referred to provisions of the Prevention of Cruelty to animals Act, 1960. Mr. Inder Sharma, Advocate, has argued that Annexure P-1 in CWP No. 9257 of 2011 has been issued without any authority of law. Mr. B.R. Kashyap, Advocate, submitted that his clients are being victimized by the private respondents and The State has not taken effective steps to protect them. Mr. Shrawan Dogra, learned Advocate General has vehemently argued that the scope of judicial review in these matters is very limited. According to him also, the people have a

deep rooted faith in animal sacrifice though he has also submitted that the role of the State Government is practically of an 'umpire'. He has referred to Section 28 of the Prevention of Cruelty to Animals Act, 1960. Mr. Bhupinder Gupta, learned Senior Advocate, has referred to '*Kalika Puran'* to buttress his submission that this practice has religious-social sanctity behind it.

29. In the case of ***The Commissioner, Hindu Religious Endowments, Madras vrs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,*** reported in ***AIR 1954 SC 282,*** their lordships have held that "religion" is a matter of faith with individuals or communities and it is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being. It will not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral parts of religion and the forms and observances might extend even to matters of food and dress. Their Lordships have further held that what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. Their Lordships have further held that the language of Articles 25 and 26 is sufficiently clear to enable the Court to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. Freedom of religion in the Constitution of India is not confined to religious beliefs only, it extends to religious practices as well, subject to the restrictions which the Constitution itself has laid down. Their lordships have held as under:

> "17. It will be seen that besides the right to manage its own affairs in matters of religion which is given by cl. (b), the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away, where as the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which cl. (b) of the Article applies.
>
> What then are matters of religion? The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case --- -'Vide Davis

v. Beason', (1888) 133 US 333 at p. 342 (G), it has been said :

"that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with 'cultus' of form or worship of a particular sect, but is distinguishable from the latter."

We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Art 44(2), Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution-makers when they framed the Constitution.

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in ay Intelligent First Cause. A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conductive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion' in Art. 25. Latham, C. J. of the High Court of Australia while dealing with the provision of S. 116, Australian Constitution which 'inter alia' forbids the Commonwealth to prohibit the 'free exercise of any religion' made the following weighty observations ---- 'Vide Adelaide Company v. The Commonwealth', 67 CLR 116 at p. 127 (H) :

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil

government should not, interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The Section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion".

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-cl. (b).under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon cl (2) (a) of the Article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

19. The contention formulated in such broad terms cannot, we think be supported, in the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26(b).

What Art. 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and normality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices.

We may refer in this connection to a few American and Australian cases, all of which arose out of the activities or persons connected with the religious association known as "Jehova's witnesses". This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities.

In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the government was justified and that S. 116, which guaranteed freedom of religion under the Australian Constitution was not in any way infringed by the National Security Regulations - 'Vide 67 CLR 16 at p. 127 (H)'. These were undoubtedly political activities though arising out of religious belief entertained by a particular community.

In such cases, as Latham C. J. pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.

22. It is to be noted that both in the American as well as in the Australian Constitution the right to freedom

of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection, An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved.

Our Constitution-makers, however, have embodie the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Arts. 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only, it extends to religious practices as well subject to the restrictions which the Constitution itself had laid down. Under Art. 26(b), therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.

Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature, for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Art. 26 (d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law, and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.

A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other

> authority would amount to a violation of the right guaranteed under cl. (d) of Art 26."

30. In the case of ***Ratilal Panachand Gandhi and ors. vs. State of Bombay and ors.,*** reported in ***AIR 1954 SC 388***, have held that a religion is not merely an opinion, doctrine or belief. It has its outward expression in the Acts as well. Article 25 protects acts done in pursuance of religious belief as part of religion. For, religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines. The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. Their lordships have held as under:

> "10. Article 25 of the Constitution guarantees to every person and not merely to the citizens of India the freedom of cnscience and the right freely to profess, practise and propagate religion. This is subject, in every case to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the Article. Sub-cl. (a) of cl. (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-cl. (b) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices.
>
> Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people.
>
> What sub-cl. (a) of cl. (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.

12. the moot point for consideration, therefore, is where is the line to be drawn between what are matters of religion and what are not? Our Constitution-makers have made no attempt to define what religion' is and it is certainly not possible to frame an exhaustive definition of the word' religion' which would be applicable to all classes of persons. As has been indicated in the Madras case referred to above, the definition of 'religion' given by Fields, J. in the American case of - 'Davis v. Beason', (1888) 133 US 333 (B), does not seem to us adequate or precise.

"The term 'religion', thus observed the learned Judge in the case mentioned above, "has reference to one's views of his relations to His Creator and to the obligations they impose of reverence for His Being and Character and of obedience to his will. It is often confounded with 'cultus' or form of worship of a particular sect, but is distinguishable from the latter".

It may be noted that 'religion' is not necessarily theistic and in fact there are well-known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well.

We may quote in this connection the observations of Latham, C. J. of the High Court of Australia in the case of - 'Adelaide Co. v. The Commonwealth', 67 Com- W. L. R. 116 at p. 124 (C) where the extent of protection given to religious freedom by S. 116 of the Australian Constitution came up for consideration.

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts which are done in pursuance of religious

belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The section refers in express terms to the 'exercise' of religion, and therefore, it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursurance of religious belief as part of religion".

In our opinion, as we have already said in the Madras case, these observations apply fully to the provision regarding religious freedom that is embodies in our Constitution.

13. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking or commercial or economic, character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.

Of course, the scale of expenses to be incurred in connection with these religious observances may be & is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of - 'Jamshed Ji. V. Soonabai', 33 Bom 122 (D), and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad bai. Vyezashni, etc. which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think are quite appropriate for our present purpose.

"If this is the belief of the community",

thus observed the learned Judge,

"and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief - it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind".

These observations do, in our opinion, afford an indication of the measure of protection that is given by Art. 26(b) of our Constitution.

14. The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief Justice Latham pointed out in the case - 'vide 67 Com - WLR 116 at p. 129 (C)', referred to above, the court should take a commonsense view and be actuated by considerations of practical necessity. It is in the light of these principles that we will proceed to examine the different provisions of the Bombay Public Trusts Act, the validity of which has been challenged on behalf of the appellants."

31. In the case of ***Mohd. Hanif Quareshi and others vs. State of Bihar*** reported in ***AIR 1958 SC 731,*** their lordships of the Hon'ble Supreme Court have held that Bihar Preservation and Improvement of Animals Act, 1956, UP Prevention of Cow Slaughter Act, 1956 and C.P. & Berar Animal Preservation Act, 1949, so far they prohibit the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, are constitutionally valid. Their lordships have held that subject to restrictions, which Article 25 imposes, every person has a fundamental right under the Constitution not merely to entertain such a religious belief, as may be approved by his judgment or conscience, but to exhibit his belief and ideas in such overt acts as are enjoined are sanctioned by his religion and further to propagate his religious views for edification of others. The free exercise of religion by which is meant the performance of outwards acts in pursuance of religious beliefs, subject to State regulations, imposed to secure order, public health and morals of the people. Their lordships have further held that the sacrifice on Bakr-Id day is not an obligatory overt act for a Mussalman to exhibit his religious belief and idea and consequently, there was no violation of the fundamental rights of the Mussalmans under Article 25(1). Their lordships have held as under:

"13. Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be

convenient to take up first the complaint founded on Art. 25 (1). That article runs as follows :

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the rights freely to profess, practise and propagate religion."

After referring to the provisions of cl. (2) which lays down certain exceptions which are not material for our present purpose this Court has, in Ratilal Panachand Gandhi v. State of Bombay, 1954 SC R 1055 at pp. 1062-1063: (A I R 1954 S C 388 at p. 391) (B), explained the meaning and scope of this article thus:

"Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people."

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meager and it is surprising that of matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

"That the petitioners further respectfully submit that the said impugned section also violates the fundamental rights of the petitioners guaranteed under Art. 25 of the Constitution inasmuch as on the occasion of their Bakr Id Day, it is the religious practice of the petitioners' community to sacrifice a cow on the said occasion, the poor members of the community usually sacrifice one cow for every 7 members whereas suit would require one sheep or

one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned section the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practiced by all Muslims from time immemorial and recognised as such in India."

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Suarah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamiltion's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussalman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveler, the sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goates. So there may be an economic compulsion although there is no religious compulsion, It is also pointed out that from time immemorial the Indian Musslamans have been sacrificing cows and this practice, if not enjoyed, is certainly sanctioned by their religion and it amounts to their practice of religion protected by Art. 25. While the petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact emphasized by the respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id day. It is part of

the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad shah, it is said, prohibited cow slaughter,. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cow, We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day in an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners.

45. We now proceed to test each of the impugned Acts in the light of the aforesaid conclusions we have arrived at. The Bihar Act, in so far as it prohibits the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, is valid. The Bihar Act makes no distinction between she-buffaloes, bulls and bullocks (cattle and buffaloes) which are useful as milch or breeding or draught animals and those which are not and indiscriminately prohibits slaughter of she-buffaloes, bulls and bullocks (cattle and buffalo) irrespective of their age or usefulness. In our view the ban on slaughter or she-buffaloes, breeding bulls and working bullocks (cattle and buffalo) which are useful is reasonable but of those which are not useful is not valid. The question as to when a she-buffalo, breeding bull or working bullock (cattle and buffalo) ceases to be useful and becomes useless and unserviceable is matter for legislative determination. There is no provision in the Bihar Act in that behalf. Nor has our attention been drawn to any rule which may throw any light on the point. It is, therefore, not possible to apply the doctrine of severability and uphold the ban on the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo) which are useful as milch or breeding or working animals and strike down the ban on the slaughter of those which are useless. The entire provision banning the slaughter of she-buffaloes, breeding bulls, and working bullocks (cattle and

buffalo) has, therefore, to be struck down. The result is that we uphold and declare that the Bihar Act in so far as it prohibits the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, is constitutionally valid and we hold that, in so far as it totally prohibits the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo), without prescribing any test or requirement as to their age or usefulness, it infringes the rights of the petitioners under Art. 19 (1) (g) and is to that extent void.

46. As regards the U. P. Act we uphold and declare, for reasons already stated, that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but we hold that in so far as it purports to totally prohibit the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness, it offends against Art. 19 (1) (g) and is to that extent void."

32. In the case of ***Sardar Sarup Singh and others vs. State of Punjab and others***, reported in ***AIR 1959 SC 860***, their lordships have held that freedom of religion in our Constitution is not confined to religious beliefs only, but extends to essential religious practices as well, subject to the restrictions which the Constitution has laid down. Their lordships have held as under:

"7. We are unable to accept this argument as correct. Article 26 of the Constitution, so far as it is relevant for our purpose, says-

"Art. 26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) .....

(b) to manage its own affairs in matters of religion;

(c)

(d) to administer such property in accordance with law."

The distinction between Cls. (b) and (d) strikes one at once. So far as administration of its property is concerned, the right of a religious denomination is to be exercised in "accordance with law'', but there is no such qualification in Cl. (b). In The Commissioner, Hindu Religious Endowments, Madras v. Sri

> Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 at pp. 1023, 1026: (AIR 1934 SC 282 at pp. 289, 290) this distinction was pointed out by this Court and it was there observed: "The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose." Secondly, the expression used in Cl. (b) is 'in matters of religion'. In what sense has the word 'religion' been used? This was considered in two decisions of this Court: 1954 SCR 1005: (AIR 1954 SC 282), and Sri Venkataramana Devaru v. State of Mysore, 1958 SCR 895: (AIR 1958 SC 255) and it was held that freedom of religion in our Constitution is not confined to religious beliefs only, but extends to essential religious practices as well subject to the restrictions which the Constitution has laid down. In 1954 SCR 1005: (AIR 1954 SC 282) (Supra) it was observed at p. 1026 (of SCR): (at p. 290 of AIR) that under Art. 26(b), a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold (we emphasise here they word 'essential'). The same emphasis was laid in the later decision of 1958 SCR 895: (AIR 1958 SC 255), where it wad said that matters of religion in Art. 26(b) include practices which are regarded by the community as part of its religion. Two questions, therefore, arise in connection with the argument of learned counsel for the petitioners: (1) does S. 148-B added to the principal Act by the amending Act of 1959 have reference only to administration of property of 'Sikh gurdwaras and, therefore, must be judged by Cl. (d) of Art. 26 or (2) does it affect 'matters of religion' within the meaning of Cl. (b) of the said Article?"

33. In the case of ***Mahant Moti Dass vs. S.P. Sahi*** reported in ***AIR 1959 SC 942***, have held that granting "matters of religion", include practices which our religious denominations regards as part of its religion, none of the provisions of the Bihar Hindu Religious Trusts Act, interferes with such practices, nor do the provisions of the Act seek to divert the trust property or funds for purposes other than indicated by the founder of the trust. Their lordships have held as under:

"14. With regard to Art. 26, cls. (a) and (b), the position is the same. There is no provision of the Act which interferes with the right of any religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes; nor do the provisions of the Act interfere with the right of any religious denomination or any section thereof to manage its own affairs in matters of religion. Learned consel for the appellants has drawn our attention to Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255, where following the earlier decision in 1954 SCR 1005 : (AIR 1954 SC 282), it was observed that matters of religion included even practices which are regarded by the community as part of its religion. Our attention has also been drawn to Ratilal Panachand v. State of Bombay, 1954 SCR 1055 : (AIR l954 SC 388), in which it has been held that a religious sect or denomination has the right to manage its own affairs in matters of religion and this includes the right to spend the trust property or its income for religion and for religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. It was further held therein that to divert the trust property or funds for purposes which the charity commissioner or the court considered expedient or proper, although the original objects of the founder, could still be carried out, was an unwarranted encroachment on the freedom of religious institutions in regard to the management of their religious affairs. We do not think that the aforesaid decisions afford any assistance to the appellants. Granting that 'matters of religion' include practices which a religious denomination regards as part of its religion, none of the provisions of the Act interfere with such practices; nor do the provisions of the Act seek to divert the trust property or funds for purposes other than those indicated by the founder of the trust or those established by usage obtaining in a particular institution. On the contrary; the provisions of the Act seek to implement the purposes for which the trust was created and prevent mismanagement and waste by the trustee. In other words, the Act by its several provisions seeks to fulfil rather than defeat the trust. In our opinion, there is no substance in the argument that the provisions of the Act contravene Arts. 25 and 26 of the Constitution."

34. In the case of ***Durgah Committee, Ajmer and anr. Vs. Syed Hussain Ali and others,*** reported in ***AIR 1961 SC 1402***, their lordships have held that matters of religion in Article 26 (b) include even practices which are regarded by the community as part of its religion in order that the practices in question should be treated as part of religion, they must however, be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion, their claim for the protection under Article 26 may have to be carefully scrutinized. In other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other. Their lordships have held as under:

> "33. We will first take the argument about the infringement of the fundamental right to freedom of religion. Articles 25 and 26 together safeguard the citizen's right to freedom of religion. Under Art. 25 (1), subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and their right freely to profess, practise and propagate religion. This freedom guarantees to every citizen not only the right to entertain such religious beliefs as may appeal to his conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as may appear to him proper in order to spread his ideas for the benefit of others. Article 26 provides that subject to public order, morality and health every religious denomination or any section thereof shall have the right-
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> (a) to establish and maintain institutions for religious and charitable purposes;
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> (b) to manage its own affairs in matters of religion;
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> (c) to own and acquire movable and immovable property; and
>
> (d) to administer such property in accordance with law.
>
> The four clauses of this article constitute the fundamental freedom guaranteed to every religious denomination or any section thereof to manage its own affairs. It is entitled to establish institutions for religious purposes, it is entitled to manage its own

affairs in the matters of religion, it is entitled to own and acquire movable and immovable property and to administer such property in accordance with law. What the expression "religious denomination" means has been considered by this Court in Commr., Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar, 1954 SCR 1005: (AIR 1954 SC 282). Mukherjea, J., as he then was, who spoke for the Court, has quoted with approval the dictionary meaning of the word "denomination" which says that a "denomination" is "a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name." The learned Judge has added that Art. 26 contemplates not merely a religious denomination but also a section thereof. Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. Religion, according to him, is a matter of faith with individuals or communities and, it is not necessarily theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress (pp. 1023, 1024)((of SCR): (p. 290 of AIR). Dealing with the same topic, though in another context, in Venkataramana Devaru v. State of Mysore, 1958 SCR 895: (AIR 1958 SC 255), Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion. And in support of this statement the learned judge referred to the observations of Mukherjea, J., which we have already cited. Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices

> which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."

35. In the case of ***Sardar Syedna Taher Saifuddin Sahib vs. State of Bombay,*** reported in ***AIR 1962 SC 853***, their lordships have held that as the right guaranteed by Article 25 (1) is not confined to freedom of conscience in the sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the consequences of that practice must also bear the same complexion and be the subject of a like guarantee. Their lordships have also held that for example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. Their lordships have held as under:

> "17. It is not disputed that the petitioner is the head of the Dawoodi Bohra community or that the Dawoodi Bohra community is a religious denomination within the meaning of Art. 26 of the Constitution. It is not even disputed by the State, the only respondent in the case, that the petitioner as the head of the community had the right, as found by the Privy Council in the case of 75 Ind App 1 : (AIR 1948 PC 66) to excommunicate a particular member of the community for reasons and in the manner indicated in the judgment of their Lordships of the Privy Council. But what is contended is that, as a result of the enactment in question, excommunication has been completely banned by the Legislature, which was competent to do so, and that the ban in no way infringes Arts. 25 and 26 of the Constitution. I have already indicated my considered opinion that the Bombay Legislature was competent to enact the Act. It now remains to consider the main point in controversy, which was, as a matter of fact, the only point urged in support of

the petition, namely, that the Act is void in so far as it is repugnant to the guaranteed rights under Arts. 25 & 26 of the Constitution. Article 25 guarantees the right to every person, whether citizen or non-citizen, the freedom of conscience and the right freely to profess, practise and propagate religion. But this guaranteed right is not an absolute one. It is subject to (1) public order, morality and health, (2) the other provisions of Part III of the Constitution, (3) any existing law regulating or restricting an economic, financial, political or other secular activity which may be associated with religious practice, (4) a law providing for social welfare and reform, and (5) any law that may be made by the State regulating or restricting the activities aforesaid or providing for social welfare & reform. I have omitted reference to the provisions of Explanations I & II and other parts of Art. 25 which are not material to our present purpose. It is noteworthy that the right guaranteed by Art. 25 is an individual right, as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by Art. 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practise and propagate his religion, and everyone is guaranteed his freedom of conscience. The question naturally arises : Can an individual be compelled to have a particular belief on pain of a penalty, like excommunication ? One is entitled to believe or not to believe a particular tenet or to follow or not to follow a particular practice in matters of religion. No one can, therefore, be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practices. The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though, his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been

guaranteed the right to practice and propagate his religion, subject to the limitations aforesaid. His right to practice his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the Legislature has declared to be of a penal character. Laws made by a competent legislature in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well-being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent legislature. It was on such humanitarian grounds, and for the purpose of social reform, that socalled religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a god to function as a devadasi, or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation.

56. I am unable to accept any of these contentions as correct. (1) First I do not agree that the readings do not sufficiently raise the point at if excommunication was part of the "practice of a religion" the consequences that flow therefrom were not also part of the "practice of religion". The position of the Dai as the religious head of the denomination not being disputed and his power to excommunicate also not being in dispute and it also being admitted that places of worship and burial grounds were dedicated for the use of the members of the denomination, it appears to me that the consequence of the deprivation of the use of these properties by persons excommunicated would be logical and would flow from the order of excommunication. It could not be contested that the consequence of a valid order of excommunication was that the person excommunicated would cease to be entitled to the benefits of the hosts created or founded for the

denomination or to the beneficial use or enjoyment of denominational property. If the property belongs to a community and if a person by excommunication ceased to be a member of that community it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community. When once it is conceded that the right guaranteed by Art. 25 (1) is not confined to freedom of conscience in the sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the consequences of that practice must also bear the same complexion and be the subject of a like guarantee.

57. (2) I shall reserve for later consideration the point about the legislation being saved as a matter of social reform under Art. 25 (2) (b), and continue to deal with the argument that the impugned enactment was valid since it dealt only with the consequences on the civil rights, of persons ex-communicated. It has, however, to be pointed out that though in the definition of "excommunication" under S. 2 (b) of the impugned Act the consequences on the civil rights of the excommunicated persons is set out, that is for the purpose of defining an "excommunication". What I desire to point out is that it is not as if the impugned enactment saves only the civil consequences of an excommunication not interfering with the other consequences of an excommunication falling within the definition. Taking the case of the Dawoodi Bohra community, if the Dai excommunicated a person on the ground of forswearing the basic tenets of that religious community the Dai would be committing an offence under S. 4, because the consequences according to the law of that religious denomination would be the exclusion from civil rights of the excommunicated person. The learned Attorney-General is therefore not right in the submission that the Act is concerned only with the civil rights of the excommunicated person. On the other hand, it would be correct to say that the Act is concerned with excommunications which might have religious significance but which also operate to deprive persons of their civil rights."

36. In the case of ***Tilkayat Shri Govindlalji Maharaj etc. vs. State of Rajasthan and others,*** reported in ***AIR 1963 SC 1638***, their

lordships have held that religious practice to which Article 25 (1) refers and affairs in matters of religion to which Article 26(b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Article 25 (1) and Article 26(b), extends to such practices. In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. Their lordships have held as under:

> "57. In 1958 SCR 895 at p. 909: (AIR 1958 SC 255 at p. 264) Venkatarama Aiyar J. observed
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> "that the matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion."
>
> It would thus be clear that religious practice to which Art. 25(1) refers and affairs in matters of religion to which Art. 26(b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Article 25(1) and Art. 26 (b) extends to such practices.
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> 58. In deciding the question as to whether a given religious practice is an integral part of the religion or not the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the, formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the

> Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of Durgah Committee Ajmer v. Syed Hussain Ali, 1962-1 SCR 383 at p. 411: (AIR 1961 SC 1402 at p. 1415) and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26."

37. In the case of ***Shastri Yagnapurushdasji and others vs. Muldas Bhundardas Vaishya and another*****,** reported in ***AIR 1966 SC 1119***, their lordships have held that it is difficult to explain/ define Hindu religion. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any philosophic concept; it does not follow any one set of religious rites or performance; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more. Their lordships have held as under:

> "27. Who are Hindus and what are the broad features of Hindu religion, that must be the first part of our enquiry in dealing with the present controversy between the parties. The historical and etymological genesis of the word "Hindu'' has given rise to a controversy amongst indologists; but the view generally accepted by scholars appears to be that the word "Hindu'' is derived from the river Sindhu otherwise known as Indus which flows from the Punjab. "That part of the great Aryan race'', says Monier Williams, "which immigrated from Central Asia, through the mountain passes into India, settled first in the districts near the river Sindhu (now called the Indust). The Persians pronounced this word Hindu and named their Aryan brethren Hindus. The Greeks, who probably gained their first ideas of India from the Persians, dropped the hard aspirate, and called the Hindus 'Indoi *("Hinduism by Monier Williams, p.1.)*

28. The Encyclopaedia of Religion and Ethics, Vol. VI, has described "Hinduism'' as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p. 636). As Dr. Radhakrishnan has observed: "The Hindu civilization is so called, since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indust) river system corresponding to the North-West Frontier Province and the Punjab. This is recorded in the Rig Veda, the oldest of the Vedas, the Hindu scriptures which give their name to this period of Indian history. The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western invaders *(The Hindu view of Life'' by Dr. Radhakrishnan, P. 12)*. That is the genesis of the word "Hindu''.

29. When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.

30. Confronted by this difficulty, Dr. Radhakrishnan realised that "to many Hinduism seems to be a name without any content. Is it a museum of beliefs, a medley of rites, or a mere map, a geographical expression *(The Hindu View of Life'' by Dr. Radhakrishnan, p. 11)*?'' Having posed these questions which disturbed foreigners when they think of Hinduism. Dr. Radhakrishnan has explained how Hinduism has steadily absorbed the customs and ideas of peoples with whom it has come into contract and has thus been able to maintain its supremacy and its youth. The term 'Hindu', according to Dr. Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods,

and practised different rites *(The Hindu view of Life" by Dr. Radhakrishnan, p. 12)* (Kurma Purana.).

31. Monier Williams has observed that "it must be borne in mind that Hinduism is far more than a mere form of theism resting on Brahmanism. It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country, and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.....The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds. *(Religious Thought & Life in India" by Monier Williams, p. 57)*

32. We have already indicated that the usual tests which can be applied in relation to any recognised religion or religious creed in the world turn out to be inadequate in dealing with the problem of Hindu religion. Normally, any recognised religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. Does this test apply to the Hindu religion? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr. Radhakrishnan in his work on Indian Philosophy (6)*. Unlike other countries. India can claim that philosophy in ancient India was not an auxiliary to any other science or art, but always held a prominent position of independence. The Mundaka Upanisad speaks of Brahma-Vidya or the science of the eternal as the basis of all sciences, 'sarva-vidya-pratistha. According to Kautilya, "Philosophy" is the lamp of all the sciences, the means of performing all the works, and the support of all the duties "In all the fleeting centuries of history" says Dr. Radhakrishnan, "in all the vicissitudes through which Indian has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage and they will be the characteristic marks of the Indian people so long as they are

privileged to have a separate existence''. The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets Truth is one but wise men describe it differently (6-A)*. The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the inter-relation between the individual and universal soul. "If we can abstract from the variety of opinion'', says Dr. Radhakrishnan, "and observe the general spirit of Indian thought. We shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and express itself in even mutually hostile teachings *(Indian Philosophy'' by Dr. Radhakrishnan, Vol. I, pp. 22-23.)*

33. The monistic idealism which can be said to be the general distinguishing nature of Hindu Philosophy has been expressed in four different forms: (1) Nondualism or Advaitism; (2) Pure monism, (3) Modified monism, and (4) Implicit monism. It is remarkable that these different forms of monistic idealism purport to derive support from the same Vedic and Upanishadic texts. Shankar, Ramanuja, Vallabha and Madhva all based their philosphic concepts on what they regarded to be the synthesis between the Upanishads, the Brahmasutras and the Bhagwad Gita. Though philosophic concepts and principles evolved by different Hindu thinkers and philosophers varied in many ways and even appeared to conflict with each other in some particulars, they all had reverence for the past and accepted the Vesas as sole foundation of the Hindu philosophy. Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view. That is how "the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the

> truth*(bid, p.48.)*When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for ex-communicating any notion or principl*e as heretical and rejecting it as such."*

Their lordships have further held that the development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstitions and that led to the formation of different sects. Budha started Budhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion. Their lordships have also held that all of them revolted against the dominance of rituals and powers of priestly class with which it came to be associated and all of them proclaimed their teachings not in Sanskrit which was the monopoly of the priestly class, but in the languages spoken by the ordinary mass of people in their respective religions. Their lordships have held as under:

> "36. Do the Hindus worship at their temples the same set or number of gods? That is another question which can be asked in this connection; and the answer to this question again has to be in the negative. Indeed, there are certain sections of the Hindu community which do not believe in the worship of idols; and as regards those sections on the Hindu community which believe in the worship of idols, their idols differ from community to community and it cannot be said that one definite idol or a definite number of idols are worshipped by all the Hindus in general. In the Hindu Pantheon the first gods that were worshipped in Vedic times were mainly Indra, Varuna, Vayu and Agni. Later, Brahma, Vishnu and Mahesh came to be worshipped. In course of time, Rama and Krishna secured a place of pride in the Hindu Pantheon, and gradually as different philosophic concepts held sway in different sects and in different sections of the Hindu community, a large number of gods were added, with the result that today, the Hindu Pantheon presents the spectacle of a very large number of gods who are worshipped by different sections of the Hindus.
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> 37. The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to removed from the Hindu thought and practices elements of corruption and superstition and that led to the formation of

different sects. Buddha started Buddhism: Mahavir founded Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayanada founded Arya Samaj, and Chaitanaya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

38. There are some remarkable features of the teachings of these saints and religious reformers. All of them revolted against the dominance of rituals and the power of the priestly class with which it came to be associated: and all of them proclaimed their teachings not in Sanskrit which was the monopoly of the priestly class, but in the languages spoken by the ordinary mass of people in their respective regions.

40. Tilak faced this complex and difficult problem of defining door or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak: "Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion *(ilak's Gitarahasaya".).* This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: "When we pass from the plane of social practice to the plane of intellectual outlook. Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are compl*ementary("The Present day*

experim*ent in Western Civilisation" by Toynbee, page 46-49.).*

48. It is necessary at this stage to indicate broadly the principles which Swaminarayan preached and which he wanted his followers to adopt in life. These principles have been succinctly summarised by Monier Williams. It is interesting to recall that before Monier Williams wrote his Chapter on Swaminarayan sect, he visited the Wartal temple in company with the Collector of Kaira on the day of the Purnima, or full moon of the month of Kartik which is regarded as the most popular festival of the whole year by the Swaminarayan sect. On the occasion of this visit, Monier Williams had long discussions with the followers of Swaminarayan and he did his best to ascertain the way Swaminarayan's principles were preached and taught and they way they were practised by the followers of the sect. We will now briefly reproduce some of the principles enunciated by Swaminarayan.

"The killing of any animal for the purpose of sacrifice to the gods is forbidden by me. Abstaining from injury is the highest of all duties. No flesh meat must ever be eaten, no spirituous or vinous liquor must ever be drunk, not even as medicine. My male followers should make the vertical mark (emblematical of the footprint of Vishnu or Krishna) with the round spot inside it (symbolical of Lakshmi) on their foreheads. Their wives should only make the circular mark with red powder or saffron. Those who are initiated into the proper worship of Krishna should always wear on their necks two rosaries made of Tulsi wood, one for Krishna and the other for Radha. After engaging in mental worship, let them reverently bow down before be pictures of Radha and Krishna, and repeat the eight syllabled prayer to Krishna (Sri -Krishnan Saranam mama, 'Great Krishna is my soul's refuge') as many times as possible. Then let them apply themselves to secular affairs. Duty (Dharma) is that good practice which is enjoined both by the Veda (Sruti) and by the law (Smriti) founded on the Veda. Devotion (Bhakti) is intense love for Krishna accompanied with a due sense of his glory. Every day all my followers should go to the Temple of God, and there repeat the names of Krishna. The story of his life should be listened to with the great reverence, and hymns in his praise should be sung on festive days. Vishnu, Siva, Ganapati (or Genesa), Parvati, and the Sun: these

> five deities should be honoured with worship Narayana and Siva should be equally regarded as part of one and same Supreme Spirit, since both have been declared in the Vedas to be forms of Brahma. On an account let it be supposed that difference in forms (or names) makes any difference in the identity of the deity. That Being, known by various names-such as the glorious Krishna, Param Brahma, Bhagavan, Purushottama-the cause of all manifestations, is to be adored by us as our one chosen deity. The philosophical doctrine approved by me is the Visishtadvaita (of Ramanuja), and the desired heavenly abode is Goloka. There to worship Krishna and be united with him as the Supreme Soul is to be considered salvation. The twice-born should perform at the proper seasons, and according to their means, the twelve purificatory rites (sanskara), the (six) daily duties, and the Sraddha offerings to the spirits of departed ancestors. A pilgrimage to the Tirthas, or holy places, of which Dvarika (Krishna's city in Gujarat) is the chief, should be performed according to rule. Alms giving and kind acts towards the poor should always be performed by all. A tithe of one's income should be assigned to Krishna; the poor should give a twentieth part. Those males and females of my followers who will act according to these directions shall certainly obtain the four great objects of all human desires-religious merit. Wealth, pleasure, and beatitude *("Religious Thought and Life in India" by Monier Williams, pp. 155-158."*

38. In the case of ***His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami etc. vs. The State of Tamil Nadu***, reported in ***AIR 1972 SC 1586***, their lordships have held that the protection of Articles 25 and 26 is not limited to the matters of doctrines or belief. They extend also to acts done in pursuance to religion and therefore, contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. What constitutes an essential part of a religious or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion. Their lordships have held as under:

> "12. This Court in Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, (1962) Supp. 2 SCR 496 = (AIR 1962 SC 853) has summarised the position in law as follows (pages 531 and 532).

> "The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the Commr. Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar, 1954 SCR 1005 = (AIR 1954 SC 282); Jagannath Ramanuj Das v. State of Orissa, 1954 SCR 1046 = (AIR 1954 SC 400) 1958 SCR 895 = (AIR 1958 SC 255) Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383 = (AIR 1961 SC 1402), and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles in not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded and include practices which are regarded by the community as a part of its religion."

39. In the case of ***Acharya Jagdishwaranand Avadhuta etc. vs. Commissioner of Police, Calcutta and another***, reported in ***AIR 1984 SC 51***, their lordships have held that performance of Tandava dance by Anandmargis in procession or at public places is not an essential religious rite to be performed by every Anandmargi. Their lordships have held as under:

> "8. We have already indicated that the claim that Ananda Marga is a separate religion is not acceptable in view of the clear assertion that it was not an institutionalised religion but was a religious denomination. The principle indicated by Gajendragadkar, C. J., while speaking for the Court in Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya (1966) 3 SCR 242 : (AIR 1966 SC 1119), also supports the conclusion that Anand Marga cannot be a separate religion by itself. In that case the question for consideration was whether the followers of Swaminarayan belonged to a religion different from that of Hinduism. The learned Chief Justice observed:
>
> "Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had

crept into it, a sect was born which was governed by its own tenets, but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy."

The averments in the writ petition would seem to indicate a situation of this type. We have also taken into consideration the writings of Shri Ananda Murti in books like Carya-Carya, Namah Shivaya Shantaya, A Guide to Human Conduct, and Ananda Vachanamritam. These writings by Shri Ananda Murti are essentially founded upon the essence of Hindu philosophy. The test indicated by the learned Chief Justice in the case referred to above and the admission in paragraph 17 of the writ petition that Ananda Margis belong to the Shaivite order lead to the clear conclusion that Ananda, Margis belong to the Hindu religion. Mr. Tarkunde for the petitioner had claimed protection of Article 25 of the Constitution but in view of our finding that Ananda Marga is not a separate religion, application of Article 25 is not attracted.

8-A. The next aspect for consideration is whether Ananda Marga can be accepted to be a religious denomination. In the Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005 at p. 1021 : (AIR 1954 SC 282 at p. 289), Mukherjea, J. (as the learned Judge then was) spoke for the Court thus :

"As regards Article 26, the first question is, what is the precise meaning or connotation of the expression 'religious denomination' and whether a Math could come within this expression. The word 'denomination' has been defined in the Oxford Dictionary to mean 'a collection of individuals classed together under the same name : a religious sect or body having a common faith and organisation and designated by a distinctive name'."

This test has been followed in The Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 393 : (AIR 1961 SC 1402). In the majority judgment in S. P. Mittal v. Union of India, (1983) 1 SCR 729 at p. 774 : (AIR 1983 SC 1 at Pp. 20-21) reference to this aspect has also been made and it has been stated :

"The words 'religious denomination' in Article 26 of the Constitution must take their colour from the word 'religion' and if this be so the expression 'religious denomination' must also satisfy the conditions :

(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;

(2) common organisation; and

(3) designation by a distinctive name."

9. Ananda Marga appears to satisfy all the three conditions, viz., it is a collection of individuals who have a system of beliefs which they regard as cunductive to their spiritual well-being; they have a common organisation and the collection of these individuals has a distinctive name. Ananda Marga, therefore, can be appropriately treated as a religious denomination, within the Hindu religion. Article 26 of the Constitution provides that subject to public order morality and health, every relgious denomination or any section thereof shall have the right to manage its own affairs in matters of religion. Mukherjea, J. in Lakshmindra Thirtha Swamiar's case (AIR 1954 SC 282) (supra) adverted to; the question as to what were the matters of religion and stated (at p. 290) :

"What then are matters of religion? The word 'religion' has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (Davis v. Benson, (1888) 133 US 333 at p. 342), it has been said : "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and Character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter". We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Article 44 (2) of the Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not

necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might, extend even to matters of food and dress ....."

"Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with, religious practices ....."

"The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26 (b) ....."

12. The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis. We have already indicated that tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr. Tarkunde's argument that taking out religious processions with tandava dance is an essential religious rite of Ananda Margis. In paragraph 17 of the writ petition the petitioner pleaded that "Tandava Dance lasts for a few minutes where two or three persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other." In paragraph 18 it has been pleaded that "when the Ananda Margis greet their spiritual preceptor at the airport, etc., they arrange for a brief welcome dance of tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes." In paragraph 26 it has been pleaded that "Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis." On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of tandava dance by every follower of Ananda Marga. Even conceding that tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public. At least none could be shown to us by Mr. Tarkunde despite an enquiry by us in that behalf. We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.

> 13. Once we reach this conclusion, the claim that the petitioner has a fundamental right within the meaning of Article 25 or 26 to perform tandava dance in public streets and public places has to be rejected. In view of this finding it is no more necessary to consider whether the prohibitory order was justified in the interest of public order as provided in Article 25.
>
> 17. The writ petitions have to fail on our finding that performance of tandava dance in procession in the public streets or in gatherings in public places is not an essential religious rite of the followers of the Ananda Marga. In the circumstances there will be no order as to costs."

40. In the case of ***Abdul Jaleel and others vs. State of U.P. and others,*** reported in ***AIR 1984 SC 882,*** their lordships have held that shifting of graves is not un-Islamic or contrary to Koran especially when ordered to be done for purpose of maintaining public order, their lordships have held as under:

> "4. In our order dated 23rd September. 1983 it has been pointed out that the fundamental rights conferred on all persons and every religious denomination under Articles 25 and 26 of the Constitution are not absolute but the exercise thereof must yield to maintenance of public order and that the suggestion mooted by the Court to shift the graves was in the larger interest of the society for the purpose of maintaining public order on every occasion of the performance of their religious ceremonies and functions by the members of both the sects herein. It has been further pointed out that the ecclesiastical edict or a right not to disturb an interred corpse is not absolute as will be clear from Section 176 (3) of Cr. P.C. which permits its exhumation for the purpose of crime detection and that this provision is applicable to all irrespective of the personal law governing the dead. In particular reference was made to one of the Fatwas relied upon by Sunni Muslims to show that even according to a Hadis quoted in that Fatwa "unnecessary shifting of graves was not permissible" and as such the edict clearly implies that it may become necessary to shift the graves in certain situations and that exigencies of public order would surely provide the requisite situation. Moreover, during the present hearing we

persistently inquired of counsel appearing on both the sides as to whether there was anything in the Holy Koran which prohibited shifting of graves and counsel for the Sunni Muslims was not able to say that there was any to be found in the Koran. On the other hand, Shri Ashok Sen appearing for Shia Muslims categorically stated that there is no text in the Holy Koran which prohibits removal or shifting of graves, he also stated that his clients (Shia Muslims) do not regard removal or shifting of a grave (whether of a Sunni Muslim or Shia Muslim) from one place to another as un-Islamic or contrary to Koran. That it is neither un-Islamic nor contrary to Koran is proved by two things. First, as pointed out in one of the affidavits, in a meeting convened by the Divisional Commissioner on 4-10-1983 Maulana Abdul Salam Nomani, Pesh Imam of Gyan-Vapi Masjid, Varanasi was present and when the Commissioner asked him regarding the shifting of the graves as directed by this Court, he replied that a grave can never be shifted except only in the circumstances when the graves are dug on the land belonging to others and the graves are set up illegally on others' land. (In our order dated 23rd September, 1983 we have pointed out that the two graves in question have come up on the land of Maharaja unauthorisedly and illegally in contravention of Court's injunction) Secondly, two historical instances of such removal have been placed on record before the Court, namely, the grave of Mumtaz Mahal was removed from Burhanpur and brought to Taj Mahal at Agra and the grave of Jahangir was removed from Kashmir and taken to Lahore. There is, therefore, no question of this Court's direction being un-Islamic or contrary to Koran or amounting to desecration of the two graves as suggested. As regards the contention that the impugned direction amounts to disproportionate interference with the religious practice of the Sunni to respect their dead, we would like to place on record that during the earlier hearing several alternative suggestions were made to the Sunni Muslims including one to stagger their ceremonies and functions during the Moharram festival to avoid a conflict with the ceremonies and functions of the Shias but all those suggestions were spurned with the result that the spectre of yearly recrudescence of ugly incidents of violence, stone-throwing, hurling of acid bulbs / bottles, damage and destruction to life and property - (the latest in the series even after giving the impugned direction being the burning and

> destruction of the most valuable Tazia of Shias during Moharram festival of 1983, which was discovered in the morning of 11th October 1983) left no choice for the Court but to direct the shifting of the graves land this direction was also given in the larger interest of the society for the purpose of maintaining. public order on every occasion of the performance of their religious ceremonies and functions by members of both the sects herein. Experience of such yearly recrudescence of ugly incidents over past several years or in the alternative prohibiting ceremonies and functions of both the sects under Section 144 Cr.P.C. necessitated the issuance of the impugned direction with a view to find a permanent solutions to this perennial problem."

41. In the case of ***Bijoe Emmanuel and others vs. State of Kerala and others***, reported in ***AIR 1987 SC 748***, their lordships have held that Article 25 is an Article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. Their lordships have held as under:

> "17. Turning next to the Fundamental Right guaranteed by Art. 25, we may usefully set out here that article to the extent relevant :
>
> "25.(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
>
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."
>
> (Explanations I and II not extracted as unnecessary)
>
> Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the

> real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Art. 25."

42. In the case of ***Dr. M. Ismail Faruquui and others vs. Union of India and others***, reported in ***(1994) 6 SCC 360***, their lordships have held that the right to worship is not at any and every place, so long as it can be practiced effectively, unless the right to worship at a particular place is itself an integral part of that right. Under the Mohomedan Law applicable in India, title to a Mosque can be lost by adverse possession. A mosque is not an essential part of the practice of the religion of Islam. Their lordships have further held that there can be a religious practice but not an essential and integral part of practice of that religion. While offering of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. *Namaz (*prayer) by Muslims can be offered anywhere, even in open. Their lordships have held as under:

> "77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.
>
> 78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially."

43. In the case of ***State of W.B. and others vs. Ashutosh Lahiri and others***, reported in ***(1995) 1 SCC 189,*** their lordships have held that the legislative intention of W.B. Animal Slaughter Control Act, 1950, is that healthy cows which are not fit to be slaughtered can not be slaughtered at all. Their lordships have held that in the context of Section 12, the religious practice must be such which requires the invocation of exemption provision under Section 12 so as to bye pass the main thrust of Section 4. For such an exercise, non-essential religious practices can not be made the basis. Their lordships have further held that it is operational for a Muslim to sacrifice a goat for one person or a cow or a camel for 7 persons. Once, the religious purpose of Muslims consists of making sacrifice of any animal which should be a healthy animal, on BakrI'd, then slaughtering of the cow is not the only way of carrying out that sacrifice. Thus, slaughtering of healthy cows on BakrI'd is not essential or required for religious purpose of Muslims or in other words, it is not a part of religious requirement for a Muslim that a cow must be necessarily sacrificed for earning religious merit on BakrI'd. Their lordships have also held that the writ petitioners representing a Hindu segment of society had the necessary locus standi to move the petition. Their lordships have held as under:

> "8. The aforesaid relevant provisions clearly indicate the legislative intention that healthy cows which are not fit to be slaughtered cannot be slaughtered at all. That is the thrust of S. 4 of the Act. In other words there is total ban against slaughtering of healthy cows and other animals mentioned in the schedule under S. 2 of the Act. This is the very essence of the Act and it is necessary to subserve the purpose of the Act i.e. to increase the supply of milk and avoid the wastage of animal power necessary for improvement of agriculture. Keeping in view these essential features of the Act, we have to construe S.12 which deals with power to grant exemption from the Act. As we have noted earlier the said section enables the State Government by general or special order and subject to such conditions as it may think fit to impose, to exempt from the operation of this Act slaughter of any animal for any religious, medicinal or research purpose. Now, it becomes clear that when there is a total ban under the Act so far as slaughtering of healthy cows which are not fit to be slaughtered as per S. 4(1) is concerned, if that ban is to be lifted even for a day, it was to be shown that such lifting of ban is necessary for subserving any religious, medicinal or research purpose. The Constitution Bench decision of this Court in Mohd. Hanif Quareshi's case (1959 SCR 629 at page 650) : (AIR 1958 SC 731 at pp. 739-40) (supra) of the report speaking through Das C. J. referred to the

observation in Hamilton's translation of Hedaya Book, XLIII at p. 592 that it is the duty of every free Mussulman arrived at the age of maturity, to offer a sacrifice on the YD Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is, therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. Once the religious purpose of Muslims consists of making sacrifice of any animal which should be a healthy animal, on Bakri Idd, then slaughtering of cow is not the only way of carrying out that sacrifice. It is, therefore, obviously not an essential religious purpose but an optional one. In this connection Mr. Tarkunde for the appellants submitted that even optional purpose would be covered by the term 'any religious purpose' as employed by S.12 and should not be an essential religious purpose. We cannot accept this view for the simple reason that S. 12 seeks to lift the ban in connection with slaughter of such animals on certain conditions. For lifting the ban it should be shown that it is essential or necessary for a Muslim to sacrifice a healthy cow on Bakri Idd day and if such is the requirement of religious purpose then it may enable the State in its wisdom to lift the ban at least on Bakri Idd day. But that is not the position. It is well settled that an exceptional provision which seeks to avoid the operation of main thrust of the Act has to be strictly construed. In this connection it is profitable to refer to the decisions of this Court in the cases Union of India v. Wood Papers Ltd.,(1991) 1 JT (SC) 151 : (AIR 1991 SC 2049) and Novopan India Ltd., Hyderabad v. C.C.E.& Customs, Hyderabad, (1994) 6 JT (SC) 80 : (1994 AIR SCW 3976). If any optional religious purpose enabling the Muslim to sacrifice a healthy cow on Bakri Idd is made the subject matter of an exemption under S.12 of the Act then such exemption would get granted for a purpose which is not an essential one and to that extent the exemption would be treated to have been lightly or cursorily granted. Such is not the scope and ambit of Sec. 12. We must, therefore, hold that before the State can exercise the exemption power under S. 12 in connection with slaughter of any healthy animal covered by the Act, it must be shown that such exemption is necessary to be granted for subserving an essential religious, medicinal or

research purpose. If granting of such exemption is not essential or necessary for effectuating such a purpose no such exemption can be granted so as to by-pass the thrust of the main provisions of the Act. We, therefore, reject the contention of the learned counsel for the appellants that even for an optional religious purpose exemption can be validity granted under S. 12 In this connection it is also necessary to consider Quareshi's case (AIR 1958 SC 731) (supra) which was heavily relied upon by the High Court. The total ban of slaughter of cows even on Bakri Idd day as imposed by Bihar Legislature under Bihar Prevention of Animals Act, 1955 was attacked as violative of fundamental right of the petitioners under Article 25 of the Constitution. Repelling this contention the Constitution Bench held that even though Article 25(1) granted to all persons the freedom to profess, practice and propagate religion, as slaughter of cows on Bakri Idd was not an essential religious practice for Muslims, total ban on cow's slaughter on all days including Bakri Idd day would not be violative of Art. 25 (1). As we have noted earlier the Constitution Bench speaking through Das C.J., held that it was optional to the Muslims to sacrifice a cow on behalf of seven persons on Bakri Idd but it does not appear to be obligatory that a person must sacrifice a cow. It was further observed by the Constitution Bench that the very fact of an option seemed to run counter to the notion of an obligatory duty. One submission was also noted that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats, and it was observed that in such a case there may be an economic compulsion although there was no religious compulsion. In this connection, Das C.J., referred to the historical background regarding cow slaughtering from the times of Mughal Emperors. Mughal Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this. Similarly, Emperors Akbar, Jehangir and Ahmed Shah, it is said, prohibited cow slaughter. In the light of this historical background it was held that total ban on cows slaughter did not offend Art. 25(1) of the Constitution.

9. In view of this settled legal position it becomes obvious that if there is no fundamental right of a Muslim to insist on slaughter of healthy cow on

Bakri Idd day, it cannot be a valid ground for exemption by the State under S. 12 which would in turn enable slaughtering of such cows on Makri Idd. The contention of learned counsel for the appellant that Art. 25(1) of the Consitution deals with essential religious practices while S. 12 of the Act may cover even optional religious practices is not acceptable. No such meaning can be assigned to such an exemption clause which seeks to whittle down and dilute the main provision of the Act, namely S.4 which is the very heart of the Act. If the appellants' contention is accepted then the State can exempt from the operation of the Act, the slaughter of healthy cows even for non-essential religious, medicinal or research purpose, as we have to give the same meaning to the three purposes, namely, religious, medicinal or research purpose, as envisaged by. Sec 12. It becomes obvious that if for fructifying any medicinal or research purpose it is not necessary or essential to permit slaughter of healthy cow, then there would be no occasion for the State to invoke exemption power under S.12 of the Act for such a purpose. Similarly it has to be held that if it is not necessary or essential to permit slaughter of a healthy cow for any religious purpose it would be equally not open to the State to invoke its exemption power under S.12 for such a religious purpose. We, therefore, entirely concur with the view of the High Court that slaughtering of healthy cows on Bakri Idd is not essential or required for religious purpose of Muslims or in other words it is not a part of religious requirement for a Muslim that a cow must be necessarily scarified for earning religious merit on Bakri Idd.

11. We may also deal with the effort made by the learned counsel for the appellants to distinguish Quareshi's case (AIR 1958 SC 731) on the ground that for interpreting the term 'religious' under Arts. 25 and 26, a restricted meaning was given for balancing the secular nature of democracy on the one hand and the interest of the individual so far as right to practise any religion is concerned on the other. In this connection, our attention was invited to the decisions of this Court in Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, (1964) 1 SCR 561 : (AIR 1963 SC 1638) and The Durgah Committee, Ajmer v. Syed Hussian Ali, (1962) 1 SCR 383: (AIR 1961 SC 1402). These decisions are of no avail to the appellants as therein while dealing with

the question of validity of certain enactments, scope of Articles 25 and 26 of the Constitution was spelt out and nothing has been held in these decisions which is contrary to what was decided in Quareshi's case (AIR 1958 SC 731), which we have noted in detail. The effort made by learned counsel for the appellants to get any and every religious practice covered by S.12 also is of no avail for the simple reason that in the context of S.12 the religious practice must be such which requires the invocation of exemption provision under S.12 so as to by-pass the main thrust of S.4. For such an exercise non-essential religious practices cannot be made the basis. Reliance placed on the decision of this Court in Hazarat Pir Mohd. Shah v. Commr. of Income-tax, Gujarat (1967) 63 ITR 490 (SC), also is of no assistance as the same refers to S. 11 of the Income-tax Act, the scheme of which is entirely different from that of the Act. Even if we agree with learned counsel for the appellants that slaughter of a healthy cow on Bakri Idd is for a religious purpose, so long as it is not shown to be an essential religious purpose as discussed by us earlier, S.12 of the Act cannot be pressed in service for buttressing such a non-essential religious purpose.

12. Before parting we may mention that one preliminary objection was raised before the High Court about the petitioners' locus standi to move the writ petition. The High Court held that it was a public interest litigation and the writ petitioners have sufficient locus standi to move the petition. That finding of the High Court was not challenged by any of the appellants. In our view rightly so as the writ petitioners representing a Hindu segment of society had felt aggrieved by the impugned exemption granted by the State. They had no personal interest but a general cause to project. Consequently, they had sufficient locus standi to move the petition. Rule 7 framed under the Act, provides that provisions of the West Bengal Animal Slaughter Control Act, 1950, shall not apply to the slaughter of any animal for religious medicinal or research purpose subject to the condition that such slaughter does not affect the religious sentiment of the neighbours of the person or persons performing such slaughter and that the previous permission of the State Government or any officer authorised by it is obtained before the slaughter. The case of the original writ petitioners before the High Court was based on religious

> sentiments and, therefore, they had moved this public interest litigation. In these circumstances, no fault could be found with the decision of the High Court recognising locus standi of the original petitioners to move this public interest litigation which we have found to be well justified on merits."

44. In the case of ***A.S. Narayana Deekshitulu vs. State of A.P. and others***, reported in ***(1996) 9 SCC 548***, their lordships have held that the only integral or essential part of the religion is protected. Non-integral or non-essential part of religion, being secular in character, can be regulated by legislation. The essential or integral part of religion to be ascertained from the doctrine of that religion itself according to its tenets, historical background and change in evolved process. While performance of religious service is integral part of religion, priest or archaka performing such service is not so. Their lordships have further held that religion not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity can not be interfered with. Every religion must believe in a conscience and ethical and moral precepts. Their lordships have further held that whether the practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Their lordships have held as under:

> "40. From that perspective, this Court is concerned with the concept of Hindu religion and dharma... Very often one can discern and sense political and economic motives for maintaining status quo in relation to religious forms masquerading it as religious faith and rituals bereft of substantial religious experience. As sure, philosophers do not regard this as religion at all. They do not hesitate to say that this is politics or economic masquerading as a religion. A very careful distinction, therefore, is required to be drawn between real and unreal religion at any stage in the development and preservation of religion as protected by the Constitution. Within religion, there is an interpretation of reality and unreality which is completely different experience. It is the process in which ideal is made rule. Thus perfection of religious experience can take place only when free autonomy is afforded to an individual and worship of the infinite is made simpler, direct communion, the cornerstone of human system. Religion is personal to the individual. Greater the law bringing an

individual closer to this freedom, the higher is its laudable and idealistic purpose. Therefore, in order that religion becomes mature internally with the human personality it is essential that mature self-enjoy must be combined with conscious knowledge. Religious symbols can be contra-distinguished from the scientific symbols and both are as old as man himself. Through scientific symbols there can be repetition of dogmatism and conviction of ignorance. True religion reaching up to the full reality of all knowledge, believe in God as the unity of the whole.

55. It thus follows that to one who is devoted to the pursuit of knowledge, the observance of rituals is of no use since the observance of rituals and the devotion of knowledge cannot co-exist. There is considerable incompatibility between knowledge and rituals inasmuch as their natures are entirely antithetical. It is only he who regards himself as the agent of action that can perform the rituals; but the nature of knowledge is altogether different and it dispels all such ideas. All the wrong ideas beginning with the identification of Self with the physical body etc., are eradicated by knowledge, while they are reinforced by action. Ignorance of Atman is at the root of action, but the knowledge of Atman destroys both. How is it possible for one to perform the prescribed rituals while engaged in the pursuit of knowledge inasmuch as they are incompatible! It is as much impossible as the co-existence of light and darkness. One cannot keep one's eyes open and closed at the same time. It is equally impossible to combine knowledge and rituals. Can one who is looking westward look eastward? How is one whose mind is directed towards the innermost Atman fit to take part in external activities?

77. The importance of rituals in religious life is relevant for evocation of mystic and symbolic beginnings of the journey but on them the truth of a religious experience cannot stand. The truth of a religious experience is far more direct, perceptible and important to human existence. It is the fullness of religious experience which must be assured by temples, where the images of the Lord in resplendent glory is housed. To them all must have an equal right to plead and in a manner of such directness and simplicity that every human being can approach the doors of the Eternal with equality and with equal

access and thereby exercise greater freedom in his own life. It is essential that the value of law must be tested by its certainty in reiterating the Core of Religious Experience and if a law seeks to separate the non-essential from the essential so that the essential can have a greater focus of attention in those who believe in such an experience, the object of such a law cannot be described as unlawful but possibly somewhat visionary.

85. Articles 25 and 26 deal with and protect religious freedom. Religion as used in these Articles must be construed in its strict and etymological sense. Religion is that which binds a man with his Cosmos, his creator or super force. It is difficult and rather impossible to define or delimit the expressions "religion" or "matters of religion" used in Articles 25 and 26. Essentially, religion is a matter of personal faith and belief of personal relations of and individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic and in fact there are well-known religions in India itself like Budhism and Jainism which do not believe in the existence of God. In India, Muslims believe in Allah and have faith in Islam; Christians in Christ and Christianity; Parsis in Zorastianism; Sikhs in Gurugranth Sahib and teachings of Gurunanak Devji, its founder, which is a facet of Hinduism like Brahamos, Aryasamaj etc.

86. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution

which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foot-hold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion of matters or religion or religious belief or practice.

90. The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos, Creator and realise his spiritual self. Sometimes, practices religious or secular, are intricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of ancient Samriti, human actions from birth to death and most of the individual actions from day to day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One, hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity. Law is a social engineering and an instrument of social change evolved by a gradual and continuous process. As Banjamin Cardozo has put it in his "Judicial Process," life is not a logic but experience. History and customs, utility and the accepted standards of

right conduct are the forms which singly or in combination shall be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentially is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. Whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question?

116. The protection of Articles 25 and 26 of the Constitution is not limited to matters of doctrine. They extend also to acts done in furtherance of religion and. therefore, they contain a guarantee, for

> rituals and observances, ceremonies and modes of worship which are integral parts of the religion. In Seshammal's case, (AIR 1972 SC 1586), (supra) on which great reliance was placed and stress was laid by the counsel on either side, this Court while reiterating the importance of performing rituals in temples for the idol to sustain the faith of the people insisted upon the need for performance of elaborate ritual ceremonies accompanied by chanting of mantras appropriate to the deity. This Court also recognised the placed of an archaka and had held that the priest would occupy place of importance in the performance of ceremonial rituals by a qualified archaic who would observe daily discipline imposed upon him by the Agamas according to tradition, usage and customs obtaine in the temple. Shri P.P. Rao, learned senior counsel also does not dispute it."

45. In the case of ***Sri Adi Visheshwara of Kashi Vishwanath Temple Varanasi and others vs. State of U.P. and others,*** reported in ***(1997)4 SCC 606,*** their lordships have held that the religious freedom guaranteed by Article 25 and 26 is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Article 25 and 26, therefore, strike a balance between rigidity or right to religious belief and faith and their intrinsic restrictions in the matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos /Creator. Their lordships have further held that the concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is a religious in character and whether it could be regarded as an essential or integral part of religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 protects it. Their lordships have further held that right to religion guaranteed by Articles 25 and 26 is not absolute or unfettered right to propagate religion which is subject to legislation by the State limiting or regulating every non-religious activity. The right to observe and practice rituals and right to manage in matters of religion are protected under these Articles.

> "28.The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and

26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos/Creator and realise his spiritual self. Sometimes, practices religious or secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of the ancient Smriti, human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity. Law is a tool of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his Judicial Process, life is not logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination all be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will he, thereby, impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are

an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. And whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question.

30.Hinduism cannot be defined in terms of Polytheism or Henotheism or Monotheism. The nature of Hindu religion ultimately is Monism/Advaita. This is in contradistinction to Monotheism which means only one God to the exclusion of all others. Polytheism is a belief of multiplicity of Gods. On the contrary, Monism is a spiritual belief of one Ultimate Supreme who manifests Himself as many. This multiplicity is not contrary to on-dualism, This is the reason why Hindus start adoring any deity either handed down by tradition or brought by a Guru or Swambhuru and seek to attain the Ultimate Supreme.

31.The protection of Articles 25 and 26 of the Constitution is not limited to matters of doctrine. They extend also to acts done in furtherance of religion and, therefore, they contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of the religion. In Seshammal case on which great reliance was placed and stress was laid by the counsel on either side, this court while reiterating the 9 Seshammal v. State af T.N., 1972 2 SCC 11 importance of performing rituals in temples for the idol to sustain the faith of the people, insisted upon the need for performance of elaborate ritual ceremonies accompanied by chanting of mantras appropriate to the deity. This court also

recognised the place of an archaka and had held that the priest would occupy place of importance in the performance of ceremonial rituals by a qualified archaka who would observe daily discipline imposed upon him by the Agamas according to tradition, usage and customs obtained in the temple. Shri P.P. Rao, learned Senior Counsel also does not dispute it. It was held that Articles 25 and 26 deal with and protect religious freedom. Religion as used in those articles requires restricted interpretation in etymological sense. Religion undoubtedly has its basis in a system of beliefs which are regarded by those who profess religion to be conducive to the future well-being. It is not merely a doctrine. It has outward expression in acts as well. It is not every aspect of the religion that requires protection of Articles 25 and 26 nor has the Constitution provided that every religious activity would not be interfered with. Every mundane and human activity is not intended to be protected under the Constitution in the garb of religion. Articles 25 and 26 must be viewed with pragmatism. By the very nature of things it would be extremely difficult, if not impossible, to define the expression "religion" or "matters of religion" or "religious beliefs or practice". Right to religion guaranteed by Articles 25 and 26 is not absolute or unfettered right to propagate religion which is subject to legislation by the State limiting or regulating every non-religious activity. The right to observe and practise rituals and right to manage in matters of religion are protected under these articles. But right to manage the Temple or endowment is not integral to religion or religious practice or religion as such which is amenable to statutory control. These secular activities are subject to State regulation but the religion and religious practices which are an integral part of religion are protected. It is a well-settled law that administration, management and governance of the religious institution or endowment are secular activities and the State could regulate them by appropriate legislation. This court upheld the A.P. Act which regulated the management of the religious institutions and endowments and abolition of hereditary rights and the right to receive offerings and plate collections attached to the duty."

46. In the case of ***N.Adithayan vs. Travancore Devaswom Board and others***, reported in ***(2002)8 SCC 106***, their lordships have

held that custom or usage, even if proved to have existed in pre-Constitution period, cannot be accepted as a source of law, if such custom violates human rights, human dignity, concept of social equality and the specific mandate of the Constitution and law made by the Parliament. Their lordships have further held that the vision of the founding fathers of the Constitution of liberating society from blind adherence to traditional superstitious beliefs sans reason or rational basis.

> "16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part-Ill, including Article 17 freedom to entertain and exhibit by outward Acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the state to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2) (b) ensures the right of the state to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the state or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down."

47. In the case of ***Commissioner of Police and others vs. Acharya Jagadishwarananda Avadhuta and anr***, reported in ***(2004)12 SCC 770*** , their lordships have held that the essential part of a religion means the core beliefs upon which a religion is founded. The essential practice means those practices that are fundamental to follow religious beliefs. It is upon the cornerstone of the essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is

essential to a religion is to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. What constitutes an integral or essential part of a religion has to be determined with reference to the doctrines, practices, tenets, historical background etc. of the given religion. In a given case, it is for the Court to decide whether a part or practice is an essential part or practice of given religion. Their lordships have further held that in a Bench consisting of three Judges of the Supreme Court in *Ananda Marga (I) (1983) 4 SCC 522*, arrived at a unanimous conclusion on facts that Tandava dance in public is not an essential and integral part of Ananda Marga faith. The Hon'ble Court further even went to the extent of assuming that Tandava dance was prescribed as a rite and then arrived at the conclusion that taking out Tandava dance in public is not essential to the Ananda Marga faith.

> "8. This observation cannot be considered as a clue to reopen the whole finding. By making that observation the Court was only buttressing the finding that was already arrived at. The learned judges of the High Court wrongly proceeded on the assumption that the finding of this Court regarding the non-essential nature of Tandava dance to the Ananda Margi faith is due to the non-availability of any literature or prescriptions by the founder. The High Court is under the? wrong impression that an essential part of religion could be altered at any subsequent point of time.
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> 9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background etc. of the given religion. (See generally the Constitution bench decisions in. The Commissioner v. L. T. Swamiar of Srirur Mutt 1954 SCR 1005, SSTS Saheb v. State of Bombay 1962 (Supp) 2 SCR 496, and Sesharnmal v. State of Tamil Nadu, (1972) 2 SCC 11, regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not). What is meant by 'an essential part or practices of a religion' is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices

that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. No body can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.

10. Here in this case Ananda Margi order was founded in 1955. Admittedly, Tandava dance was introduced as a practice in 1966. Even without the practice of Tandava dance (between 1955 to 1966) Ananda Margi order was in existence. Therefore, Tandava dance is not the 'core' upon which Ananda Margi order is founded. Had Tandava dance been the core of Ananda Margi faith, then without which Ananda Margi faith could not have existed.

11. There is yet another difficulty in accepting the reasoning of the High Court that a subsequent addition in Carya Carya could constitute Tandava dance as essential part of Ananda Margi faith. In a given case it is for the Court to decide whether a part or practice is an essential part or practice of .a given religion. As a matter of fact if in the earlier litigations the Court arrives at a conclusion of fact regarding the essential part or practice of a religion - it will create problematic situations if the religion is allowed to circumvent the decision of Court by making alteration in its doctrine. For example, in N. Adithayan v. Travancore Devaswom Board, (2002) 8

> SCC 106, this Court found that a non-Brahmin could be appointed as a poojari (priest) in a particular temple and it is not essential to that temple practice to appoint only a brahmin as poojari. Is it open for that temple authorities to subsequently decide only brahmins could be appointed as poojaris by way of some alterations in the relevant doctrines? We are clear that no party could even revisit such a finding of fact. Such an attempt will result in anomalous situations and could only be treated as a circuitous way to overcome the finding of a Court. If subsequent alterations in doctrine could be allowed to create new essentials, the Judicial process will then be reduced into a useless formality and futile exercise. Once there is a finding of fact by the competent Court, then all other bodies are estopped from revisiting that conclusion. On this count also the decision of High Court is liable to be set aside."

48. In the case of ***State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat and others***, reported in ***(2005) 8 SCC 534***, their lordships have held that slaughter of cow and cow progeny on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. Their lordships have held that an optional religious practice is not covered by Article 25 (a). Their lordships have departed from ***Quarishi's*** case (1959 SCR 629). Their lordships have held as under:

> "22. In State of West Bengal and Ors. v. Ashutosh Lahiri, (1995) 1 SCC 189, this Court has noted that sacrifice of any animal by muslims for the religious purpose on BakrI'd does not include slaughtering of cow as the only way of carrying out that sacrifice. Slaughtering of cow on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. An optional religious practice is not covered by Article 25(1). On the contrary, it is common knowledge that cow and its progeny, i.e., bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makr-Sankranti and Gopashtmi. A good number of temples are to be found where the statue of 'Nandi' or 'Bull' is regularly worshipped. However, we do not propose to delve further into the question as we must state, in all fairness to the learned counsel for the parties, that no one has tried to build any argument

either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution.

85. Empirical research was carried out under field conditions in North Gujarat Region (described as Zone-I) and Saurashtra region (described as Zone-II). The average age of aged bullocks under the study was 18.75 years. The number of bullocks/pair used under the study were sufficient to draw sound conclusions from the study. The gist of the findings arrived at, is summed up as under:

Farmer's persuasion

The aged bullocks were utilized for different purposes like agricultural operations (ploughing, planking, harrowing, hoeing, threshing) and transport-hauling of agricultural produce, feeds and fodders of animals, drinking water, construction materials (bricks, stones, sand grits etc.) and for sugarcane crushing/ khandsari making. On an average the bullocks were yoked for 3 to 6 hours per working day and 100 to 150 working days per year. Under Indian conditions the reported values for working days per year ranges from 50 to 100 bullock paired days by small, medium and large farmers. Thus, the agricultural operations-draft output are still being taken up from the aged bullocks by the farmers. The farmers feed concentrates, green fodders and dry fodders to these aged bullocks and maintain the health of these animals considering them an important segment of their families. Farmers love their bullocks.

Age, body measurement and body weight

The biometric and body weight of aged bullocks were within the normal range.

Horsepower generation/Work output

The aged bullocks on an average generated 0.68 hp/bullock, i.e.18.1% less than the prime/young bullocks (0.83 hp/bullock). The aged bullocks walked comfortably with an average stride length of 1.43 meter and at the average speed of 4.49 km/hr. showing little less than young bullocks. However, these values were normal for the aged bullocks performing light/medium work of carting. These values were slightly lower than those observed in case of prime or young bullocks. This clearly indicates that the aged bullocks above 16 years of age proved their work efficiency for both light as well

as medium work in spite of the age bar. In addition to this, the experiment was conducted during the months of May-June, 2000 _ a stressful summer season. Therefore, these bullocks could definitely generate more work output during winter, being a comfortable season. The aged bullock above 16 years of age performed satisfactorily and disproved that they are unfit for any type of draft output i.e. either agricultural operations, carting or other works.

Physiological responses and haemoglobin concentration

These aged bullocks are fit to work for 6 hours (morning 3 hours + afternoon 3 hrs.) per day. Average Hb content (g%) at the start of work was observed to be 10.72 g% and after 3 hours of work 11.14g%, indicating the healthy state of bullocks. The increment in the haemoglobin content after 3 to 4 hours of work was also within the normal range and in accordance with prime bullocks under study as well as the reported values for working bullocks.

Distress symptoms

In the initial one hour of work, 6 bullocks (3.8%) showed panting, while 32.7% after one hour of work. After 2 hour of work, 28.2% of bullocks exhibited salivation. Only 6.4% of the bullocks sat down/lied down and were reluctant to work after completing 2 hours of the work. The results are indicative of the fact that majority of the aged bullocks (93%) worked normally. Summer being a stressful season, the aged bullocks exhibited distress symptoms earlier than the prime/young bullocks. However, they maintained their physiological responses within normal range and generated satisfactory draft power.

104. Even if the utility argument of the Quareshi's judgment is accepted, it cannot be accepted that bulls and bullocks become useless after the age of 16. It has to be said that bulls and bullocks are not useless to the society because till the end of their lives they yield excreta in the form of urine and dung which are both extremely useful for production of bio-gas and manure. Even after their death, they supply hide and other accessories. Therefore, to call them 'useless' is totally devoid of reality. If the expenditure on their maintenance is compared to the return which they give, at the most, it can be said that they become 'less useful'.(Report of the National Commission on Cattle, July 2002, Volume I, p. 279.)

105. The Report of the National Commission on Cattle has analyzed the economic viability of cows after they stopped yielding milk and it also came to the conclusion that it shall not be correct to call such cows 'useless cattle' as they still continue to have a great deal of utility. Similar is the case with other cattle as well.

"Economic aspects:

The cows are slaughtered in India because the owner of the cow finds it difficult to maintain her after she stops yielding milk. This is because it is generally believed that milk is the only commodity obtained from cows, which is useful and can be sold in exchange of cash. This notion is totally wrong. Cow yields products other than milk, which are valuable and saleable. Thus the dung as well as the urine of cow can be put to use by owner himself or sold to persons or organizations to process them. The Commission noticed that there are a good number of organizations (goshalas) which keep the cows rescued while being carried to slaughter houses. Very few of such cows are milk yielding. Such organizations use the urine and dung produced by these cows to prepare Vermi-compost or any other form of bio manure and urine for preparing pest repellents. The money collected by the sale of such products is normally sufficient to allow maintenance of the cows. In some cases, the urine and dung is used to prepare the medical formulations also. The organizations, which are engaged in such activities, are making profits also.

Commission examined the balance sheet of some such organizations. The expenditure and income of one such organization is displayed here. In order to make accounts simple the amounts are calculated as average per cow per day.

It is obvious that expenditure per cow is Rs. 15-25 cow/day.

While the income from sale is Rs. 25-35 cow-day.

These averages make it clear that the belief that cows which do not yield milk are unprofitable and burden for the owner is totally false. In fact it can be said that products of cow are sufficient to maintain them even without milk. The milk in such cases is only a by_product.

It is obvious that all cow owners do not engage in productions of fertilizers or insect repellents. It can also be understood that such activity may not be feasible for owners of a single or a few cows. In such cases, the cow's urine and dung may be supplied to such organizations, which utilize these materials for producing finished products required for agricultural or medicinal purpose. Commission has noticed that some organizations which are engaged in production of agricultural and medical products from cow dung and urine do purchase raw materials from nearby cow owner at a price which is sufficient to maintain the cow."

(Report of National Commission on Cattle, July 2002, Vol. II, pp.68-69)

109. On the basis of the available material, we are fully satisfied to hold that the ban on slaughter of cow progeny as imposed by the impugned enactment is in the interests of the general public within the meaning of clause (6) of Article 19 of the Constitution.

122. We have already pointed out that having tested the various submissions made on behalf of the writ petitioners on the constitutional anvil, the Constitution Bench in Quareshi-I upheld the constitutional validity, as reasonable and valid, of a total ban on the slaughter of : (i) cows of all ages, (ii) calves of cows and she-buffaloes, male or female, and (iii) she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle. But the Constitution Bench found it difficult to uphold a total ban on the slaughter of she-buffaloes, bulls or bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals, on the material made available to them, the ban failed to satisfy the test of being reasonable and "in the interests of the general public". It is clear that, in the opinion of the Constitution Bench, the test provided by clause (6) of Article 19 of the Constitution was not satisfied. The findings on which the above-said conclusion is based are to be found summarized on pp.684-687. Para-phrased, the findings are as follows:

(1) The country is in short supply of milch cattle, breeding bulls and working bullocks, essential to maintain the health and nourishment of the nation. The cattle population fit for breeding and work must

be properly fed by making available to the useful cattle in presenti in futuro. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed.

(2) Total ban on the slaughter of cattle would bring a serious dislocation, though not a complete stoppage, of the business of a considerable section of the people who are by occupation Butchers (Kasai), hide merchant and so on.

(3) Such a ban will deprive a large section of the people of what may be their staple food or protein diet.

(4) Preservation of useful cattle by establishment of gosadan is not a practical proposition, as they are like concentration camps where cattle are left to die a slow death.

(5) The breeding bulls and working bullocks (cattle and buffaloes) do not require as much protection as cows and calves do.

These findings were recorded in the judgment delivered on 23rd April, 1958. Independent India, having got rid of the shackles of foreign rule, was not even 11 years old then. Since then, the Indian economy has made much headway and gained a foothold internationally. Constitutional jurisprudence has indeed changed from what it was in 1958, as pointed out earlier. Our socio-economic scenario has progressed from being gloomy to a shining one, full of hopes and expectations and determinations for present and future. Our economy is steadily moving towards prosperity in a planned way through five year plans, nine of which have been accomplished and tenth is under way.

136. India, as a nation and its population, its economy and its prosperity as of today are not suffering the conditions as were prevalent in 50s and 60s. The country has achieved self-sufficiency in food production. Some of the states such as State of Gujarat have achieved self-sufficiency in cattle-feed and fodder as well. Amongst the people there is an increasing awareness of the need for protein rich food and nutrient diet. Plenty of such food is available from sources other than cow/cow progeny meat. Advancements in the field of Science, including Veterinary Science, have strengthened the health and longetivity of cattle (including cow progeny). But

the country's economy continues to be based on agriculture. The majority of the agricultural holdings are small units. The country needs bulls and bullocks.

137. For multiple reasons which we have stated in very many details while dealing with Question-6 in Part II of the judgment, we have found that bulls and bullocks do not become useless merely by crossing a particular age. The Statement of Objects and Reasons, apart from other evidence available, clearly conveys that cow and her progeny constitute the backbone of Indian agriculture and economy. The increasing adoption of non-conventional energy sources like Bio-gas plants justify the need for bulls and bullocks to live their full life in spite of their having ceased to be useful for the purpose of breeding and draught. This Statement of Objects and Reasons tilts the balance in favour of the constitutional validity of the impugned enactment. In Quareshi-I*(Mohd. Hanif Quareshi v. Sate of Bihar, 1959 SCR 629 : AIR 1958 SC 731)* the Constitution Bench chose to bear it in mind, while upholding the constitutionality of the legislations impugned therein, insofar as the challenge by reference to Article 14 was concerned, that "the legislature correctly appreciates the needs of its own people". Times have changed; so have changed the social and economic needs. The Legislature has correctly appreciated the needs of its own people and recorded the same in the Preamble of the impugned enactment and the Statement of Objects and Reasons appended to it. In the light of the material available in abundance before us, there is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause 'inconvenience' or some 'dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public. The former must yield to the latter.

139. Thus, the eminent scientist is very clear that excepting the advanced countries which have resorted to large scale mechanized farming, most of the countries (India included) have average farms of small size. Majority of the population is engaged in farming within which a substantial proportion belong to small and marginal farmers category. Protection of

cow progeny will help them in carrying out their several agricultural operations and related activities smoothly and conveniently. Organic manure would help in controlling pests and acidification of land apart from resuscitating and stimulating the environment as a whole.

142. For the foregoing reasons, we cannot accept the view taken by the High Court. All the appeals are allowed. The impugned judgment of the High Court is set aside. The Bombay Animal Preservation (Gujarat Amendment) Act, 1994 (Gujarat Act No. 4 of 1994) is held to be intra vires the Constitution. All the writ petitions filed in the High Court are directed to be dismissed."

Their lordships have also held that by enacting clause (g) in Article 51-A and giving it the status of fundamental duty, one of the objects sought to be achieved by the Parliament is to ensure that the spirit and message of Article 48 and 48-A are honoured as a fundamental duty of every citizen.

"51. By enacting clause (g) in Article 51-A and giving it the status of a fundamental duty, one of the objects sought to be achieved by the Parliament is to ensure that the spirit and message of Articles 48 and 48A is honoured as a fundamental duty of every citizen. The Parliament availed the opportunity provided by the Constitution (Forty-second Amendment) Act, 1976 to improve the manifestation of objects contained in Article 48 and 48-A. While Article 48-A speaks of "environment", Article 51-A(g) employs the expression "the natural environment" and includes therein "forests, lakes, rivers and wild life". While Article 48 provides for "cows and calves and other milch and draught cattle", Article 51-A(g) enjoins it as a fundamental duty of every citizen "to have compassion for living creatures", which in its wider fold embraces the category of cattle spoken of specifically in Article 48.

169. One of the other reasons which has been advanced for reversal of earlier judgments was that at the time when these earlier judgments were delivered Article 48(A) and 51(A) were not there and impact of both these Articles were not considered. It is true that Article 48(A) which was introduced by the 42nd Constitutional Amendment in 1976 with effect from 3.1.1977 and Article 51(A) i.e. fundamental duties were also brought about by the same amendment. Though, these Articles were not in

existence at that time but the effect of those Articles were indirectly considered in the Mohd. Hanif Qureshi's case in 1958. It was mentioned that cow dung can be used for the purposes of manure as well as for the purpose of fuel that will be more echo-friendly. Similarly, in Mohd. Hanif Qureshi's case their Lordships have quoted from the scriptures to show that we should have a proper consideration for our cattle wealth and in that context their Lordships quoted in para 22 which reads as under:

"[22.] The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural society. Early Aryans recognized its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow" in Rg.Veda (VIII,43,11). The slaying of a great ox (Mahoksa) or a "great Goat" (Mahaja) for the entertainment of a distinguished guest has been enjoined in the Satapatha Brahmana (III.4. 1-2). Yagnavalkya also expresses a similar view (Vaj.1. 109). An interesting account of those early days will be found in Rg.Vedic Culture by Dr. A.C. Das, Chapter 5, pages 203-5 and in the History of Dharamasastras (Vol.II, Part II) by P.V. Kane at pages 772-773. Though the custom of slaughtering of cows and bulls prevailed during the vedic period, nevertheless, even in the Rg. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called "Aghnya" (not to be slain). There was a school of thinkers amongst the Risis, who set their face against the custom of killing such useful animals as the cow and the bull. High praise was bestowed on the cow as will appear from the following verses from Rg.Veda, Book VI, Hymn XXVIII (Cows) attributed to the authorship of Sage Bhardavaja:

"1. The kine have come and brought good fortune; let them rest in the cow-pen and be happy near us.

Here let them stay prolific, many coloured, and yield through many morns their milk for Indra.

6. O Cows, ye fatten e'n the worn and wasted, and make the unlovely beautiful to look on.

Prosper my house, ye with auspicious voices, your power is glorified in our assemblies.

7. Crop goodly pasturages and be prolific; drink pure sweet water at good drinking places.

Never be thief or sinful man your master, and may the dart of Rudra still avoid you." (Translation by Ralph Griffith).

Verse 29 of hymn 1 in Book X of Atharva Veda forbids cow slaughter in the following words:

"29. The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours."

Hyman 10 in the same book is a rapturous glorification of the cow:

"30. The cow is Heaven, the cow is Eath, the cow is Vishnu, Lord of life.

The Sadhyas and the Vasus have drunk the outpourings of the cow.

34. Both Gods and mortal men depend for life and being on the cow. She hath become this universe; all that the sun surveys is she."

P.V. Kane argues that in the times of the Rg. Veda only barren cows, if at all, were killed for sacrifice or meat and cows yielding milk were held to be not fit for being killed. It is only in this way, according to him that one can explain and reconcile the apparent conflict between the custom of killing cows for food and the high praise bestowed on the cow in Rg. Vedic times. It would appear that the protest raised against the slaughter of cows greatly increased in volume till the custom was totally abolished in a later age. The change of climate perhaps also make the use of beef as food unnecessary and even injurious to health. Gradually cows became indicative of the wealth of the owner. The Neolithic Aryans not having been acquainted with metals, there were no coins in current use in the earlier stages of their civilization, but as they were eminently a pastoral people almost

every family possessed a sufficient number of cattle and some of them exchanged them for the necessaries of their life. The value of cattle (Pasu) was, therefore, very great with the early Rg. Vedic Aryans. The ancient Romans also used the word pecus or pecu (pasu) in the sense of wealth or money. The English words, "pecuniary" and "impecunious", are derived from the Latin root pecus or pecu, originally meaning cattle. The possession of cattle in those days denoted wealth and a man was considered rich or poor according to the large or small number of cattle that he owned. In the Ramayana king Janaka's wealth was described by reference to the large number of herds that he owned. It appears that the cow was gradually raised to the status of divinity. Kautilya's Arthasastra has a special chapter (Ch.XXIX) dealing with the "superintendent of cows" and the duties of the owner of cows are also referred to in Ch.XI of Hindu Law in its sources by Ganga Nath Jha. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions."

170. Therefore it cannot be said that the Judges were not conscious about the usefulness and the sanctity with which the entire cow and its progeny has been held in our country. Though Article 48(A) and 51(A) were not there, but their Lordships were indirectly conscious of the implication. Articles 48(A) and 51(A) do not substantially change the ground realities which can persuade to change the views which have been held from 1958 to 1996. Reference was also made that for protection of top soil, the cow dung will be useful. No doubt the utility of the cow dung for protection of the top soil is necessary but one has to be pragmatic in its approach that whether the small yield of the cow dung and urine from aged bulls and bullocks can substantially change the top soil. In my

> opinion this argument was advanced only for the sake of argument but does not advance the case of the petitioners/appellants to reverse the decision of the earlier Benches which had stood the test of time."

49. In the case of ***MP Gopalakrishnan Nayar and another vs. State of Kerala and others***, reported in ***(2005)11 SCC 45***, their lordships have held that have explained the word "Hindu" as under:

> "22. The word 'Hindu' is not defined. A Hindu admittedly may or may not be a person professing Hindu religion or a believer in temple worship. A Hindu has a right to choose his own method of worship. He may or may not visit a temple. He may have a political compulsion not to openly proclaim that he believes in temple worship but if the submission of the Appellants is accepted in a given situation, the 1978 Act itself would be rendered unworkable. Idol worships, rituals and ceremonials may not be practised by a person although he may profess Hindu religion.
>
> 24. The legislature has not chosen to qualify the word "Hindu" in any manner. The meaning of word is plain and who is a Hindu is well known. The legislature was well aware that "Hindu" is a comprehensive expression (as the religion itself is) giving the widest freedom to people of all hues opinion, philosophies and beliefs to come within its fold. [See Shastri Yagnapurushdasji and others Vs. Muldas Bhundardas Vaishya and another, AIR 1966 SC 1119 and Dayal Singh and Others Vs. Union of India and Others, (2003) 2 SCC 593, para 37]"

50. In the case of ***Javed and others vs. State of Haryana and others***, reported in ***(2003) 8 SCC 369*** , their lordships have held that protection under Article 25 and 26 of the Constitution is with respect to religious practice which forms an essential and part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.

> "43. A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

> 45. The meaning of religion - the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in Dr. M. Ismail Faruqui and Ors. v. Union of India & Ors., (1994) 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of the religion. The latter is not protected by Article 25.
>
> 59. In our view, a statutory provision casting disqualification on contesting, or holding, an elective office is not violative of Article 25 of the Constitution."

51. In the case of ***State of Karnataka and another vs. Dr. Praveen Bhai Thogadia***, reported in ***(2004) 4 SCC 684***, their lordships have held that the State should have no religion of its own and each person whatever his religion, must get an assurance from the State that he has the protection of law freely to profess, practice and propagate his religion and freedom of conscience. Their lordships have also observed that the core of religion based upon spiritual values, which the Vedas, Upanishads and Puranas were said to reveal to mankind seem to be "love others, serve others, help ever, hurt never" and "***Sarve Jana Sukhinu Bhavantoo***".

> "6. Courts should not normally interfere with matters relating to law and order which is primarily the domain of the concerned administrative authorities. They are by and large the best to assess and to handle the situation depending upon the peculiar needs and necessities, within their special knowledge. Their decision may involve to some extent an element of subjectivity on the basis of materials before them. Past conduct and antecedents of a person or group or an organisation may certainly provide sufficient material or basis for the action contemplated on a reasonable expectation of possible turn of events, which may need to be avoided in public interest and maintenance of law and order. No person, however, big he may assume or claim to be, should be allowed irrespective of the position he may assume or claim to hold in public life to either act in a manner or make speeches which would destroy secularism recognised by the Constitution of India, 1950 (in short the 'Constitution'). Secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that State should have no religion of its own and no one

could proclaim to make the State have one such an endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person whatever be his religion must get an assurance from the State that he has the protection of law freely to profess, practice arid propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of ones own presumptuous good social order. Therefore, whenever the concerned authorities in charge of law and order find that a person's speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings.

9. Our country is the world's most heterogeneous society, with rich heritage and our Constitution is committed to high ideas of socialism, secularism and the integrity of the nation. As is well known, several races have converged in this sub-continent and they carried with them their own cultures, languages, religions and customs affording positive recognition to the noble and ideal way of life - Unity in Diversity'. Though these diversities created problems, in early days, they were mostly solved on the basis of human approaches and harmonious reconciliation of differences, usefully and peacefully. That is how secularism has come to be treated as a part of fundamental law, and an unalignable segment of the basic structure of the country's political system. As noted in S. R. Bommai v. Union of India etc. (1994 (3) SCC 1), freedom of religion is granted to all persons of India. Therefore, from the point of view of the State, religion, faith or belief of a particular person has no place and given no scope for imposition on individual citizen. Unfortunately, of late vested interests fanning religious fundamentalism of all kinds vying with each other are attempting to subject the constitutional machinaries of the State to great stress and strain with certain quaint ideas of religious priorities, to promote their own selfish ends, undeterred and unmindful of the disharmony it may ultimately bring about and even undermine national integration achieved with much difficulties and laudable determination of those strong spirited servants of

> yester years. Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of the larger interest of society and basic requirement of a welfare State. Religion sans spiritual values may even be perilous and bring about chaos and anarchy all around. It is, therefore, imperative that if any individual or group of persons, by their action or caustic and inflammatory speech are bent upon sowing seed of mutual hatred, and their proposed activities are likely to create disharmony and disturb equilibrium, sacrificing public peace and tranquillity, strong action, and more so preventive actions are essentially and vitally needed to be taken. Any speech or action which would result in ostracization of communal harmony would destroy all those high values which the Constitution aims at. Welfare of the people is the ultimate goal of all laws, and State action and above all the Constitution. They have one common object, that is to promote well being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names. It is inconceivable that there can be social well being without communal harmony, love for each other and hatred for none. The chore of religion based upon spiritual values, which the Vedas, Upanishad and Puranas were said to reveal to mankind seem to be - "Love others, serve others, help ever, hurt never" and "Sarvae Jana Sukhino Bhavantoo". Oneupship in the name of religion, whichever it be or at whomsoever's instance it be, would render constitutional designs countermanded and chaos, claiming its heavy toll on society and humanity as a whole, may be the inevitable evil consequences, whereof."

52. In the case of ***M. Chandra vs. M. Thangamuthu and another***, reported in ***(2010) 9 SCC 712***, their lordships have held that Hinduism is not a religion with one God or one holy scripture. The practices of Hindus vary from region to region, place to place. Hinduism does not have a single founder, a single book, a single Church or even a single way of life.

> "40. We must remember, as observed by this Court in Ganpat's case, Hinduism is not a religion with one God or one Holy Scripture. The practices of Hindus vary from region to region, place to place. The Gods worshipped, the customs, Traditions, Practice, rituals etc, they all differ, yet all these people are Hindus. The determination of the religious acceptance of a person must be not be made on his

> name or his birth. When a person intends to profess Hinduism, and he does all that is required by the practices of Hinduism in the region or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him.
>
> 41. Hinduism appears to be very complex religion. It is like a centre of gravity doll which always regain its upright position however much it may be upset. Hinduism does not have a single founder, a single book, a singe church or even a single way of life. Hinduism is not the caste system and its hierarchies, though the system is a part of its social arrangement, based on the division of labour. Hinduism does not preach or uphold untouchability, though the Hindu Society has practiced it, firstly due to reasons of public health and later, due to prejudices. (copied in tits and bits from the book facets of Hinduism by Sri Swami Harshananda)."

53. In the case of ***Union of India and others vs. Rafique Shaikh Bhikan and another***, reported in ***(2012) 6 SCC 265***, their lordships have held that Haj subsidy was not in consonance with the tenets of Islam and have observed that there should be progressive reduction of subsidy and its complete discontinuance in ten years.

> "37. From the statement made in paragraph 21 of the affidavit, as quoted above, it is clear that the Government of India has no control on the cost of travel for Haj. The air fare to Jeddah for traveling for Haj is increased by airlines to more than double as a result of the regulations imposed by the Saudi Arabian Authorities. It is illustratively stated in the affidavit that in the year 2011, the air fare for Haj was Rs.58,800/- though the normal air fare to and from Jeddah should have been around Rs.25,000/. In the same paragraph, it is also stated that for the Haj of 2011, each pilgrim was charged Rs.16,000/- towards air fare. In other words, what was charged from the pilgrims is slightly less than 2/3rd of the otherwise normal fare. We see no justification for charging from the pilgrims an amount that is much lower than even the normal air fare for a return journey to Jeddah.
>
> 42. Before leaving the issue of Haj subsidy, we would like to point out that as the subsidy is progressively reduced and is finally eliminated, it is likely that more and more pilgrims would like to go for Haj through PTOs. In that eventuality the need may arise for a substantial increase in the quota for the PTOs

> and the concerned authorities would then also be required to make a more nuanced policy for registration of PTOs and allocation of quotas of pilgrims to them. For formulating the PTO policy for the coming years, the concerned authorities in the Government of India should bear this in mind. They will also be well advised to invite and take into account suggestions from private operators/ travel agents for preparing the PTO policy for the future."

54. In the case of ***N.R. Nair and others etc. etc. vs. Union of India and others***, reported in ***AIR 2000 Kerala 340***, their lordships have held that banning the training and exhibition of animals was not violative of Article 19(1)(g) of the Constitution.

55. In the case of ***Animal Welfare Board of India vs. A. Nagaraja and others***, reported in ***(2014) 7 SCC 547***, their lordships have held that animal welfare laws have to be interpreted keeping in mind the welfare of animals and species best interest subject to just exceptions out of human necessity. Their lordships have also held that every species has a n inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Their lordships have further held that so far animals are concerned, "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour and dignity. Animal has also honour and diginity which can not be arbitrarily deprived of. Their lordships have held that Article 51 (g) and (h) are magna carta for protecting the life of animals.

> "15. We have to examine the various issues raised in these cases, primarily keeping in mind the welfare and the well-being of the animals and not from the stand point of the Organizers, Bull tamers, Bull Racers, spectators, participants or the respective States or the Central Government, since we are dealing with a welfare legislation of a sentient- being, over which human-beings have domination and the standard we have to apply in deciding the issue on hand is the "Species Best Interest", subject to just exceptions, out of human necessity.
>
> 57. We may, at the outset, indicate unfortunately, there is no international agreement that ensures the welfare and protection of animals. United Nations, all these years, safeguarded only the rights of human beings, not the rights of other species like animals, ignoring the fact that many of them, including Bulls, are sacrificing their lives to alleviate human suffering,

combating diseases and as food for human consumption. International community should hang their head in shame, for not recognizing their rights all these ages, a species which served the humanity from the time of Adam and Eve. Of course, there has been a slow but observable shift from the anthropocentric approach to a more nature's right centric approach in International Environmental Law, Animal Welfare Laws etc. Environmentalist noticed three stages in the development of international environmental law instrument, which are as under:

(a) The First Stage: Human self-interest reason for environmental protection

- The instruments in this stage were fuelled by the recognition that the conservation of nature was in the common interest of all mankind.

- Some the instruments executed during this time included the Declaration of the Protection of Birds Useful to Agriculture (1875), Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive (1900), Convention for the Regulation of Whaling (1931) which had the objective of ensuring the health of the whaling industry rather than conserving or protecting the whale species.

- The attitude behind these treaties was the assertion of an unlimited right to exploit natural resources – which derived from their right as sovereign nations.

(b) The Second Stage: International Equity

- This stage saw the extension of treaties beyond the requirements of the present generation to also meet the needs to future generations of human beings. This shift signalled a departure from the pure tenets of anthropocentrism.

- For example, the 1946 Whaling Convention which built upon the 1931 treaty mentioned in the preamble that "it is in the interest of the nations of the world to safeguard for future generations the great natural resource represented by the whale stocks". Similarly, the Stockholm Declaration of the UN embodied this shift in thinking, stating that "man …… bears a solemn responsibility to protect and improve the environment for present and future generations"

and subsequently asserts that "the natural resources of the earth .... must be safeguarded for the benefit of present and future generations through careful planning and management". Other documents expressed this shift in terms of sustainability and sustainable development.

(c) The Third Stage: Nature's own rights

- Recent Multinational instruments have asserted the intrinsic value of nature.

- UNEP Biodiversity Convention (1992) "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, educational, cultural, recreational and aesthetic values of biological diversity and its components .... [we have] agreed as follows:.....". The World Charter for Nature proclaims that "every form of life is unique, warranting respect regardless of its worth to

man." The Charter uses the term "nature" in preference to "environment" with a view to shifting to non-anthropocentric human-independent terminology."

61. When we look at the rights of animals from the national and international perspective, what emerges is that every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Animal has also honour and dignity which cannot be arbitrarily deprived of and its rights and privacy have to be respected and protected from unlawful attacks.

68. Article 51A(h) says that it shall be the duty of every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform. Particular emphasis has been made to the expression "humanism" which has a number of meanings, but increasingly designates as an inclusive sensibility for our species. Humanism also means, understand benevolence, compassion, mercy etc. Citizens should, therefore, develop a spirit of compassion and humanism which is reflected in the Preamble of PCA Act as well as in Sections 3 and 11 of the Act. To look after the welfare and well-being of the animals and the duty to prevent the infliction of pain or suffering on animals highlights the principles of humanism in Article 51A(h).

Both Articles 51A(g) and (h) have to be read into the PCA Act, especially into Section 3 and Section 11 of the PCA Act and be applied and enforced.

71. We have, however, lot of avoidable non-essential human activities like Bullock-cart race, Jallikattu etc. Bulls, thinking that they have only instrumental value are intentionally used though avoidable, ignoring welfare of the Bulls solely for human pleasure. Such avoidable human activities violate rights guaranteed to them under Sections 3 and 11 of PCA Act. AWBI, the expert statutory body has taken up the stand that events like Jallikattu, Bullock-cart race etc. inherently involve pain and suffering, which involves both physical and mental components, including fear and distress. Temple Grandin and Catherine Johnson, in their work on "Animals in Translation" say:

"The single worst thing you can do to an animal emotionally is to make it feel afraid. Fear is so bad for animals I think it is worse than pain. I always get surprised looks when I say this. If you gave most people a choice between intense pain and intense fear, they'd probably pick fear."

Both anxiety and fear, therefore, play an important role in animal suffering, which is part and parcel of the events like Jallikattu, Bullock- cart Race etc..

RIGHT TO LIFE:

72. Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity.

Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. Animals' well-being and welfare have been statutorily recognised under

> Sections 3 and 11 of the Act and the rights framed under the Act. Right to live in a healthy and clean atmosphere and right to get protection from human beings against inflicting unnecessary pain or suffering is a right guaranteed to the animals under
>
> Sections 3 and 11 of the PCA Act read with Article 51A(g) of the Constitution. Right to get food, shelter is also a guaranteed right under Sections 3 and 11 of the PCA Act and the Rules framed thereunder, especially when they are domesticated. Right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well. Right, not to be beaten, kicked, over-ridder, over-loading is also a right recognized by Section 11 read with Section 3 of the PCA Act. Animals have also a right against the human beings not to be tortured and against infliction of unnecessary pain or suffering. Penalty for violation of those rights are insignificant, since laws are made by humans. Punishment prescribed in Section 11(1) is not commensurate with the gravity of the offence, hence being violated with impunity defeating the very object and purpose of the Act, hence the necessity of taking disciplinary action against those officers who fail to discharge their duties to safeguard the statutory rights of animals under the PCA Act."

56. The United States Supreme Court in the case of ***Abraham Braunfeld vs. Albert N. Brown***, reported in ***6 L. Ed. 2d 563***, have held that a State has power to provide a weekly respite from all labour and, at the same time, to get one day of the week apart from the others as a day of rest, repose, recreation, and tranquility. The Supreme Court has also held that the constitutional guarantee of the free exercise of religion is not violated by the Pennsylvania statute which penalizes the Sunday retail sale of certain enumerated commodities (18 Purdon's Pa Stat Ann (4699.10)), either on its face or as applied to retail merchants who are members of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention of all manner of work from nightfall each Friday until nightfall each Saturday; this is so even tough enforcement of the statute would impair the ability of such a merchant to earn a livelihood or would render him unable to continue in his business, thereby losing his capital investment.

The Supreme Court has further laid down the test to determine freedom of religion as under:

> "The effect of a law as bringing about an economic disadvantage to some religious sects and not to others because of the special practices of the various

religions is not an absolute test for determining whether the law violates the constitutional guaranty of freedom of religion."

57. The United States Supreme Court in the case of ***Employment Division, Department of Human Resources of the State of Oregon v. Galen W. Black***, reported in ***99 L Ed 2d 753***, have held that the free exercise of religion clause of the Federal Constitution's First Amendment precludes any governmental regulation of religious beliefs as such; government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit dissemination of particular religious views; however, there is a distinction between the absolute constitutional protection against governmental regulation of religious beliefs, on the one hand, and the qualified protection against the regulation of religiously motivated conduct, on the other; the protection that the First Amendment provides to legitimate claims to the free exercise of religion does not extend to conduct that a state has validly proscribed.

58. Justice Frankfurter in ***Minersville School Dist. Bd. of Ed.*** V ***Gobitis***, 310 US 586, 594-595, *84 L Ed 1375*, 60 S Ct 1010 (1940): has held that "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

59. In ***Reynolds*** v ***United States***, 98 US 145, 25 L Ed 244 (1879), the United States Supreme Court has held that "Laws are made for the government of actions and while they can not interfere with mere religious beliefs and opinions, they may with practices ….. Can a man excuse his practices to contrary because of his religious beliefs? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

60. The core issue involved in these petitions is whether animal sacrifice is an essential/central theme and integral part of Hindu religion or not? The Apex Court, as noticed herein above in the case of ***The Commissioner, Hindu Religious Endowments, Madras*** (***supra***), have held that a religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and the forms and observances might expand even to matters of food and dress. What constitutes the essential/integral part of Hindu religion is primarily to be ascertained in respect of the doctrine of that religion itself. We could not find it from the material placed on record that animal sacrifice is an essential part of the religion by making reference to the doctrines of Hindu religion itself.

61. The overt act of sacrificing animals in the temples or its premises is not obligatory overt act to reflect religious belief and idea. Their lordships of the Hon'ble Supreme Court in the case of **Durgah Committee, Ajmer** (**supra**), have held that even practices though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are bound to constitute an essential and integral part of a religion, the protection under Article 26 of the Constitution of India is not available.

62. Now as far as the contention raised by Mr. Shrawan Dogra, learned Advocate General that the scope of judicial review in these matters is very limited is concerned, is no more *res integra* in view of the law laid down by the Hon'ble Supreme Court in the case of **Tilkayat Shri Govindlalji Maharaj (supra)**. Their lordships of the Hon'ble Supreme Court have held that the question will always have to be decided by the Court whether a given religious practice is an integral part of religion or not and the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.

63. In the case of **Shastri Yagnapurushdasji (supra),** their lordships have highlighted that the development of Hindu religion and philosophy shows that from time to time, saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition. It led to the formation of different sects. Budha started Budhism and Mahavir founded Jainism. The same principle has been reiterated by their lordships of the Hon'ble Supreme Court in the case of **His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami etc. (supra**). In the case of **A.S. Narayana Deekshitulu (supra)**, their lordships of the Hon'ble Supreme Court held that the integral or essential part of religion is to be ascertained from the doctrine of that religion itself according to its tenets, historical background and change in evolved process. Their lordships have further held that whether the practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. In the case of **N. Adithayan (supra**), their lordships of the Hon'ble Supreme Court have held that custom or usage, even if proved to have existed in pre-Constitutional period, cannot be accepted as a source of law, if such custom violates human rights, human dignity, concept of social equality and the specific mandate of the Constitution and law made by the parliament. Their lordships have also highlighted that the vision of the founding fathers of the Constitution was to liberate society from blind adherence to traditional superstitious beliefs sans reason or rational basis. The animal sacrifice can not be treated as fundamental to follow a religious belief and practice. It is only if taking away of that part of practice can result in a fundamental change in the character of that

religion or belief that could be treated as essential or integral part. We reiterate that if animal sacrifice is taken out, it will not result in fundamental change in the character of the Hindu religion or in its belief. Their lordships of the Hon'ble Supreme Court in the case of ***State of Karnataka and another*** **(supra)** have held that the core of religion is based upon spiritual values which the Vedas, Upanishads and Puranas were said to reveal to mankind, seem to be "love others, serve others, help ever, hurt never."

64. The Hindus have regarded the Veda as a body of eternal scripture. The earliest portion of the Veda consists of four metrical hymns known as *Samhitas* and called *Rg Veda, Yajur Veda, Sama Veda* and *Atharva Veda*. The earliest of these texts is that of the *Rg Veda*. The hymns and chants of the Vedas gave rise to elaborate ritualistic approach interpretations called *Brahmanas* and *Aranyakas*. The Vedic ideas of sacrifice and mythology were reinterpreted in terms of the macrocosm and microcosm. The whole of Vedic literature consists of four Vedas, or Samhitas; several expository rituals texts attached to each of these Vedas, called Brahamanas; texts giving secret and mystical explanations of the rituals, called Aranakas; and speculative treatises, or Upanishads, concerned chiefly with a mystical interpretation of the Vedic ritual and its relation to man and the Universe. The most elaborate sacrifice described in the Brahamanas is the horse-sacrifice (*Asvamedha*). It was an ancient rite that a king undertook to increase his influence. The horse-sacrifice was given cosmological significance by equating various parts of the sacrificial horse with corresponding element of the cosmos as was *brhadaranyaka.* In **Sources of Indian Tradition, Second Edition Volume One From the Beginning to 1800 of Ainslie T. Embree**, sacrifices as enunciated in Upnishads read as under:

> ***" Sacrifices- Unsteady Boats on the Ocean of Life***
>
> Some later Uupnishads represent a reaction to the glorification of the sacrifice. The teacher of the *Mundaka Upnishad quoted below seems to concede a place for sacrifice in man's life- by way of religious discipline; but he concludes that sacrifice is ineffectual as a means to the knowledge of the highest reality and to spiritual emancipation. On the other hand, as is suggested by the passage cited above, some earlier Upanishadic teachers substituted a kind of "spiritual" or "inner" sacrifice for the "material" or "external" sacrifice.*
>
> *[From Mundaka Upanisad, 1.2.1, 7-13]*
>
> This is that truth. The sacrificial rites that the sages saw in the hymns are manifoldly spread forth in the three [Vedas]. Perform them constantly, O lovers of truth. This is your path to the world of good deeds.

When the flame flickers after the oblation fire has been kindled, then, between the offerings of the two potions of clarified butter one should proffer his principal oblations- an offering made with faith…

Unsteady, indeed, are these boats in the form of sacrifices, eighteen in number, in which is prescribed only the inferior work. The fools who delight in this sacrificial ritual as the highest spiritual good go again and again through the cycle of old age and death.

Abiding in the midst of ignorance, wise only according to their own estimate, thinking themselves to be learned, but really obtuse, these fools go round in a circle like blind men led by one who is himself blind.

Abiding manifoldly in ignorance they, all the same, like immature children think to themselves: "We have accomplished our aim." Since the performers of sacrificial ritual do not realize the truth because of passion, therefore, they, the wretched ones, sink down from heaven when the merit that qualified them for the higher world becomes exhausted.

Regarding sacrifice and merit as most important, the deluded ones do not know of any other higher spiritual good. Having enjoyed themselves only for a time on top of the heaven won by good deeds [sacrifice, etc.] they reenter this world or a still lower one.

Those who practice penance (tapas) and faith in the forest, the tranquil ones, the knowers of truth, living the life of wandering mendicancy- they depart, freed from passion, through the door of the sun, to where dwells, verily, that immortal Purusha, the imperishable Soul [atman].

Having scrutinized the worlds won by sacrificial rites, a brahman should arrive at nothing but disgust. The world that was not made is not won by what is done [i.e. by sacrifice].For the sake of that knowledge he should go with sacrificial fuel in hand as a student, in all humility to a preceptor [guru] who is well versed in the [Vedic] scriptures and also firm in the realization of Brahman.

Unto him who has approached him in proper form, whose mind is tranquil, who has attained peace, does the knowing teacher teach, in its very truth, that knowledge about Brahman by means of which

> one knows the imperishable Purusha, the only Reality."

65. In the earliest phase of Indian thought the observance of the cosmic and moral law and the performance of dharma in the form of sacrifice were believed in as means of propitiating the gods and gaining heavenly enjoyment in the after life. The third category besides Vedas, Upnishadas are the Puranas. The Puranas are great storehouse of legends of myths about the gods, principally Shiva and Vishnu, and their relations with mankind. These are at the heart of popular Hinduism. They provide the mythological framework for the tradition. They also exemplify what is pervasive aspect, namely, *bhakti,* or the practice of devotion, passionate devotion to a particular deity.

66. The fourth group can be characterized as '*tantra'. The 'tantras'* have inner meanings that are only to be communicated by a guru to his disciples. The tantric way, although characterized by secret rituals, arcane symbolism, and hidden teachings, shares with the other ways to salvation, with the great emphasis on devotion.

67. The hymn of Rg Veda were much occupied with Soma ritual and animal sacrifices are indicated by the *Apri Suktas.* However, these practices were prevalent only in pre-historic times. Now, in this era, these practices have no social sanction but merely based on superstition and ignorance.

68. The Gita differs from Upanishads. The Upanishads generally put forth the view that, because this phenomenal world and human existence are in some sense unreal, one should renounce this worldly life and aim at realizing the essential identity of one's soul with the Universal Self, which is the only absolute reality. The Upanishadic attitude towards life and society is fundamentally individualistic. The Gita on the other hand, teaches that one has a duty to promote *Lokasangrah*, the stability, solidarity, and progress of society. As an essential constituent of society, therefore, one must have an active awareness of ones social obligations. The Vedic ritual practices were exclusive in character. The Gita permits a way of life in which all can participate. In contrast to ritual sacrifice, the Gita offers a concept of sacrifice embracing all actions done in fulfillment of ones *sarvadharma.*

69. The advancing Indian society has been depicted by **Amaury de Riencourt in "The Soul of India Revised Edition 1986**", as under:

> *"The optimistic buoyancy of the Rg-Veda had eventually given way to the darker, pessimistic and fearful mood of the Atharva-Veda, whose world picture was replete with nefarious ghosts, grinning demons and spirits of death, and whose rules of conduct were centered on bloody and cruel sacrifices. Men no longer loved or admired the gods but feared them cringingly. Religious spirit was gradually replaced by the magical. The Rg-Vedic devotional*

mantra (prayer) became a magic spell or incantation that sought to ward off a threat or compel a reluctant spirit, in true magical style, rather than implore it, in true religious style. The prevailing deities were now Kala (Time), Kama (Love), and Skambha, who replaced Prajapati and was soon going to metamorphose itself into Purusa and Brahman. Hell and its horrors came in for an increasing share of attention. In many ways, this Atharva-Veda represents the rising demonology which became so prominent in Europe's pre-Reformation days.

Then, the Yajur-Veda and the Brahmanas emphasized the decline of the true spirit of religious fervor along with the growth of an intricate ritual, a complex liturgy, a cold, formal and artificial organization of clerical pomp and sacrifices. It would seem that at all such periods there is a deliberate attempt on the part of an increasingly powerful clergy to emphasize the dark and fearful side of religion in order to increase its power over the superstitious minds of its followers. The gods and spirits are no longer accessible to the common man as they were in the earlier days: the priestly 'experts' interpose themselves and become the highly paid spiritual attorneys of an increasingly bewildered population. Brahmin priests became as powerful and as corrupt as the late medieval clergy in Western Europe, an Indian clergy bent on securing to the utmost their secular power and prerogatives through complex ceremonies and mechanical sacerdotalism. Dry and pedantic scholasticism took over the great Vedic Revelation and exploited it to the full for the benefit of the Brahmins."

70. What can be gathered from the facts enumerated, hereinabove, is that the practice of animal sacrifice is prevalent in some areas of the State. There is ample material placed on record by the petitioners and the persons who have filed individual affidavits that the animals are put to a lot of suffering, pain and agony at the time of their sacrifice. The methods adopted to kill these innocent animals are barbaric. It is stated in the affidavits by various individuals that at times it takes about 15 blows to kill the animal. The animal runs amok to save his life. The animals are sacrificed in the presence of other animals, which must be an agonizing experience for those animals.

71. Articles 25 and 26 of the Constitution of India protects, of course, the religious beliefs, opinions and practices but not superstitions. A religion has to be seen as a whole and thereafter it can

be seen whether a particular practice is core / central to the religion. It can be a hybrid also. In the instant case, offerings in the temples can be made by offering flowers, fruits, coconut etc. According to us, there are compelling reasons and grounds to prohibit this practice. A democratic polity is required to be preferred to a system in which each ones conscience is a law and to itself. The State has also the obligation under constitutional mandate to promote the health, safety and general welfare of the citizens and animals.

72. The stand of the State Government in the reply is that this practice is prevalent from time immemorial and the people have a deep routed faith and belief in animal sacrifice. The Court has directed, as noticed hereinabove, the State Government to propose a regulation to arrest this evil. The State Government instead of filing an affidavit giving therein measures required to curb this practice has chosen to file the reply.

73. The Vedas were composed in 1500 B.C. There is reference to sacrifices made in Upanishads and Puranas. The Vedas are eternal, Puranas are the governing of mythological beliefs and the manner in which the *'pooja/archana'* is to be offered to the Gods. The Bhagwat Gita does not deal with this aspect of sacrifices as contained in the Puranas. The Vedas, Upanishads and Puranas were composed during the earliest phase of civilization. The devotees in these days were put to fear and were also afraid of the wrath of natural calamities. The society has advanced. We are in a modern era. The rituals, which may be prevalent in the early period of civilization have lost their relevance and the old rituals are required to be substituted by new rituals which are based on reasoning and scientific temper. Superstitions have no faith in the modern era of reasoning.

74. Now, as far as Puranas referred to by Mr. Bhupinder Gupta, Senior Advocate are concerned, they only refer to the manner in which the sacrifices are to be performed. There is reference of "tradition of human sacrifice". The devotees are made to believe that the deity would be happy for a number of years as per the sacrifices of each species of animals/birds. The deity, as per this Purana, would be much happier if a man is sacrificed. These practices have outlived and have no place in the 21st century. The animal sacrifice of any species may be a goat or sheep or a buffalo, can not be, in our considered view, treated as integral/central theme and essential part of religion. It may be religion's practice but definitely not an essential and integral part of religion. Hindu Religion, in no manner, would be affected if the animal sacrifice is taken out from it. It has come on record that in a number of temples, the enlightened members of the priestly community and Mandir Committees have done away with the practice of animal sacrifice. Recently, Mandir committee Dharech has stopped this practice as per the news item. The *Karuna* (compassion) is deeply ingrained in the Hindu philosophy. Vedas, as we have already noticed, are eternal and their relevance would be for all times to come. However, the *Samritis* will come to an end as time passes on more and more *Samritis* will go, Saints would come and would

change and would enlighten us on duties and paths according to the necessity of the age. We have to progress. A society should look forward, of course, by following values of all religions. The essentials of any religion are eternal. The non-essentials are relevant for some time. The animal/bird sacrifice cannot be treated as eternal. We should experience religion. We have to stand up against the social evils, with which the society at times is beset with. Social reforms are required to be made. We are required to build up a new social order. We have to take a pragmatic approach. The new Mantra is salvation of the people, by the people. The Hindus have to fulfill the Vedantic ideas but by substituting old rituals by new rituals based on reasoning.

75. The animals have basic rights and we have to recognize and protect them. The animals and birds breathe like us. They are also a creation of God. They have also a right to live in harmony with human beings and the nature. No deity and *Devta* would ever ask for the blood. All *Devtas* and deities are kind hearted and bless the humanity to prosper and live in harmony with each other. The practice of animal/bird sacrifice is abhorrent and dastardly.

76. The welfare of animals and birds is a part of moral development of humanity. Animals/ birds also require suitable environment, diet and protection from pain, sufferings, injury and disease. It is the man's special responsibility towards the animals and birds being fellow creatures. We must respect the animals. They should be protected from the danger of unnecessary stress and strains. The United Kingdom Farm Animal Welfare Council (FAWC) has expanded 5 freedoms for animals as under:

> 1. Freedom from hunger and thirst – by ready access to fresh water and a diet designed to maintain full health and vigour.
>
> 2. Freedom from discomfort – by the provision of an appropriate environment including shelter and a comfortable resting area;
>
> 3. Freedom from pain, injury or disease – by prevention or through rapid diagnosis and treatment;
>
> 4. Freedom to express normal behaviour – by the provision of sufficient space, proper facilities and company of the animal's own kind; and
>
> 5. Freedom from fear and distress – by the assurance of conditions that avoid mental suffering.

77. These are fundamental principles of animal welfare. The Welfare Quality Project (WQP) research partnership of scientists from Europe and Latin America founded by the European Commission has developed a standardized system for assessing animal welfare as under:

1. “Animals should not suffer from prolonged hunger, i.e. they should have a sufficient and appropriate diet.

2. Animals should not suffer from prolonged thirst, i.e. they should have a sufficient and accessible water supply.

3. Animals should have comfort around resting.

4. Animals should have thermal comfort, i.e. they should neither be too hot nor too cold.

5. Animals should have enough space to be able to move around freely.

6. Animals should be free from physical injuries.

7. Animals should be free from disease, i.e. farmers should maintain high standards of hygiene and care

8. Animals should not suffer pain induced by inappropriate management, handling, slaughter or surgical procedures (e.g. castration, dehorning).

9. animals should be able to express normal, non-harmful social behaviours (e.g. grooming).

10. Animals should be able to express other normal behaviours, i.e. they should be able to express species –specific natural behaviours such as foraging.

11. Animals should be handled well in all situations, i.e. handlers should promote good human-animal relationships.

12. Negative emotions such as fear, distress, frustration or apathy should be avoided, whereas positive emotions such as security or contentment should be promoted.”

78. We definitely need to make an all out effort to overcome the evils in society. Religion, faith gives coherence to lives and the thought process. We must permit gradual reasoning into the religion. Samritis derive their strength from generation to generation. They are storehouse of wisdom. Old traditions must give way to new traditions.

79. Article 48 of the Constitution of India provides for organization of agriculture and animal husbandry. Article 48-A talks of protection and improvement of environment and safeguarding of forests and wild life. It is the fundamental duty of every citizen as per Article 51-A (g) of the Constitution of India to protect and improve natural environment including forests, lakes, rivers and wild life, and to have

compassion for living creatures. Article 51-A(h) stresses to develop the scientific temper, humanism and the spirit of inquiry and reform. Article 51-A(i) talks of safeguarding public property and to abjure violence. '*Ahimsa'* is also the central theme of the Hindu Philosophy though later on expounded by Budha. The State's affidavit talking of vegetarian and non-vegetarian food is wholly misplaced. The core issue has never been addressed in the reply filed by the State government to the issues. The Court can always see whether a particular practice is essential or non-essential by taking into evidence, including by going through the religious scriptures. It is not a forbidden territory but the Court has to tread cautiously. The Court has to necessarily go into the entire gamut of Articles 25 and 26, the statutes pertaining to religion. Every citizen has a freedom of conscience including right to freely profess, practise and propagate religion and also to manage its own affairs in the matter of religion. The right to freedom of conscience and right to profess, practise and propagate religion and manage its own affairs in the matter of religion would not be affected if the practice of animal sacrifice is discontinued. It may strengthen the religion. The discontinuation of animal sacrifice would not in any manner violate Articles 25 and 26 of the Constitution of India. Articles 25 and 26 of the Constitution of India are to be read with Articles 48, 48-A and 51-A of the Constitution of India.

80. Strong reliance has been placed by the Government on Section 28 of the Prevention of Cruelty to Animals Act, 1960. This enactment has been carried out to prevent the infliction of unnecessary pain on animals. 'Animal' has been defined to mean any living creature other than a human being. Chapter III of the Act provides for 'Cruelty to Animals Generally'. It inter alia provides beating, kicking, over-riding, over-driving, overloading, torturing or otherwise treating any animal so as to subject it to unnecessary pain or suffering, as cruelty. Section 28 of the Act reads as under:

> "28. Saving as respects manner of killing prescribed by religion: Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community."

81. Section 11 and Section 28 of this Act are to be interpreted as per Articles 48, 48-A, 51-A(g), 51-A(h) and 51-A(i). The underlying principle of Section 28 is that it would not be an offence to kill any animal in the manner required by the religion of any community. It does not permit, in any manner, to sacrifice an animal in temple. Mostly the temples are open to public and the conscience of all the devotees are to be taken into consideration. It has come on record that the killing of animals in a brutal manner causes immense pain, strain, agony and suffering to the animals. The animals are left to bleed after inflicting injuries on their parts. The blood is strewn all over. The Apex Court, as we have already noted above has held that killing of cows on BakrI'd is not an integral part of Muslim religion.

82. The Hon'ble Supreme Court, in the case of ***Sardar Syedna Taher Saifuddin Sahib*** vs. ***State of Bombay,*** reported in *AIR 1962 SC 853*, have already held human and animal sacrifice to be deleterious. We have advanced by another half century but till date, the practice of animal sacrifice is still prevalent in this part of the country. The killing of various species of animals/birds is not an integral/central and essential part of Hindu religion. According to rule 3 of the Prevention of Cruelty to Animals (Slaughter House) Rules, 2001, no person is authorized to slaughter any animal within a municipal area except in a slaughter house recognized or licensed by the concerned authority. No animal, which is pregnant, or has an offspring less than three months old, or is under the age of three months or has not been certified by a veterinary doctor that it is in a fit condition can be slaughtered. According to sub-rule (1) of rule 6, no animal can be slaughtered in a slaughter house in sight of other animals and according to sub-rule (3) of rule 6, slaughter house shall provide separate sections of adequate dimensions sufficient for slaughter of individual animals to ensure that the animal to be slaughtered is not within the sight of other animals. Sub-rule (5) of rule 6 provides that knocking section in slaughter house is so planned as to suit the animal and particularly the ritual slaughter, if any, and such knocking section and dry landing area associated with it is so built that escape from this section can be easily carried out by an operator without allowing the animal to pass the escape barrier. If the animal cannot be slaughtered in a slaughter house in sight of other animals, how human can see sacrifice of animal, that too, in a holy and pious places like temples.

83. We also take judicial notice of the news items which are published in English and vernacular newspapers, whereby the statements are being made by certain organizations for convening *Jagti* or *Dev Samaj* to discuss this issue. They are free to discuss the issue. However, their actions can not be in negation of rule of law. The prominence of values enshrined in the Constitution is above any religious values or values enshrined in any personal or religious law. They have no right, whatsoever, to issue any mandate/dictate in violation of basic human rights of the human beings as well as animal rights. The animals have emotions and feelings like us. Religion cannot be allowed to become a tool for perpetuating untold miseries on animals. If any person or body tries to impose its directions on the followers in violation of the Constitution or validly enacted law, it would be an illegal act (see : ***Visha Lochan Madan*** vs**.** ***Union of India and ors***., reported in (2014) 7 SCC 707). The extra Constitutional bodies have no role and cannot issue directives to the followers not to obey the command of law. They cannot be permitted to sit in appeal over the orders/judgments of the Court. Whether a particular practice is an essential/central theme and integral part of religion, can only be decided by the Courts of law and any religion congregation cannot become law unto themselves. This Constitutional issue is no more *res integra*, in view of the law laid down by the Hon'ble Supreme Court in the case of ***Visha Lochan Madan*** vs**.**

Union of India and ors., reported in (2014) 7 SCC 707. Their Lordships have held as under:

> "13. As it is well settled, the adjudication by a legal authority sanctioned by law is enforceable and binding and meant to be obeyed unless upset by an authority provided by law itself. The power to adjudicate must flow from a validly made law. Person deriving benefit from the adjudication must have the right to enforce it and the person required to make provision in terms of adjudication has to comply that and on its failure consequences as provided in law is to ensue. These are the fundamentals of any legal judicial system. In our opinion, the decisions of Dar-ul-Qaza or the Fatwa do not satisfy any of these requirements. Dar-ul-Qaza is neither created nor sanctioned by any law made by the competent legislature. Therefore, the opinion or the Fatwa issued by Dar-ul-Qaza or for that matter anybody is not adjudication of dispute by an authority under a judicial system sanctioned by law. A Qazi or Mufti has no authority or powers to impose his opinion and enforce his Fatwa on any one by any coercive method. In fact, whatever may be the status of Fatwa during Mogul or British Rule, it has no place in independent India under our Constitutional scheme. It has no legal sanction and can not be enforced by any legal process either by the Dar-ul-Qaza issuing that or the person concerned or for that matter anybody. The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored. In case any person or body tries to impose it, their act would be illegal. Therefore, the grievance of the petitioner that Dar- ul-Qazas and Nizam-e-Qaza are running a parallel judicial system is misconceived.
>
> 14. As observed earlier, the Fatwa has no legal status in our Constitutional scheme. Notwithstanding that it is an admitted position that Fatwas have been issued and are being issued. All India Muslim Personal Law Board feels the "necessity of establishment of a network of judicial system throughout the country and Muslims should be made aware that they should get their disputes decided by the Quazis. According to the All India Muslim Personal Law Board "this establishment may not have the police powers but shall have the book of Allah in hand and sunnat of the Rasool and all decisions should be according to the Book and the

Sunnat. This will bring the Muslims to the Muslim Courts. They will get justice".

15. The object of establishment of such a court may be laudable but we have no doubt in our mind that it has no legal status. It is bereft of any legal pedigree and has no sanction in laws of the land. They are not part of the corpus juris of the State. A Fatwa is an opinion, only an expert is expected to give. It is not a decree, not binding on the court or the State or the individual. It is not sanctioned under our constitutional scheme. But this does not mean that existence of Dar-ul-Qaza or for that matter practice of issuing Fatwas are themselves illegal. It is informal justice delivery system with an objective of bringing about amicable settlement between the parties. It is within the discretion of the persons concerned either to accept, ignore or reject it. However, as the Fatwa gets strength from the religion; it causes serious psychological impact on the person intending not to abide by that. As projected by respondent No. 10 "God fearing Muslims obey the Fatwas". In the words of respondent No. 10 "it is for the persons/parties who obtain Fatwa to abide by it or not. It, however, emphasises that "the persons who are God fearing and believe that they are answerable to the Almighty and have to face the consequences of their doings/deeds, such are the persons, who submit to the Fatwa". Imrana's case is an eye-opener in this context. Though she became the victim of lust of her father in law, her marriage was declared unlawful and the innocent husband was restrained from keeping physical relationship with her. In this way a declaratory decree for dissolution of marriage and decree for perpetual injunction were passed. Though neither the wife nor the husband had approached for any opinion, an opinion was sought for and given at the instance of a journalist, a total stranger. In this way, victim has been punished. A country governed by rule of law cannot fathom it.

Their lordships have further held that the directives issued by a religious congregation have no force of law. Any person trying to enforce that by any method, shall be illegal and is required to be dealt with in accordance with law.

"17. In the light of what we have observed above, the prayer made by the petitioner in the terms sought for cannot be granted. However, we observe

> that no Dar-ul-Qazas or for that matter, any body or institution by any name, shall give verdict or issue Fatwa touching upon the rights, status and obligation, of an individual unless such an individual has asked for it. In the case of incapacity of such an individual, any person interested in the welfare of such person may be permitted to represent the cause of concerned individual. In any event, the decision or the Fatwa issued by whatever body being not emanating from any judicial system recognised by law, it is not binding on anyone including the person, who had asked for it. Further, such an adjudication or Fatwa does not have a force of law and, therefore, cannot be enforced by any process using coercive method. Any person trying to enforce that by any method shall be illegal and has to be dealt with in accordance with law.
>
> 18. From the conspectus of what we have observed above, we dispose off the writ petition with the observation aforesaid, but without any order as to the costs."

84. We have invoked the '*doctrine of parens patriae'* alongwith other constitutional provisions, as discussed hereinabove, to protect the basic rights of animals. The issuance of Annexure P-1 in CWP No. 9257/2011 was valid. The petitioners in CWP No.4499/2012 are required to be protected by the respondent-State for highlighting this social evil.

85. Accordingly, we allow the writ petition CWP No. 5076/2012 and issue the following mandatory directions, prohibiting/banning animal/bird sacrifice in the temples and public places as under:

1. No person throughout the State of Himachal Pradesh shall sacrifice any animal or bird in any place of religious worship, adoration or precincts or any congregation or procession connected with religious worship, on any public street, way or place, whether a thoroughfare or not, to which the public are granted access to or over which they have a right to pass;

2. No person shall officiate or offer to officiate at, or perform or offer to perform, or serve, assist or participate, or offer to serve, assist, or participate, in any sacrifice in any place of public religious worship or adoration or its precincts or in any congregation or procession, including all lands, buildings near such places which are ordinarily used for the purposes connected with religious or adoration, or in

any congregation or procession connected with any religious worship in a public street;

3. No person shall knowingly allow any sacrifice to be performed at any place which is situated within any place of public religious worship, or adoration, or is in his possession or under his control;

4. The State Government is directed to publish and circulate pamphlets henceforth to create awareness among the people, to exhibit boards, placards in and around places of worship banning the sacrifice of animals and birds;

5. The State Government is further directed to give due publicity about the prohibition and sacrifice in media both audio and visual, electronic and in all the newspapers; and

6. All the duty holders in the State of Himachal Pradesh are directed to punctually and faithfully comply with the judgment. It is made clear that the Deputy Commissioners and Superintendents of Police of all the Districts shall personally be responsible to prevent, prohibit the animal / bird sacrifices throughout the State of Himachal Pradesh.

7. The expression 'temple' would mean a place by whatever designation known, used as a place of public worship and dedicated to, and for the benefit of, or used as a right by the Hindu community or any section thereof, as a place of public religious worship. The temple premises shall also include building attached to the temple, land attached to the temple, which is generally used for the purposes of worship in the temple, whether such land is in the property of temple area or place attached to the temple or procession is performed.

86. Consequently, in the light of above judgment, CWP Nos.9257 of 2011 and 4499/2012 are rendered infructuous.

CMP Nos. 14962 and 14963 of 2014

87. Now, as far as the plea raised by the applicants, that they were not heard before passing of the order, merits outright rejection. The Court had got the public notices issued in newspapers permitting the persons to place their respective views before the Court. The present applications have been filed very belatedly, when the ad-interim order has been passed on 1.9.2014.

88. No separate orders are required to be passed in the present applications, in view of the judgment and the same are rejected. Pending application(s), if any, also stands disposed of.

"Live and let live"

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Sudesh Kumari & others .....Appellants
Vs.
Ramesh Kumar & others ..... Respondents

FAO No.6 of 2006 a/w
C.O. No.2 of 2014
Date of decision: 26.09.2014

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal deducting GPF subscription of ₹4,000/-, HRA of ₹200/-, FTA of ₹75/- and GIS of ₹30/- while assessing the loss of income- Age of the deceased was 51 years and the Motor Accident Claims Tribunal had applied the multiplier of 7- Held that gross salary was taken to be taken into consideration and multiplier of 9 was to be applied, therefore, the claimants are entitled to compensation of ₹6000/- X 12 X 9= 6, 48,000/, ₹ 2,000/- towards expenses on the obsequies, ₹2,500/- towards loss of estate and ₹ 5,000/- towards loss of consortium .

(Para – 16 to 18)

Cases Referred:

Sarla Verma & others versus Delhi Transport Corporation & another, AIR 2009 Supreme Court 3104

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellants: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate for respondents No.1 and 2.
Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Ms.Sudesh Kumari, Licence Clerk, Registering and Licensing Authority, Amb, District Una, H.P. present in Court. She has also produced the original record, which do disclose that the verification

report is correctly issued. After perusing the record, the same was returned to the Officer in the open Court.

2. Heard. This appeal is directed against the award dated 30th September, 2005, passed by the Motor Accident Claims Tribunal, Una, H.P (for short, "the Tribunal") in MAC Petititon No. 53 of 2002, titled Sudesh Kumari & others vs. Ramesh Kumar & others, whereby and whereunder a sum of Rs.2,78,972/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and against the owner and the insurer was to satisfy the award amount with right of recovery from the owner (for short the "impugned award").

3. The owner has also filed cross objections and questioned the impugned award on the ground that the Tribunal has wrongly granted the right of recovery. The insurer, insured and the claimants have not questioned issues No.1, 3, 4, 6 and 7 on any count. Thus, the findings returned on the same by the Tribunal are upheld.

4. The only dispute relates to issues No.2 and 5. In order to determine issues No.2 and 5, it is necessary to give brief facts of the case, the womb which has given birth to this appeal.

5. Surinder Singh deceased became the victim of vehicular accident on 14.10.2002, which was caused by the driver, namely, Moti Lal, who had driven the offending vehicle i.e. bus bearing registration No. HP-19-2112 rashly and negligently near Shiv Mandir in Deoli village. The deceased sustained injuries and succumbed to the same. The claimants being the widow, sons and daughters have claimed the compensation to the tune of Rs.10 lacs as per the break-ups given in the claim petition.

6. Precisely, the case of the claimants was that the deceased was the only bread earner, was earning Rs.9,117/- per month as an employee, being Gram Panchayat Vikas Adhikari in Block Development Office, Gagret and he was also earning Rs.2,000/- from agriculture vocation and thus, the claimants have lost source of dependency.

7. The driver, owner and the insurer resisted the claim petition.

8. The following issues came to be framed in the claim petition:-

> "1. Whether the respondent No.2 was driving bus H.P.19-2112 on 14.10.2002 near Shiv Mandir, Deoli, in a rash and negligent manner resulting in the death of Surinder Singh as alleged. OPP
>
> 2. If issue No.1 is proved, whether the petitioners are entitled for compensation, if so, as to what amount and from whom. OPP.

3. Whether the petition is bad for misjoinder and non-joinder of necessary parties as respondent No.1 has sold bus No. HP-19-2112 to one Rana Singh son of Banta Singh as alleged OPR.

4. Whether the petition is bad for misjoinder and non-joinder of necessary parties as respondent No.1 has sold bus No. HP-19-2112 to one Rana Singh son of Banta Singh as alleged. OPR.

5. Whether the respondent No.2 was not holding a valid and effective driving licence to drive the vehicle which was being driven in violation of the terms and conditions of the Insurance policy as well as provisions of the Motor Vehicle Act. OPR.

6. Whether bus No. HP-19-2112 was being plied without any valid R.C. route permit and fitness certificate as alleged. OPR

7. Whether the petition has been filed by the petitioner in collusion with respondent Nos. 1 and 2 as alleged. OPR

8. Relief."

9. The parties have led evidence. The claimants have examined Sudesh Kumari, Agya Ram, Dr S.K. Bansal, Vijay Kumar and Arun Kumar. The respondents i.e. driver, owner and the insurer have not led any evidence. However, they have placed on record the insurance policy Ext. RX. The claimants have also placed on record copies of FIR (Ext.PW-2/A), post mortem report (Ext PW-3/A) and salary statement (Ext.PW-4/A).

10. The Tribunal after scanning the evidence, oral as well as documentary, held that the driver has driven the offending vehicle rashly and negligently and caused the accident, is not in dispute. However, I have gone through the impugned award and am of the considered view that the claimants have proved the said issue. Accordingly the findings returned on issue No.1 are upheld.

Issues No.3, 4, 6 and 7

11. It was for the owner, insurer and the driver to lead evidence and discharge the onus. They have not led any evidence and failed to discharge the onus. Thus, the findings returned on the said issues are also upheld.

Issues No.2 and 5

12. The Tribunal after scanning the evidence held that the driver of the offending vehicle was not having valid licence to drive the offending vehicle involved in the accident. During the pendency of the

appeal Mr. Ajay Sharma, Advocate, has furnished copy of the verification report, which was obtained by him from the Registering and Licensing Authority, Amb, District Una to the effect that the driver was having valid driving licence to drive LMV(Cab) & HTV vehicles.

13. Mr. J.S. Bagga, learned counsel for the insurer was asked to seek instructions, which he obtained but was not in a position to make any statement, was directed to cause appearance of respondent No.3, failed to do so, however, he stated that he could not inform respondent No.3 due to the ailment of his mother. His statement is taken on record.

14. The Licence Clerk of the Registering and Licensing Authority, Amb, District Una has admitted that the report was issued by the Registering and Licensing Authority, Amb, District Una. After perusal of the record, it can safely be held that the driver of the offending vehicle was having valid driving licence to drive LMV(Cab) & HTV vehicles.

15. Viewed thus, it is held that the driver of the offending vehicle was competent to drive the vehicle and the insured has not committed any willful breach. Therefore, the findings returned on issue No.5 are set aside and the same is decided in favour of the insured and against the insurer.

16. The Tribunal has fallen in error in deducting GPF subscription of Rs.4,000/-, HRA of Rs.200/-, FTA of Rs.75/- and GIS of Rs.30/- while assessing the loss of income. In terms of salary statement Ext. PW-4/A, the gross salary of the deceased was Rs.9,117/-, after deducting 1/3rd towards personal expenses, the claimants have lost source of dependency to the tune of Rs.6,000/-

17. The Tribunal has also fallen in error in applying the multiplier of '7' in view of the age of the deceased. The age of the deceased was 51 years at the time of the accident and the multiplier applicable was '9' in view of Schedule II appended to the Motor Vehicles Act, 1988 read with the judgments made by the Apex Court in cases tilted as ***Sarla Verma (Smt.) and others*** versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104*** and ***Reshma Kumari & others*** versus ***Madan Mohan and another***, reported in ***2013 AIR (SCW) 3120.***

18. The claimants are entitled to compensation to the tune of Rs.6000X12X9= 6,48,000 plus Rs.2,000/- under the head of 'expenses on the obsequies', Rs.2,500/- under the head of 'loss of estate' and Rs.5,000/- under the head of 'loss of consortium', as awarded.

19. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.6,57,500/- alongwith interest at the rate of 7.5% from the date of presentation of the claim petition till its final realization.

20. Respondent No.3 is directed to deposit the enhanced amount in the Registry of this Court within six weeks from today. On deposition of the same, it shall be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

21. The impugned award is modified, as indicated above. The appeal stands disposed of alongwith all miscellaneous applications accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

New India Assurance Company Limited ...Appellant.

Vs.

Smt. Kiran Sharma & others ...Respondents.

FAO No. 216 of 2007
a/w CO No. 201 of 2008
Decided on: 26.09.2014

Motor Vehicle Act, 1988- Section 166- The deceased was a Manager of Dhauladhar Public Education Society- his salary was ₹17,500/- per month- Claimants are three in number, therefore 1/4th of the amount is to be deducted towards personal expenses of the deceased, and the loss of dependency would be ₹ 13,000 per month- Age of the deceased was 49 years and therefore, the multiplier of 13 would be applicable- the claimants would be entitled for compensation of ₹20,28,000/- towards loss of dependency, ₹ 2,000/- towards funeral expenses, ₹ 5,000/- toward loss of consortium and ₹2,500/- towards loss of estate .

(Para – 19, 20)

Cases Referred:

Sarla Verma & others versus Delhi Transport Corporation & another, AIR 2009 Supreme Court 3104,

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant: Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Dinesh Kumar Sharma, Advocate, for respondents No. 1 to 3/cross-objectors.

Mr. Sanjeev Bhushan, Advocate, for respondent No. 4.

Mr. Satyen Vaidya, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 28th March, 2007, made by the Motor Accident Claims Tribunal (Presiding Officer, Fast Track Court), Solan, District Solan, H.P. (hereinafter referred to as "the Tribunal") in Petition No. 3 FTC/2 of 06/05, titled as Smt. Kiran Sharma & others versus Smt. Kamla Devi & others, whereby compensation to the tune of Rs.19,05,520/- with interest @ 7½% per annum from the date of institution of the petition till its realization came to be awarded in favour of the claimants, as per the apportionment made in the award and against the appellant-insurer (hereinafter referred to as "the impugned award") on the grounds taken in the memo of appeal.

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

3. The appellant-insurer has questioned the impugned award on the grounds that the accident was outcome of contributory negligence and the amount awarded is excessive.

Brief facts:

4. The claimants had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Acts, 1988 (hereinafter referred to as "the MV Act") for grant of compensation to the tune of Rs. 30,00,000/-, as per the break-ups given in the claim petition.

5. Precisely, the case of the claimants was that Shri Ajit Kumar, their sole bread earner, husband of claimant No. 1 and father of claimants No. 2 and 3, became the victim of motor vehicular accident at the age of 48 years, on 24th July, 2003, near Chamakaripul, Tehsil Arki, District Solan, which was caused by Shri Raj Pal, driver of truck bearing registration No. HP-11-8115, while driving the same rashly and negligently.

6. The claimants have specifically averred in paras 10 and 24 of the claim petition as to how the accident has occurred and who has caused the same. The appellant-insurer has filed reply and has not denied the said factum.

7. It is apt to reproduce para 3 of the reply on merits filed by the appellant-insurer in reply to paras 8 to 10 of the claim petition herein:

> *"3. That the contents of para 8 to 10 are denied for want of knowledge. Respondents No. 1 & 2 can effectively reply to the contents of these paras. Police of PS Darlaghat has registered false FIR No. 102/03 dated 24.7.03 against the driver of Truck."*

8. It would also be profitable to reproduce para 7 of the reply, which is reply to paras 22 to 24 of the claim petition herein:

> *"7. That the contents of para 22 to 24 are denied for the want of knowledge. The facts stated in these para are within the special knowledge of the petitioners and they may be put to strict proof of the facts stated in this Para. The rest of the contents are denied for the want of knowledge. Respondents No. 1 & 2 can effectively reply to the contents of this para regarding taking place of accident. The accident has not taken place due to rash and negligent driving of driver of Truck. The manner in which the accident is stated to have taken place is denied."*

9. In view of the above, the appellant-insurer has not specifically denied the factum of accident, is an evasive denial and as per the mandate of Order 8 of the Code of Civil Procedure (hereinafter referred to as "the CPC"), it is admission.

10. The owner-insured and the driver of the offending vehicle had not filed any reply. Thus, the averments contained in the claim petition have remained unrebutted so far it relate to them.

11. The following issues came to be framed by the Tribunal on 30th December, 2005:

> *"1. Whether death of deceased Ajit Kumar has been arisen out of use of motor vehicle and was on account of rash/negligent driving of the truck by respondent No. 2? OPP*
>
> *2. If issue No. 1 is proved in affirmative, what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether respondent No. 2 did not possess a valid and effective D.L.? OPR-3*
>
> *4. Whether vehicle was being driven in violation of standard terms and conditions of the Insurance policy? OPR-3*
>
> *5. Relief."*

12. The claimants have examined Shri Shashi Kumar Pandit as PW-1, HHC Babu Ram as PW-2, Shri Surinder Kumar as PW-4, claimant-Kiran Sharma, widow of the deceased, has herself stepped into the witness box as PW-3 and have also placed on record the documentary evidence.

13. It is apt to record herein that neither the owner/insured and the driver nor the appellant-insurer has led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

Issue No. 1:

14. The Tribunal, after scanning the evidence and while taking note of FIR No. 102 of 2003 of Police Station Darlaghat, Ex. P-16, rightly held that the driver of the offending truck, namely Raj Pal, had driven the truck rashly and negligently on the said date and had caused accident, in which deceased-Ajit Kumar lost his life. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 and 4:

15. The appellant-insurer has not led any evidence and has not discharged the onus. The Tribunal has rightly decided both these issues in favour of the claimants, the owner-insured and the driver of the offending vehicle and against the appellant-insurer. Accordingly, the findings returned on issues No. 3 and 4 are upheld.

Issue No. 2:

16. Learned counsel for the appellant-insurer argued that the accident was outcome of the contributory negligence and the Maruti Van was also involved in the accident, has neither pleaded nor led evidence to that effect. Thus, the argument is misconceived.

17. However, it is worthwhile to mention herein, at the cost of repetition, that the appellant-insurer has not taken this ground in the reply, thus cannot now plead and take a ground, which has not been taken by it before the Tribunal. Even otherwise, there is no evidence to this effect, as discussed by the Tribunal while determining issue No. 1 and as upheld hereinabove.

18. Admittedly, the age of the deceased was below 49 years at the time of the accident. The Tribunal has rightly applied the multiplier of '13' in view of the Schedule appended with the MV Act read with the ratio laid down by the Apex Court in **Sarla Verma & others versus Delhi Transport Corporation & another,** reported in **AIR 2009 Supreme Court 3104,** upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120**.

19. The deceased was Manager of Dhauladhar Public Education Society, his salary was Rs. 17,500/- per month and that is the income taken by the Tribunal. Though, the claimants have pleaded that the

deceased was also earning Rs. 25,000/- per annum from agriculture and Rs. 1,00,000/- per annum from other sources, but that was not considered and granted by the Tribunal.

20. I deem it proper to record herein that the claimants are three in number, one fourth was to be deducted towards the personal expenses of the deceased in view of the Apex Court's judgment in **Sarla Verma's case (supra)** upheld in **Reshma Kumari's case (supra)**, thus, the Tribunal has fallen in error in deducting one third towards the personal expenses of the deceased. Accordingly, it is held that the personal expenses of the deceased were Rs. 4,500/-. The claimants have lost source of dependency to the tune of Rs. 13,000/- per month(Rs.17500/- - Rs. 4500/-), i.e. Rs.13,000/- x 12 = Rs. 1,56,000/- per annum. The Tribunal has rightly applied the multiplier of '13'. The total loss of income comes to Rs. 1,56,000/- x 13 = Rs. 20,28,000/-. The claimants are also entitled to Rs. 2,000/- under the head 'funeral expenses', Rs.5,000/- under the head 'loss of consortium' and Rs. 2,500/- under the head 'loss of estate'. Viewed thus, the claimants are held entitled to the enhanced compensation to the tune of Rs. 20,28,000/- + Rs. 2,000/- + Rs. 5,000/- + Rs. 2,500/- = Rs. 20,37,500/- .

21. Having said so, the appeal is dismissed, cross objections are allowed and the impugned judgment is modified, as indicated hereinabove.

22. The appellant-insurer is directed to deposit the enhanced amount of compensation before the Registry within eight weeks. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

FAOs (MVA) No. 170 of 2007 & 171 of 2007.

Date of decision: 26th September, 2014.

1. FAO No. 170 of 2007.

Neelam Nadda and another .....*Appellants.*

Vs.

Narender Singh and others ...*Respondents.*

2. <u>FAO No. 171 of 2007.</u>

Oriental Insurance Co. Ltd. .....Appellant.

Vs.

Smt. Neelam Nadda and others ...Respondents.

Motor Vehicle Act, 1988- Section 166- The deceased was drawing ₹18,443/- as salary – Tribunal had taken the income of deceased as ₹10,495/- which was his carry home salary- held, that the Tribunal erred in taking the carry home salary as the income of the deceased- deduction made towards GPF and other subscriptions were part of the income– Taking the salary as ₹18,400/- and after deducting 1/3rd of the salary, loss of dependency is taken as 12,300/-after applying the multiplier 12 the compensation was enhanced to ₹17,71,200/- with interest.

(Para- 14, 15, 16)

Cases Referred:

Sarla Verma versus Delhi Road Transport Corporation, AIR 2009 SC 3104,

Reshma Kumari & ors vs. Madan Mohan & anr., 2013 AIR SCW 3120

For the appellant(s):	*Mr.K.B. Khajuria, Advocate, for the appellants in FAO No. 170 of 2007 and Mr. Deepak Bhasin, Advocate, for the appellant in FAO No. 171 of 2007.*
For the respondent(s)	*Mr.Satyan Vaidya, Advocate, for respondent No. 1 and 2 and Mr. Deepak Bhasin, Advocate, for respondent No. 3 in FAO No. 170 of 2007.*
	Mr. K. B. Khajuria, Advocate, for respondents No. 1 and 2 and Mr. Satyen Vaidya, Advocate, for respondents No. 3 and 4 in FAO No. 171 of 2007.

The following Judgment of the Court was delivered:

<u>Mansoor Ahmad Mir, Chief Justice,</u> *<u>(Oral)</u>*.

Both these appeals are outcome of an award dated 22.2.2007, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P, for short "The Tribunal" in MAC Case No. 43 of 2005 titled *Smt.Neelam Nadda and another vs. Narinder Singh and others,* whereby compensation to the tune of Rs.10,58,000/- came to be awarded in favour of the claimants alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, hereinafter referred to as "the impugned award", for short.

2. The claimants in FAO No. 170 of 2007 have questioned the impugned award on the ground of adequacy of compensation. The insurer through the medium of FAO No. 171 of 2007 has questioned the impugned award on the ground of saddling it with the liability.

BRIEF FACTS.

3. The claimants filed claim petition before the Tribunal, for the grant of compensation to the tune of Rs.50 lacs as per the break-ups given in the claim petition, on the ground that the deceased Dr. Chander Shekhar Nadda, was travelling in a maruti car No.HP-24-4647 on 11th June, 2004 as an occupant. The driver was driving the said vehicle in a normal speed with due diligence but met with an accident which was caused by Iqbal Singh driver of the offending tractor bearing registration No. PB-43-A-9185, being driven by him rashly and negligently, as per details given in para 4 of the claim petition.

4. The respondents contested and resisted the claim petition. However, owner of the tractor Narender Singh and its driver Iqbal Singh have admitted the factum of accident in reply to paras 23 and 24 of the claim petition. It is apt to reproduce para 24 of the claim petition and para 10 of the reply to paras 23 and 24 of the claim petition, filed by respondents No. 1 and 2 herein.

> *"24. That on ill-fated day of 11.6.2004, the deceased Dr. CS. Nadda was going in his car No. HP.24/4647 alongwith petitioner No. 1 from Bilaspur to Chandigarh which was being driven by his driver Roop Lal, s/h Sh. Jeet Ram, r/o Diara Sector, Bilaspur, HP. The deceased was sitting on the front seat alongwith the driver and the petitioner No. 1 was sitting on the back seat of the vehicle. At about 7.45 a.m. when the car reached in front of I.T.I. and near Octroi post, Ropar, a tractor trolly bearing No. PB43A/9185 was standing on the side of the road, when the car which was being driven in a normal speed and deligently reached near the tractor trolly, the driver of the tractor trolly without giving any signal reversed it in a rash and negligent manner and hit the car No. HP-24-4647 on its left side and all the occupants of the car received multiple injuries and were taken to Distt. Hospital, Ropar, in unconscious condition where Dr. C.S. Nadda died due to the injuries sustained by him at about 9 30. a.m."*
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> *"10.Para No. 23 and 24 of the petition are wrong hence denied. The petitioner has died due to negligent driving of vehicle of deceased bearing Regn. No. HP-24/4647 as such the respondents are not liable to*

pay any compensation to the petitioner. The insurer of the vehicle/Car No. HP-24/4647 and its driver are the necessary parties to the claim petition. The petitioners are not entitled to any compensation as alleged in the para as the amount claimed is highly exorbitant and excessive."

5. Thus, the driver had admitted the accident, which was result of rash and negligent driving of the driver.

6. The following issues came to be framed by the Tribunal:

(i) *Whether Dr. Chander Shekhar had died in an accident with vehicle Bo.PB-43-A-9185 which was being driven by respondent No. 2 in a rash and negligent manner, as alleged? OPP*

(ii) If issue No. 1 proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP.

(iii) Whether the petition is not maintainable?OPR-1 & 2.

(iv) Whether the accident is a result of contributory negligence of respondent No. 2. driver of tractor No. PB-43-A-9185 and driver of Maruti Car No. HP-24-4647?OPR3.

(v) Whether respondent No. 2 driver of tractor No.PB-43-A-9185 was driving the vehicle in violation of the provisions of M.V. Act, if so, its effect? OPR3.

(vi) Whether the petition is bad for non-joionder and mis-joinder of necessary parties? OPR-1 & 2.

(vii) Relief.

7. Parties led evidence.

8. The claimants have examined Roop Lal, (PW2) Sita Ram (PW3) and one of the claimants, i.e. Neelam Nadda also stepped into the witness-box as PW1.

9. The owner and driver have examined one Daler Singh as RW-1 and driver Iqbal Singh also stepped into the witness-box as RW2.

10. The insurer-appellant has not led any evidence thus, the evidence led by the claimants and insured remained unrebutted.

11. There is ample evidence on the record to the effect that driver Iqbal Singh has driven the offending vehicle, i.e. tractor in a rash and negligent manner on the said date and has caused the accident, in which the deceased, namely, Dr. Chander Shekhar Nadda sustained

injuries and succumbed to the same. There was no need to lead any evidence in view of the admission made by the driver and owner as discussed hereinabove. However, they have led the evidence and proved the factum of accident. Accordingly, the findings returned by the Tribunal on Issue No.1 are upheld.

12. The insurer had to prove issues No. 4 and 5, have not led any evidence, failed to discharge the onus, thus the Tribunal has rightly decided issues No. 4 and 5 against the appellant and in favour of the claimants. Accordingly, the findings on the said issues are upheld.

13. The driver and owner had to prove issues No. 3 and 6, failed to lead any evidence and in view of the pleadings, there was no need to lead any evidence. It is apt to record herein that the owner and driver have not questioned the impugned award on any ground. Accordingly, findings on these issues are upheld.

14. Now coming to issue No.2. Admittedly, deceased was a government employee and was drawing Rs.18,443/- as salary, as per the salary certificate Ext. PW3/A which has been discussed by the Tribunal in paras 20 and 21 of the impugned award, but the Tribunal has fallen in error in making deductions while assessing the loss of income.

15. I wonder how the Tribunal has held that the claimants have lost source of income only to the tune of Rs.10,08,000/- by taking income of the deceased as Rs.10495/- (carry home salary), despite the fact that he was drawing salary to the tune of Rs.18,443/- per month as per the salary certificate Ext. PW3/A. The deductions which were made towards the G.P.F and other subscriptions are also part of the income and part of gross salary. Thus, the Tribunal has fallen in error in holding that the income of the deceased was to the tune of Rs.10,495/- while he was drawing salary to the tune of Rs.18443/-. In fact, the Tribunal has to make the assessment while keeping in view the subsequent pay revision and inflation of price. However, I deem it proper to hold that deceased was earning Rs.18,400/- per month and after deducting 1/3rd, it is held that the claimants have lost source of dependency to the tune of Rs.12,300/- per month. The date of birth of the deceased is given as 15.7.1960, meaning thereby he was 45 of years at the time of the accident and the Tribunal has rightly applied the multiplier of "12" keeping in view the Second Schedule appended to the Motor Vehicles Act and the mandate rendered in ***Sarla Verma*** *versus* ***Delhi Road Transport Corporation,*** reported in ***AIR 2009 SC 3104***, upheld in ***Reshma Kumari & ors*** *vs.* ***Madan Mohan & anr.,*** reported in ***2013 AIR SCW 3120.***

16. Thus, the claimants are held entitled to Rs.12,300x12= 14,76,000x12= 17,71,200/- with interest @7.5% per annum from the date of filing the claim petition till its realization, and lawyer's fee to the tune of Rs.2,200/- as granted by the Tribunal.

17. The factum of insurance is not disputed and insurer has failed to plead and prove that insured has committed any willful breach. Thus, the insurer came to be rightly saddled with the liability.

18. The insurance company is directed to deposit the enhanced amount within six weeks from today in the Registry of this Court. On deposit, the same shall be released in favour of the claimants, through payee's account cheque, strictly in terms of the conditions contained in the impugned award. The amount already deposited by the insurance company, be released in favour of the claimants, forthwith, through payee's account cheque.

19. At this stage, the learned counsel for the insurance company in FAO No. 171 of 2007 stated that he has filed application under Order 41 Rule 27 of the Code of Civil Procedure for additional evidence. It is unfortunate that insurer has dragged the claimants to the *lis* right from 2005. The insurer has contested the claim petition without any ground. As discussed hereinabove, the insurer has not led any evidence in defence before the Tribunal right from 2005 till the passing of the impugned award. The insurer has contested the claim petition on flimsy grounds, knowing the fact that the insurer is liable to indemnify the insured.

20. As a consequence, the appeal filed by the Insurance company being FAO No. 171 of 2007 is dismissed and appeal filed by the claimants for enhancement being FAO No. 170 of 2007 is allowed and compensation is enhanced, as indicated above.

21. Having said so, the application being CMP No. 401 of 2007 in FAO No. 171 of 2007, is also dismissed.

22. Send down the record, forthwith.

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

State of H.P. .....Appellant.
Vs.
Rakesh Kumar and others. .....Respondents.

Cr. Appeal No.584 of 2008.
Judgment reserved on:23.7.2014
Date of Decision: September 10,2014,

Indian Penal Code, 1860- Section 498-A, 306- Deceased was married to accused- He demanded dowry of Rs.50,000/-, he also used to beat her- Deceased committed suicide- Held that, the version of the prosecution that accused had subjected the deceased to cruelty was duly corroborated by the testimonies of prosecution witnesses as well as the fact that the accused had tendered apology and had assured not to repeat these acts-the Prosecution case cannot be doubted due to the fact that no independent witness from locality was examined- generally, married women are subjected to cruelty inside the house and they narrate these facts to their relatives, therefore, the relatives are the best witnesses - The fact that the matter was not reported to the Police or Panchayat will not make the prosecution case doubtful as efforts are made by the relatives of a woman to keep the matrimonial life intact - However, it was not proved that the accused had abetted the deceased to commit suicide- No immediate nexus between the abetment and suicide was proved on record- The accused convicted for commission of offences punishable under Section 498-A IPC and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.10,000/-- The accused acquitted of the commission of offences punishable under Section 306 IPA.

(Para-9 to 23)

For the appellant: Mr.B.S.Parmar and Mr.Ashok Chaudhary, Addl.Advocates General with Mr.Vikram Thakur, Deputy Advocate General & Mr. J.S.Guleria, Assistant Advocate General.

For the respondents: Mr Pankaj Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

The present appeal filed against the judgment passed by learned Additional Sessions Judge Fast Track Court Una District Una in Sessions Case No. 27 of 2007 titled State Vs. Rakesh Kumar and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by the prosecution are that co-accused Rakesh Kumar is the husband of deceased Raman Jot, co-accused Jagdish Chand is the father-in-law of deceased, co-accused Ashok Kumar is brother-in-law of deceased and co-accused Asha Devi is the mother-in-law of deceased Raman Jot. It is further alleged by prosecution that all accused persons committed cruelty upon deceased Raman Jot in her matrimonial house. It is further alleged by prosecution that on dated 4.7.2006 at about 10.15 AM at place Behdala accused persons abetted deceased Raman Jot to commit suicide. It is further alleged by prosecution that marriage was solemnized on dated 28.11.2005 as per Hindu rites and customs between deceased Raman Jot and co-accused Rakesh Kumar. It is further alleged by prosecution that after marriage the accused persons harassed deceased Raman Jot and demanded dowry by way of Rs.50,000/- (Fifty thousand) from deceased Raman Jot when she was alive. It is further alleged by prosecution that accused persons have also used to beat deceased Raman Jot in her matrimonial home. It is further alleged by prosecution that the parents of deceased Raman Jot came to Behdala when deceased was alive and accused persons tendered an apology and undertaken not to repeat the same action in future. It is further alleged by prosecution that again deceased Raman Jot rang up her father and asked her father to bring deceased to her parental house as deceased was subjected to cruelty in her matrimonial house. It is further alleged by prosecution that relatives of deceased came to meet the deceased Raman Jot in her matrimonial house but accused persons did not allow them to meet the deceased. It is further alleged by prosecution that ultimately on dated 4.7.2006 deceased Raman Jot committed suicide by way of jumping into the well in village Behdala. It is further alleged by prosecution that thereafter Pradhan Gram Panchayat Behdala informed the parents of deceased Raman Jot by way of telephone about the death of deceased Raman Jot. It is further alleged by prosecution that photographs of dead body are Ext. PW9/A to PW9/G. It is further alleged by prosecution that police officials recorded the statement of complainant Ext.PW1/A under Section 154 Cr.PC and thereafter FIR Ext PW13/A was recorded. It is further alleged by prosecution that post mortem of the dead body of deceased Raman Jot was conducted in District hospital Una. It is further alleged by prosecution that as per post mortem report deceased Raman Jot died due to drowning leading to asphyxia. It is further alleged by prosecution that site plan Ext PW15/B was prepared. The accused persons did not plead guilty and claimed tried. Charge was framed against the accused persons under Sections 498-A IPC and 306 IPC on dated 16.1.2008.

3. The prosecution examined fifteen witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Shri Kamaljit Singh

PW2	Shri Gurmeet Singh
PW3	Shri Juggar Singh
PW4	Shri Lakhvir Singh
PW5	Smt.Sonia Rana
PW6	Smt.Parminder Kaur
PW7	Ms.Jasbir Kaur
PW8	C. Poonam Devi
PW9	HC. Shahi Kumar
PW10	Dr.M.K. Pathak
PW11	HC. Ram Avtar
PW12	Harbhajan Dass
PW13	H.C. Sukhdev Singh
PW14	Jagdish Ram
PW15	Inspector Ajay Rana

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

Sr.No.	Description.
Ex.PW 1/A	Statement of Kamaljeet Singh.
Ex.PW 9/A to 9/G	Photographs of deceased
Ex.PW 9/H	Negatives
Ex.PW 10/A	Request from S.H.O. for Post mortem
Ex.PW 10/B	Report of Chemical examination
Ex.PW 10/C	Post mortem Report
Ex.PW 11/A	Report No.6
Ex.PW 11/B	Report No.5
Ex.PW 13/A	F.I.R.
Ex.PW 15/A	Form 25/35 A
Ex.PW 15/B	Site Plan
Ex.PW 15/C	Statement of Gurmeet Singh.
Ex.PW 15/D	Statement of Lakhbir Singh.
Ex.PW 15/E	Statement of Jasbir Kaur.

5. We have considered the submissions of the learned Additional Advocate General appearing on behalf of the appellant and learned Advocate appearing on behalf of the respondents.

6. Question that arises for determination before us in this appeal is whether learned trial Court on the basis of material on record was justified in acquitting the accused persons.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

7. PW1 Kamal Jit Singh has stated that he was posted as ward servant in BBMB Hospital Nangal. He has stated that he had three children i.e. one son and two daughters. He has stated that deceased Raman Jot was his elder daughter and she was married to co-accused Rakesh Kumar of village Behdala on dated 28.11.2005. He has stated that the marriage of deceased Raman jot was solemnized according to Hindu rites and customs. He has stated that he had given dowry to his deceased daughter as per his capacity. He has stated that for about 2 ½ months the relations of his daughter remained normal with her in-laws and thereafter they started harassing her by demanding dowry and used to give beatings to her. He has stated that deceased Raman Jot had complained to him that accused persons have demanded dowry and have also beaten the deceased in her matrimonial house. He has stated that thereafter he and his wife, younger daughter and 2/3 other persons of the village went to Behdala and talked with the accused persons and they tendered an apology and stated that they would not repeat the same act in future. He has stated that thereafter about one month later deceased Raman Jot ranged him at night and told him that the accused persons were subjecting her with cruelty without any reason. He has stated that deceased told him that he should come to take deceased Raman Jot from her matrimonial house. He has stated that thereafter he went to village Behdala on his scooter and brought deceased Raman Jot to her parental house at Nangal. He has stated that after about 15 days accused persons along with their relatives came to his house at Nangal and again tendered an apology and thereafter on the next day he sent deceased Raman Jot with the accused persons to her matrimonial house. He has stated that after about 15/20 days he and his brother-in-law went to the matrimonial house of deceased to meet her but the accused persons did not allow them to meet deceased and after sitting for about two hours in the matrimonial house of deceased they came back to Nangal. He has stated that when they were leaving the house of accused persons deceased Raman Jot came in a weeping situation. He has stated that on dated 4.7.2006 Smt Sonia Rana Pradhan Gram panchayat Behdala informed one Bhajan Lal telephonically that deceased Raman Jot had jumped into the well and committed suicide. He has stated that thereafter he along with the villagers and members of the Panchayat went to village Behdala and found that the police and fire brigade personnel were present and were trying to take out the dead body from the well. He has stated that as the well was quite deep they could not take out the dead body on dated 4.7.2006. He has stated that dead body

was taken out on dated 5.7.2006 in the morning from the well. He has stated that thereafter he gave his statement Ext.PW1/A under Section 154 Cr PC to the police official. He has stated that Ext PW1/A bears his signatures. He denied suggestion that accused persons did not harass deceased Raman Jot. He denied suggestion that he made a false report to the police regarding cruelty and demand of dowry to deceased Raman Jot. He denied suggestion that accused persons did not demand any dowry. He has denied suggestion that accused persons have not beaten the deceased in her matrimonial home.

7.1 PW2 Gurmeet Singh has stated that he is running a khokha of cigarettes near the well at Behdala. He has stated that on dated 4.7.2006 at about 9.15 AM when he was in his shop along with Vipan Kumar he heard a noise from the well and on hearing the sound he along with other persons of village went to the well and found that somebody had jumped into the well. He has stated that thereafter he informed Pradhan Smt Sonia Rana. He denied suggestion that he warned deceased Raman Jot not to jump into well. He denied suggestion that co-accused Rakesh Kumar and Asha Devi were running behind the deceased and were stopping her from jumping into well. He has stated that the police took the photographs of the dead body and completed other formalities.

7.2 PW3 Juggar Singh has stated that he is a meson by profession. He has stated that on dated 4.7.2006 he heard noise from the side of well and went there where he came to know that the wife of co-accused Rakesh Kumar had jumped into the well. He has stated that the police and fire brigade personnel had reached at the spot. He has stated that he assisted the police in retrieving deceased Raman Jot from the well for which he went into the well but he could not succeed as the well was quite deep. He has stated that on the next day he along with Jagdish Ram and Rajinder Parshad were able to retrieve the dead body of the deceased from well.

7.3 PW4 Lakhvir Singh has stated that he is driver by profession. He has stated that he has two sisters. He has stated that deceased Raman Jot was his elder sister who was married with co-accused Rakesh Kumar of Behdala on dated 28.11.2005. He has stated that for about 2 ½ months after the marriage the relation of his sister remained normal with her in-laws and thereafter they started ill-treating her by way of demanding dowry and by way of giving beatings to deceased. He has stated that accused persons were also demanding Rs.50,000/- (fifty thousand). He has stated that thereafter his father went to village Behdala and he brought back the deceased to Nangal. He has stated that after 15 days the accused persons along with their relatives came to the parental house of deceased at Nangal and assured that they would not repeat the same act in future. He has stated that after tendering the apology the accused persons took the deceased back to Behdala. He has stated that on dated 4.7.2006 when he was in the transport union his father intimated him on telephone that he should go immediately to Behdala. He has stated that thereafter he accompanied

with his father, sarpanch and other panchayat members went to Behdala and when they reached at Behdala the deceased Raman Jot had already jumped into the well. He has stated that police tried to retrieve the dead body from the well but since the well was quite deep the dead body could not be taken out on dated 4.7.2006. He has stated that the dead body was taken out from the well on dated 5.7.2006. He denied suggestion that accused persons did not demand any dowry from the deceased. He denied suggestion that accused persons have not committed any cruelty upon deceased in her matrimonial house.

7.4 PW5 Smt Sonia Rana has stated that on dated 4.7.2006 when she was in her house at about 9.30 AM one Gurmit Singh intimated her on telephone that deceased Raman Jot had jumped into the well. She has stated that on receiving said information she went to the well where many people had already gathered around the well. She has stated that thereafter she intimated the police and fire brigade on telephone. She has stated that thereafter she intimated one Bhajan Lal on telephone about the incident and asked him to inform the parents of deceased Raman Jot. She has stated that after some time her parents reached at the spot. She has stated that on dated 4.7.2006 the police and other persons present at the spot could not succeed in retrieving the dead body of deceased Raman Jot as the well was quite deep. She has stated that on dated 5.7.2006 the police retrieved the dead body of deceased with the help of fire brigade officials. She has stated that thereafter the police conducted its proceeding and took the photographs and identified the dead body.

7.5 PW6 Smt Parminder kaur has stated that she is a house wife. She has stated that deceased Raman Jot was her elder daughter. She has stated that deceased was married to co-accused Rakesh Kumar of Behdala on dated 28.11.2005. She has stated that for about 2 ½ months the relations of her daughter remained normal with the accused persons. She has stated that thereafter the accused persons started harassing the deceased. She has stated that accused persons started demanding money and also beaten the deceased. She has stated that this fact was told to her by her daughter when she came to her parental house. She has stated that after few days the accused persons came to the parental house of deceased Raman jot and tendered an apology and thereafter the deceased was sent back to her matrimonial house. She has stated that on dated 4.7.2006 in the evening her husband told her that deceased Raman Jot had jumped into the well and her dead body could not be retrieved. She has stated that dead body of deceased Raman Jot was retrieved on 5.7.2006 and thereafter her last ceremony was performed. She has denied suggestion that deceased did not make any complaint to her against accused persons. She denied suggestion that accused persons have not harassed deceased in her matrimonial house.

7.6 PW7 Ms Jasbir Kaur has stated that deceased was her elder sister. She has stated that deceased Raman Jot was married to co-accused Rakesh Kumar on dated 28.11.2005 as per Hindu rites at village Behdala. She has stated that deceased was kept properly for about 2 ½

months and thereafter she was harassed and dowry was demanded. She has stated that accused persons demanded Rs.50,000/- (Fifty thousand) from her deceased sister as dowry. She has stated that above stated facts were narrated to her by her deceased sister personally. She has stated that her sister had informed on telephone that she was harassed by accused persons in her matrimonial house and thereafter deceased was brought to her parental house. She has stated that thereafter accused persons came to the parental house of deceased and tendered an apology and thereafter her deceased sister was sent to matrimonial house with accused persons. She has stated that on dated 4.7.2006 her father and brother along with other persons of village had gone to Behdala and came to know that deceased had committed suicide by way of jumping into well. She denied suggestion that accused persons have not harassed the deceased in any manner in her matrimonial house. She denied suggestion that accused persons had not demanded any dowry from deceased in her matrimonial house. She denied suggestion that accused persons have not tendered any apology to the parents of deceased.

7.7 PW8 Constable Poonam Devi has stated that she was posted as Constable general duty in Police Station Sadar Una for the last two years. She has stated that she remained associated in the investigation of the present case. She has stated that on dated 5.7.2006 the dead body of deceased Raman Jot was took out from the well with the help of rope and hooks. She has stated that as per direction of Investigating Officer she inspected the body of deceased Raman Jot with the help of camera and it was found that there was one injury on right hip and one injury on the left ankle. She has stated that Investigating Officer got the dead body identified from the father of deceased Raman Jot and thereafter the dead body was sent for post mortem. She has stated that she does not know how the deceased sustained injuries.

7.8 PW9 HC Shashi Kumar has stated that he was posted as photographer in Police Line Una. He has stated that on dated 5.7.2006 on the direction of Investigating Officer he had taken the photographs of deceased Raman Jot from various angel which are Ext PW9/A to PW9/G and negatives are Ext PW9/H.

7.9 PW10 Dr M.K Pathak has stated that he was posted as Medical Officer at Una in the year 2006. He has stated that a request Ext PW 10/A was received from Station House Officer for conducting post mortem of deceased Raman Jot along with inquest report. He has stated that he conducted the post mortem and on examination on dated 5.7.2006 at about 4 PM he found that R.M. was well developed and eyes were closed. He has stated that whitish fine leather was coming out of both nostrils and face. He has stated that reddish discharge with froth was coming out from her mouth. He has stated that deceased died due to asphyxia. He has stated that he referred the viscera for chemical examination. He has stated that no poison and alcohol was detected in the viscera. He has stated that the cause of death was due to drowning leading to asphyxia.

7.10 PW11 HC Ram Avtar has stated that he was posted at Constable at Police Station Sadar Una in the year 2006. He has stated that he brought roznamcha register. He has stated that report No.6 dated 4.7.2006 Ext PW11/A is the true copy. He has stated that report No.5 dated 5.7.2006 Ext.PW11/B is also true copy of the original. He has stated that both the reports were in his hand.

7.11 PW12 Harbhajan Dass has stated that on dated 4.7.2006 at about 10.15 AM he received a telephonic call from Smt Sonia Rana Pradhan Behdala that the daughter of Kamal Jit Singh had jumped into the well. He denied suggestion that no telephone call was received.

7.12 PW13 HC Sukh Dev Singh has stated that he was posted as Constable at Police Station Sadar Una in the year 2006. He has stated that on the receipt of rukka Ext PW1/A in Police Station Una he recorded FIR Ext PW13/A.

7.13 PW14 Jagdish Ram has stated that he was working in IPH Department as Beldar. He has stated that on dated 4.7.2006 when he was going for his duty he saw many people had gathered around the well. He has stated that on inquiry he was told that deceased Raman Jot had jumped into the well. He has stated that he assisted the police in retrieving the dead body from the well but the same could not be taken out on dated 4.7.2008 as the well was quite deep. He has stated that dead body was taken out on dated 5.7.2006 in the morning.

7.14 PW15 Inspector Ajay Rana has stated that he remained posted as SHO at Police Station Una in the year 2006. He has stated that on dated 4.7.2006 at about 9.35 AM an information was received on telephone in Police Station Una from Pradhan Gram Panchayat Behdala stating that one lady had jumped into the well and a report in this regard Ext PW11/A was prepared. He has stated that after the receipt of the said information he along with other police officials proceeded to the spot. He has stated that many people had gathered around the well near patwarkhana of village Behdala. He has stated that on inquiry he came to know that one lady Raman Jot wife of co-accused Rakesh Kumar had jumped into the well. He has stated that thereafter they made efforts to retrieve the dead body from the well with the help of local persons and fire brigade officials but they did not succeed despite best efforts as the well was quite deep. He has stated that on the next day in the morning they again tried to take out the dead body and ultimately the dead body was took out from the well. He has stated that dead body was got identified from the father of the deceased. He has stated that photographs of the dead body were taken which are Ext PW9/A to PW9/G. He has stated that thereafter dead body was examined by lady constable Poonam Kumari and two injuries were found on the body of deceased Raman Jot. He has stated that thereafter statement under Section 154 Cr PC Ext PW1/A was recorded and the same was sent to Police Station for registration of FIR through Constable Surinder Kumar upon which FIR Ext PW13/A was recorded. He has stated that he filled form 25/35A Ext PW15/A and sent the dead body to District Hospital Una for post mortem. He has stated that thereafter he prepared site plan

Ext PW15/B.He has stated that he recorded the statements of the witnesses. He has stated that thereafter he prepared the challan under Sections 498-A and 306 IPC. He has denied suggestion that he recorded the statement of complainant Kamal Jit at his own. He denied suggestion that he did not prepare site plan at the spot. He denied suggestion that accused persons never demanded any dowry from deceased Raman Jot.

8. The statements of accused persons were also recorded under Section 313 Cr.PC. Accused persons have stated that they are innocent and falsely implicated in present case. Accused persons did not lead any defense evidence.

(A) Mental Cruelty upon deceased Raman Jot aged 19 years proved beyond reasonable doubt as per testimony of PW1 Kamal Jit Singh father of deceased.

9. As per testimony of PW1 Kamal Jit Singh it is proved on record beyond reasonable doubt that for about 2 ½ months the relations of deceased Raman Jot with accused persons remained cordial and thereafter deceased was harassed by accused persons by way of demanding dowry and by way of giving beatings to deceased. As per testimony of PW1 Kamal Jit Singh it is proved on record beyond reasonable doubt that deceased had personally informed PW1 through telephone that accused persons were committing cruelty towards her by way of demanding dowry and by way of giving beatings to deceased. It is proved on record beyond reasonable doubt that thereafter PW1 and his wife and his younger daughter and two other persons of village went to the matrimonial house of deceased Raman Jot and talked with accused persons and ultimately accused persons tendered apology and accused persons stated that they would not repeat the incident of cruelty in future and thereafter they came back. As per testimony of PW1 it is proved beyond reasonable doubt that thereafter about one month later the deceased telephoned him at night and told that accused persons were subjecting her with cruelty without any reason in the matrimonial house of deceased and deceased told PW1 that she should be brought back from her matrimonial house to her parental house. As per testimony of PW1 it is proved beyond reasonable doubt that thereafter PW1 went to matrimonial house of deceased at village Behdala on his scooter and brought the deceased to her parental house at Nangal. As per testimony of PW1 it is proved beyond reasonable doubt that thereafter for about 15 days accused persons along with their other relatives came to parental house of deceased at Nangal and tendered apology and thereafter deceased Raman Jot was sent to her matrimonial house. As per testimony of PW1 it is proved beyond reasonable doubt that thereafter about 15/20 days PW1 and his brother-in-law went to the matrimonial house of the deceased to meet her but the accused persons did not allow them to meet the deceased and after sitting there for about two hours they came back to their house at Nangal and when they were leaving the matrimonial house of the deceased the deceased Raman Jot came in weeping condition. It is proved on record that thereafter on

dated 4.7.2006 deceased aged 19 years committed suicide by way of jumping into well. It is well settled law that testimony of the witness should be read as a whole and should not be read in isolation. It is also proved beyond reasonable doubt as per testimony of PW1 Kamal Jit Singh father of deceased that mental cruelty was caused to the deceased in her matrimonial house. It is also proved beyond reasonable doubt that deceased had died within seven years after her marriage in her matrimonial house. Testimony of PW1 is trustworthy, reliable and inspires confidence of Court.

(B) Mental Cruelty upon deceased Raman Jot aged 19 years proved beyond reasonable doubt as per testimony of PW 4 Lakhvir Singh brother of deceased.

10. It is proved beyond reasonable doubt as per testimony of PW4 that for about 2 ½ months the deceased was kept properly in her matrimonial house and thereafter the behaviour of the accused persons became abnormal and accused persons started ill-treating the deceased by way of demanding dowry and had also given beatings to her. It is proved on record beyond reasonable doubt as per testimony of PW4 that deceased had complained through telephone about demand of dowry from accused persons and beatings to deceased from accused persons in her matrimonial house. It is proved on record beyond reasonable doubt that as per testimony of PW4 that deceased informed directly that accused persons had demanded an amount of Rs.50,000/- (Fifty thousand). It is proved beyond reasonable doubt that thereafter father of deceased went to matrimonial house of deceased at Behdala and brought deceased Raman Jot back to her parental house at Nangal. It is proved beyond reasonable doubt that after fifteen days the accused persons along with their relatives came to parental house of the deceased at Nangal and told that they would not repeat the act of cruelty in future and after tendering an apology they took the deceased back to her matrimonial house at Behdala. It is proved beyond reasonable doubt as per testimony of PW4 that thereafter on dated 4.7.2006 the deceased committed suicide by way of jumping into well. The testimony of PW4 Lakhvir Singh is also trust worthy, reliable and inspires confidence of the Court.

(C) Mental Cruelty upon deceased Raman Jot aged 19 years proved beyond reasonable doubt as per testimony of PW 6 Smt. Parminder Kaur mother of the deceased.

11. It is proved beyond reasonable doubt that for about 2 ½ months the relations of deceased with accused persons were cordial and thereafter they started harassing deceased Raman Jot and demanded money and also gave beatings to deceased Raman Jot in her matrimonial house. Factum of demand of dowry and factum of beatings in matrimonial house was directly disclosed by deceased Raman Jot to her mother PW6. Deceased requested her parents to take her from the matrimonial house and as per request of deceased Raman Jot the deceased was brought to her parental house at Nangal. It is proved beyond reasonable doubt that after few days the accused persons came

to the parental house of deceased at Nangal and tendered an apology and told that they would treat the deceased properly in her matrimonial house and thereafter deceased was again sent to her matrimonial house. Thereafter deceased Raman Jot committed suicide by way of jumping into well in her matrimonial house. The testimony of PW6 Parminder Kaur mother of deceased is also trust worthy, reliable and inspires confidence of the Court.

(D) Mental Cruelty upon deceased Raman Jot aged 19 years proved beyond reasonable doubt as per testimony of PW 7 Jasbir kaur sister of deceased.

12. It is proved beyond reasonable doubt as per testimony of PW7 that for about 2 ½ months deceased Raman Jot was kept properly in-laws house and thereafter the accused persons had harassed the deceased by way of demanding dowry and by way of beatings the deceased. It is also proved on record beyond reasonable doubt that accused persons demanded Rs.50,000/- (Fifty thousand) from the deceased and deceased told this fact to PW7 personally when she visited her parental house. It is proved on record beyond reasonable doubt as per testimony of PW7 that deceased telephoned to her parents about cruelty in matrimonial house and thereafter her father came to matrimonial house of deceased and brought the deceased to her parental house. It is proved beyond reasonable doubt that thereafter accused persons came to parental house of deceased and tendered an apology and thereafter the deceased was sent back to her matrimonial house with accused persons. It is proved beyond reasonable doubt as per testimony of PW7 that again deceased reported about mental cruelty in her matrimonial house to her parents and thereafter father and maternal uncle of deceased were gone to the matrimonial house of deceased but the accused persons did not allow them to meet the deceased. It is proved that thereafter the deceased had committed suicide by way of jumping into well in her matrimonial house. The testimony of PW7 Jasbir Kaur is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW7 Jasbir Kaur.

(E) Death of deceased proved by way of jumping into well as per corroborative evidence.

13. The death of deceased Raman Jot aged 19 years by way of jumping into well proved beyond reasonable doubt by way of corroborative evidence of PW2 Gurmeet Singh, PW3 Juggar Singh, PW4 Lakhvir Singh, PW8 Poonam Devi and PW9 Shashi Kumar who have stated in positive manner that deceased Raman Jot had committed suicide by way of jumping into well. The factum of suicide by deceased is proved by way of corroborative evidence. No reason has been assigned by the accused persons as to why deceased had committed suicide by way of jumping into well in her matrimonial house. There is no evidence on record in order to prove that deceased Raman Jot was suffering from any mental illness. There is no evidence on record in order to prove that deceased was medically treated somewhere by the Medical Officer for any disease prior to her death. In the present case it is proved beyond

reasonable doubt that deceased had died by way of jumping herself into the well and the cause of death was drowning leading to asphyxia.

(F) Abetment to commit suicide under Section 306 IPC not proved beyond reasonable doubt.

14. There is no evidence on record in order to prove that accused persons had abetted the deceased to commit suicide prior to commission of suicide by the deceased by way of jumping into well. On the date when the deceased committed suicide PW1 Kamal Jit Singh, PW4 Lakhvir Singh, PW6 Smt Parminder Kaur and PW7 Jasbir Kaur were not present in the matrimonial house of the deceased when the deceased had committed suicide. There is no evidence on record in order to prove that accused persons had abetted the deceased to commit suicide on dated 4.7.2006. It is well settled law that there should be immediate nexus between the abetment and suicide. In the present case immediate nexus of abetment and suicide is not proved on record beyond reasonable doubt. Hence it is held that learned trial Court has rightly acquitted the accused persons under Section 306 IPC by way of giving them benefit of doubt.

(G) Presumption under Section 113 B of the Indian Evidence Act 1872 is not rebutted by accused persons.

15. Section 113 B of the Indian Evidence Act 1872 was incorporated w.e.f. 19.11.1986 and as per Section 113 B the Courts are under legal obligation to draw the presumption of dowry death. The Court has drawn the presumption as to dowry death under Section 113 B of the Indian Evidence Act 1872 in the present case and the accused persons did not adduce any evidence on record in order to rebut the presumption under Section 113B of the Indian Evidence Act 1872.

16. Submission of learned Advocate appearing on behalf of accused persons that learned trial court has rightly acquitted the accused persons under Section 498-A IPC is rejected being devoid of any force for the reason hereinafter mentioned. As per testimony of PW1 Kamal Jit Singh father of deceased, PW4 Lakhvir Singh brother of deceased, PW6 Smt Parminder Kaur mother of deceased and PW7 Jasbir Kaur sister of deceased it is proved beyond reasonable doubt that accused persons had committed cruelty upon the deceased when deceased was residing in her matrimonial house. It is proved on record beyond reasonable doubt that the deceased had personally complained about the mental cruelty to her relatives i.e. father, mother, brother and sister. It is well settled law that generally the married woman used to inform the factum of cruelty to her relatives only qua matrimonial disputes.

17. Another submission of learned Advocate appearing on behalf of accused persons that no independent witness from the locality has stated that accused persons have committed cruelty upon deceased in her matrimonial house and on this ground present appeal be dismissed is also rejected being devoid of any force for the reason

hereinafter mentioned. It is well settled law that offence under Section 498-A is a matrimonial offence. It is well settled law that no independent witness of the locality could be procured in order to prove the matrimonial offence when offence is committed inside the room in matrimonial house. In the present case it is proved beyond reasonable doubt that deceased Raman Jot aged 19 years had committed suicide by way of jumping herself into well in her matrimonial house.

18. Another submission of learned Advocate appearing on behalf of accused persons that the testimony of PW1 Kamal Jit Singh, PW4 Lakhvir Singh, PW6 Smt.Parminder Kaur and PW7 Jasbir Kaur are not sufficient to convict the accused persons under Section 498-A IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in AIR 1999 SC 2071 titled Arun Vyas and another Vs. Anita Vyas that cruelty as defined in Section 498-A IPC is a continuing offence and on each occasion the woman has cause of action. Cruelty under Section 498-A means harassment of the woman in her matrimonial house with the view to coercing the woman to meet an unlawful demand for any property. It is well settled law that cruelty or harassment is not only physical cruelty but even a mental cruelty is cruelty as per Section 498-A IPC. It is well settled law that offence under Section 306 IPC and Section 498-A IPC are two independent sections. The basic difference between Section 498-A IPC and Section 306 IPC is that of 'intention' only. Under Section 498-A cruelty committed by the husband or his relations drag the woman to commit suicide while under Section 306 IPC suicide is abetted and intended by accused persons.

19. Another submission of learned Advocate appearing on behalf of accused persons that deceased or relatives did not file any complaint in panchayat and on this ground appeal filed by the State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that when the accused persons committed cruelty upon the deceased in her matrimonial house the parents of the deceased brought the deceased from her matrimonial house and thereafter accused persons again visited to parental house of the deceased and tendered an apology and assured that they would not commit the offence of cruelty upon the deceased in her matrimonial house and thereafter the deceased was sent to her matrimonial house by her parents. It is proved on record that even after giving assurance by the accused persons that they would not commit any cruelty towards deceased in her matrimonial house deceased again informed the factum of cruelty to her parents, brother and sister by way of telephone and thereafter again the parents of the deceased went to meet the deceased in her matrimonial house but they were not allowed to meet the deceased and they saw the deceased was weeping in her matrimonial house and thereafter the deceased committed suicide in her matrimonial house by way of jumping into well. In the present case it is proved beyond reasonable doubt that accused persons had committed cruelty upon the deceased in her matrimonial house and deceased was dragged to commit suicide by way of jumping herself into well which was situated nearby the matrimonial house of the deceased. Even as per site

plan placed on record the place where the deceased committed suicide by way of jumping into well is situated nearby the matrimonial house of the deceased. Court is of the opinion that deceased did not lodge FIR against the accused persons and also did not report the matter in panchayat in order to keep her matrimonial life intact but despite the best efforts on the part of the deceased the cordial relations between the deceased and her in-laws did not remain intact and deceased was dragged to commit suicide in the well which was situated nearby her matrimonial house. The definition of cruelty as defined under Section 498-A IPC consists of two parts. The first part relates to willful conduct which is of such nature as to drive the woman to commit suicide and second part relates to harassment of married woman with a view to coercing her to meet any unlawful demand for any property.

20. Submission of learned Advocate appearing on behalf of accused persons that there are material contradictions between the testimony of PW1 Kamal Jit Singh, PW4 Lakhvir Singh, PW6 Parminder kaur and PW7 Jasbir Kaur and on this ground appeal filed by the State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that oral testimony of the witness should be read as a whole and should not be read in isolation. The Court has carefully perused the testimony of PW1 Kamal Jit Singh, PW4 Lakhvir Singh, PW6 Parminder kaur and PW7 Jasbir Kaur as a whole. There is no material contradiction between the testimony of PW1, PW4, PW6 and PW7 which goes to the root of the case qua offence punishable under Section 498-A IPC. It is well settled law that minor contradictions are bound to come when the statement of the prosecution witness is recorded after the gap of one year and nine months. It is well settled law that conviction can be sustained on the solitary evidence of the witnesses in a criminal case if testimony of the witness is trust worthy, reliable and inspires confidence of the Court. (See AIR 1973 SC 944 titled Jose Vs. the State of Kerala. Also see AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh and also see AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madras). It was held in case reported in AIR 1987 SC 1328 Dalbir Singh and others Vs. State of Punjab that there is no hard and fast rule which could be laid down for appreciation of evidence and it was held that each case should be decided as per proved facts. It is well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trials. (See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana). There is no evidence on record in the present case that deceased was suffering from any mental ailment. There is no evidence on record to prove that deceased was having any extra marital relation with some other person. There is no explanation on the part of the accused persons as to why the deceased committed suicide in her matrimonial house by way of jumping into well without any plausible reason. It is well settled law that no person would jump into well without any plausible reason in her matrimonial house. There is no medical evidence qua mental illness of deceased Raman Jot.

Even as per Section 134 of Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any fact.

21. Another submission of learned Advocate appearing on behalf of accused persons that PW1, PW4, PW6 and PW7 are relative witnesses and interested witnesses and conviction cannot be given upon their testimonies is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that in matrimonial offence relatives are best witnesses. It was held in case reported in AIR 1981 SC 1390 titled State of Rajasthan Vs. Kalki and another that relative witnesses are not equivalent to interested witnesses.

22. In view of the above stated facts we affirmed the acquittal of accused persons passed by learned trial Court qua offence punishable under Section 306 IPC by way of giving them benefit of doubt and we set aside the judgment of learned trial Court qua acquittal of accused persons under Section 498-A IPC and we convict all the accused persons under Section 498-A IPC. We hold that all the accused persons had committed mental cruelty upon deceased in her matrimonial house by way of their willful conduct. Appeal is partly allowed.

23. Now convicted persons will be heard on the quantum of sentence on 7.10.2014 upon the offence punishable under Section 498-A IPC. Convicted persons be produced before us by way of bailable warrant.

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Cr. Appeal No. 584 of 2008

QUANTUM OF SENTENCE

07.10.2014

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

Mr. Pankaj Sharma, Advocate, for all convicted persons.

Convicted persons namely Jagdish, Asha Devi, Ashok Kumar are in police custody of HC Ravinder Kumar No. 37, C. Vijay Kumar No. 393 P.S. Una HP and Mr.Pankaj Sharma, Advocate, submitted before us that after hearing upon quantum of sentence order upon quantum of sentence be announced today itself qua all convicted persons.

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

25. Learned Additional Advocate General appearing on behalf of the State submitted before us that convicted persons have committed heinous offence under Section 498-A IPC and deterrent punishment be awarded to the convicted persons in order to maintain majesty of law. On the contrary learned defence counsel appearing on behalf of convicted persons submitted before us that convicted persons are first offenders and further submitted that age of convicted Rakesh Kumar is 33 years, age of convicted Jagdish Chand is 57 years, age of convicted Asha Devi is 54 years and age of convicted Ashok Kumar is 30 years and lenient view be taken keeping in view the age of convicted persons.

26. 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.

27. In view of the fact that deceased died at the age of 19 years in her matrimonial house by way of jumping into the well due to mental cruelty given by convicted persons we are of the opinion that offence of mental cruelty in matrimonial houses on married women at the young age of 19 years is a stigma on the society. In order to maintain majesty of law and in order to regain the confidence of general public in the judiciary and in view of the facts stated above we sentence all convicted persons as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 498-A IPC	All convicted persons are sentenced to undergo simple imprisonment for one year. All convicted persons are also sentenced to pay fine of Rs. 10,000/-(Rs. Ten thousand only) each. In default of payment of fine, each convicted person shall further undergo simple imprisonment for three months.

28. Period of custody during investigation, inquiry and trial will be set off. Certified copy of this judgment and sentence be also supplied to convicted persons forthwith free of cost by learned Additional Registrar (Judicial). Case property will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings. Warrant of execution

of sentence be issued to the Superintendent Jail forthwith for compliance by learned Additional Registrar (Judicial) in accordance with law.

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

Khushi Ram & ors. .....Petitioners.
Versus
State of H.P. & anr. .....Respondents.

CWP No. 5033 of 2014.
Decided on: 19.09.2014.

Constitution of India, 1950- Article 226 – Petitioner had filed a civil suit before the learned Sub Judge, which was decreed- State preferred an appeal before the learned District Judge, Kangra, who set aside the judgment and decree and transferred the matter to the District Collector, Kangra, to decide the suit in accordance with Sections 3 & 4 of the H.P. Village Common Land (Vesting and Utilization) Act, 1974- The Collector held that the respondents had become the owners of the land under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972- A Review petition was filed before the Sub-Divisional Officers exercising the powers of Collector which was beyond limitation- However, the Sub Divisional Officer reviewed the order- Petitioner filed an appeal before the Divisional Commissioner who dismissed the same- Held, that the earlier order was passed by the Sub Divisional Officer exercising the powers of the Collector on 1.6.1999, Review petition was filed in the year 2005- Limitation prescribed under Section 9-A of the H.P. Village Common Lands (Vesting and Utilization) Amendment Act, 2001 is 90 days- No Notice was issued prior to the review of the order, therefore, the earlier order was a nullity which could not be cured by the subsequent orders.

(Para-23)

For the petitioners: Mr. R.K.Sharma, Sr. Advocate, with Ms. Vidushi Sharma, Advocate.

For the respondents: Mr. Ashok Chaudhary, Addl. AG with Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner instituted Civil Suit bearing No. 74/86 in the Court of learned Sub Judge (Ist Class), Nurpur for declaration to the

effect that they were tenants in equal shares over the suit land comprised in Khata No. 126, Khatauni No. 385, Khasra Nos. at present 1219, 1220, 1221, 1223, 1224, 952, 953, 956, 956/1, 958, 959, 1127, 1147, 1149, measuring 3-74-71 hectares, situated in Tika Baduhi, Mauza Khanni, Tehsil Nurpur, Distt. Kangra, H.P. The suit was decreed by the learned Sub Judge on 25.2.1988.

2. Respondent-State filed an appeal against the judgment and decree dated 25.2.1988 before the learned District Judge, Kangra, bearing Civil Appeal No. 64/1988. The learned District Judge, Kangra, set aside the judgment and decree passed by the learned Sub Judge (Ist Class), Nurpur and transferred the matter to the Collector, Kangra District to decide the suit in accordance with Sections 3 & 4 of the H.P. Village Common Land (Vesting and Utilization) Act, 1974. He passed orders on 1.6.1999. The Collector held that respondents have become owners of the land under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972.

3. The respondents filed the review petition before the Sub Divisional Officer exercising powers of the Collector against the order dated 1.6.1999. The review petition filed by the respondent-State was also beyond limitation i.e. 90 days. The Sub Divisional Collector, Nurpur, reviewed the order dated 1.6.1999 on 19.5.2005. The petitioner filed appeal before the learned Divisional Commissioner, against the order dated 19.5.2005. He dismissed the same on 20.3.2009. The fact of the matter is that the earlier orders were passed by the Sub Divisional Officer (C) exercising the powers of Collector on 1.6.1999. The review petition was filed in the year 2005. The limitation prescribed under Section 9-A of the H.P. Village Common Lands (Vesting and Utilization) Amendment Act, 2001 is 90 days. The petitioner has not been issued even a notice before the order was reviewed on 19.5.2005. Since the earlier order was a nullity, it would not be cured by the subsequent order passed by the learned Divisional Commissioner on 20.3.2009. It is also evident from the order dated 19.5.2005 that the report from the Revenue Officer was called for. The petitioner was not associated during the pendency of enquiry.

4. Accordingly, the Writ petition is allowed. Annexure P-14 dated 19.5.2005 passed by the Sub Divisional Officer and Annexure P-16, order dated 20.3.2009 passed by the learned Divisional Commissioner, Kangra are quashed and set aside. The respondent-State is directed to pay Rs. 5000/- costs to the petitioner. Pending application(s), if any shall stand disposed of.

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

Ms. Monika Singh .... Petitioner.
Vs.
State of H.P. and others .... Respondents.

CWP No. 824 of 2014.
Reserved on: 17.09.2014.
Date of Decision: 25 .9.2014.

Constitution of India, 1950- Article 226- Petitioner, a member of Child Welfare Committee, was removed from the office on the ground that she had failed to attend the meeting and to put her signatures on the attendance and proceedings register- Petitioner contended that she had passed orders and the removal was unjustified- Held, that the petitioner had issued the orders for age determination of a child in her individual capacity which is against the Constitution of District Child Welfare Committee- She was to work with the Chairperson and other members of the District Child Welfare Committee and not individually- she had not attended the meetings and had not put her signatures on the registers-hence, her removal was justified.

(Para-4, 5, 6)

Juvenile Justice (Care and Protection of Children) Rules, 2007- Rule, 26- Rules provide that the order of the Committee shall be signed by at least two members thus, signing the minute register is impliedly necessitated by the rules.

(Para-8)

For the petitioner: Mr. Bhupinder Singh Kanwar, Advocate.

For the respondents: Mr. Anup Rattan, Addl. Advocate General for respondents No. 1 to 3.
Mr. Digvijay Singh, counsel, for respondent No.6.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant petition is directed against the order comprised in, Annexure P-12, whereby the respondents ordered the removal of the petitioner from the office of the Member of Child Welfare Committee, Shimla. The removal of the petitioner from the office of Member of Child Welfare Committee, Shimla was preceded by a detailed inquiry carried out by the State Selection Committee. The petitioner in the writ petition contends that the findings recorded by the State Selection Committee in

its inquiry report are infirm, inasmuch as in the absence of standard operating procedures having been formulated and notified by the respondents for adoption by and for regulating the working of the District Child Welfare Committees functioning in the State of Himachal Pradesh, the insistence by the respondents upon the petitioner signing the minutes of the proceedings in the Register as a portrayal of her attending the meeting was uncalled for. She also contends that she had, on 5.8.2013, recorded the statements of the child and the mother along with respondent No.6 hence it was untenably concluded by the State Selection Committee in its report that she was willfully absent on 5.8.2013. Moreover, she contends that on the strength of Annexures P-4 and P-7 a register qua attendance maintained by respondent No.5 no conclusion could be derived qua the factum of hers not attending the sittings of the District Child Welfare Committee from 2.3.2013 to 29.6.2013. Besides, she contends that the entire procedure adopted by the State Selection Committee while it not having afforded her an adequate opportunity to project her stand in defence is hence ingrained with the vice of infraction of the principle of audi alteram partem, as such, rendering the conclusions and findings arrived at in the inquiry report, to be vitiated.

2. Detailed replies have been filed by the respondents to the writ petition wherein a focused stand has been portrayed qua the findings and conclusions arrived at by the State Selection Committee in its inquiry report being both vindicable as well as not warranting interference. The allegations against the petitioner fall within the ambit of the provisions of Section 29(4)(iii) of the Juvenile Justice (Care & Protection of Children) Act, 2000, inasmuch, as, she purportedly failed to, for consecutive three months without any valid reason, attend the meetings of the Committee. Also the State Selection Committee before commencing the inquiry qua the aforesaid allegations against the petitioner had served notice upon the petitioner. She in consequence appeared before the State Selection Committee. She even had projected her stand before the State Selection Committee. Consequently, she having been afforded full and adequate opportunity by the State Selection Committee to project her stand in defence disables her to contend that she was condemned unheard by the State Selection Committee. A perusal of the findings and conclusions recorded by the State Selection Committee in its inquiry divulge that they are both intensive and ad nauseam vis-à-vis enunciative upon the material on record in support of the allegations against the petitioner. A portrayal is made in it of each of the defences canvassed by the petitioner before the State Selection Committee as also the defence canvassed before this Court by the petitioner having been taken into account and it having been construed to be unsustainable. The portrayal aforesaid does not appear for lack of emergence of any perversity or absurdity to be unwarranted. A perusal of paragraph 21 of the inquiry report discloses the fact of the petitioner having admitted the factum of a register having been maintained by one of the members of Child Welfare Committee. However, on a perusal of pages 47, 54, 57, 58, 62 and 64 to 69 of the register, by the State Selection Committee unearthed the fact of the

pages aforesaid having been omitted to be signed by the petitioner. The factum of the register acquiring credibility is manifested by the fact of the minutes of the meeting being scribed by the petitioner alongwith Mr. B.P.Adhikari. Consequently, with credibility having hence come to be foisted to the attendance register, absence of signatures of the petitioner as well as of Mr. B.P.Adhikari on pages aforesaid, marks the fact of the absence of the petitioner on the apposite dates. Therefore, leaves the allegation against the petitioner of hers without any valid reason absenting herself from the meetings of the District Child Welfare Committee to be sustainable.

3. While hence imputing credibility to the register maintained by Ms. Sapna Banta, one of the members of the District Child Welfare Committee, the State Selection Committee while singling out 25.4.2013 as a test check date for determining the truth of the contention of the petitioner of her being present on the said date, it construed that in the face of the petitioner in her individual capacity having issued orders for age determination of a child portrays the fact that there was lack of satisfaction of the enjoined statutory coram for constituting the meeting of the District Child Welfare Committee valid and tenable. The petitioner in hers individually rendering orders of 25.4.2013, which individualistic act did not constitute the factum of a valid meeting of the District Child Welfare Committee, Shimla having been convened, sequelly it was aptly determined that the petitioner in individually and unilaterally convening meetings of the District Child Welfare Committee, did not render her empowered to contend that she either participated in it or was present therein. In the said Selection Committee dispelling the factum of the presence of the petitioner on 25.4.2013 had anvilled its conclusion on well founded facts. Also then it having construed the maintenance of a file CNCP No. 107 of 2013 produced by the petitioner before it for communicating the factum of her presence in personification of her attendance to be depricable, especially when the maintenance of the file by the petitioner is not in consonance with the office decorum nor also when it has not been concluded by the State Selection Committee that the proceedings of the District Child Welfare Committee as comprised in it were valid and tenable, theirs having been signatured by the coram prescribed under the norms, does not obviously give any leverage to the petitioner to contend that with hers having maintained files of certain cases which purportedly demonstrate the factum of hers diligently performing her job, as well, as hers too maintaining the records of the proceedings, she was falsely implicated.

4. Even otherwise the petitioner taking to individually maintain case files portrays the fact of hers not working in collaboration with the Chairperson and other members of the District Child Welfare Committee, obviously when the proceedings of the District Child Welfare Committees are collaborative, joint and not individualistic, hers individualistic approach is antithetical to the very purpose of the constitution of the District Child Welfare Committee whose proceedings are valid only in case the enjoined coram attends them and not when as the petitioner has taken to individually record statements on 5.8.2013 of

a child and mother and not obtained signatures of the members which would have rendered the enjoined coram to be tenably and validly convened on 5.8.2013 and its hence portraying the factum of hers diligently performing her duties inasmuch as she having attended the meeting on 5.8.2013.

5. For reiteration, she was enjoined to work in tandem with the chairperson and other members of the District Child Welfare Committee and not individually. The proceedings of the Child Welfare Committee were collaborative, joint and not individualistic. Even if she has contended before this Court that she on 5.8.2013 had recorded the statements of child and mother and obtained the signatures of a member present, in personification of hers attending the meeting nonetheless besides also the said factum does not enjoy any sanctity in the absence of the coram prescribed under Rule 26 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 for a meeting of the District Child Welfare Committee being construed to be valid, being of three members, having remained fulfilled inasmuch, as, on 5.8.2013 she had alongwith a co-member signatured the proceedings whereas the said factum did not constitute the holding of a valid meeting of the District Child Welfare Committee within the ambit of Rule 26 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Hence, her presence then, if any, is of no consequence.

6. Moreover, each of the reasons as propounded by the writ petitioner before this Court for rendering untenable the conclusion and findings arrived by the State Selection Committee have been both intensively and extensively discussed and adverted to by the State Selection Committee in its report. A preponderant emphasis has been laid by the State Selection Committee while considering the defence portrayed by her anchored upon the factum of the petitioner as contended by her before it taking to maintain individualistic files of proceedings, as also, of the ratification of the proceedings of the District Child Welfare Committee by the coram which hence purportedly foisted it with tenability. Nonetheless with the factum of hers having omitted to signature the minutes register whose credibility remained uneroded as tenably concluded by the State Selection Committee pronounces upon any such ratification being entirely fictitious. Consequently, the allegation against the petitioner stood proved by a reasoned order rendered by the State Selection Committee. The order of removal of the petitioner from the office of the Member of the District Child Welfare Committee while harbored upon a well reasoned inquiry report which is neither perverse nor absurd, hence does not require any interference.

7. Lastly, the learned counsel for the petitioner contends that in the absence of the respondent having formulated a standard operating procedure for adoption by the District Child Welfare Committee for regulating their meetings the respondent untenably insisted upon the factum of recording and signing of minutes register in personification of hers having attended the meetings of the District Child Welfare Committee. However, the said contention gets disempowered as well as

rudderless in the face of Rule 26(4), of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which is extracted hereinafter:

> "26(4). For final disposal of a case, the order of the Committees shall be singed by at least two members, including the Chairperson."

8. Prescribing the statutory necessity of the orders of the Committee being signed by atleast two members. Besides, the said statutory requirement fastened upon the District Child Welfare Committee, the maintenance and signing of the minutes register in corroboration to and in support of the factum of the members of the Committee while comprising a valid coram holding sittings of the District Child Welfare Committees wherein decisions were arrived at, is also impliedly necessitated. Therefore, with their being a statutory prescription in the Juvenile Justice (Care and Protection of Children) Rules, 2007 qua the regulatory procedure to be adopted by the District Child Welfare Committee for the holding of their meetings, there was no necessity enjoined upon the respondents to either formulate or to circulate for adoption by the District Child Welfare committee any standard operating procedure for governing the manner of theirs holding meetings or qua the manner in which their presence therein is to be established.

9. The sumon bonum of the above discussion is that when each of the stances projected by the writ petitioner before this Court for falsifying the allegations though concluded to be truthful by the State Selection Committee have been meted out with tenable, sound and cogent reasoning by the State Selection Committee that too on an intensive analysis of the material placed before it. As also when the said findings as arrived at by the State Selection Committee having not been displayed by any cogent material to the contrary adduced by the petitioner to be nugatory, hence, the findings and conclusions are both reasonable and tenable. Accordingly, the impugned order Annexure P-12 is affirmed and maintained. The writ petition is dismissed. No costs. All pending applications are also disposed of accordingly.

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

State of H.P. .....Appellant.
Versus
Lal Chand & Anr. ...Respondents.

Cr.Appeal No.327 of 2008.
Reserved on: 05/09/2014.
Date of Decision : 25.09.2014.

NDPS Act, 1985- Section 20- Accused were found riding a motorcycle- On search of motorcycle one bag containing 3 Kgs. and other bag containing 2 Kgs. of Charas were recovered- Held, that the Investigating Officer had failed to collect the documents revealing the ownership of motorcycle, which shows that the accused had never acquired the possession of motorcycle- Investigation was tainted and the accused were falsely implicated – Further, as per the prosecution case the police party was checking the vehicles, however no vehicle was associated with the recovery-Accused acquitted. (Para-17)

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

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

1. The instant appeal is directed against the judgement of acquittal, rendered on 4.12.2007, by the learned Additional Sessions Judge, Fast Track Court, Dharamshala, District Kangra, H.P., in Sessions Trial No.31/07, whereby the respondents have been acquitted for theirs having committed offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act').

2. The prosecution story, in brief, is that on 3.6.2007, a police party, headed by SI Gulzari Lal, proceeded on patrol duty and laid Naka near Chamunda, at place known as Eco Khad. While conducting checking of the vehicles, passing from there at about 3.10 a.m., they noticed one motor-cycle coming from the side of Chamunda, which was being plied by Lal Chand and Ghambir Chand was the pillion rider. On being signaled, the motor-cycle was stopped and thereafter checking of the same was conducted. On checking the dickey of the motorcycle, two plastic bags were found, which were suspected to be containing Charas. On weighment, one bag was found containing three Kilograms and the other bag, two Kilograms of Charas, respectively. Out of the aforesaid bags, two samples of 25 grams each were taken. The samples as well as the bulk of the Charas were packed separately. In total, six parcels were prepared and sealed on the spot. Seizure memo, as well as NCB Forms, were prepared. Thereafter, the accused as well as the case property, along with motor-cycle, were taken to the Police Station, Dharamshala, where the case property, along with motor-cycle, was deposited with the MHC. The MHC sent two samples for test to be chemically analyzed at FSL, Junga, which were reported to be containing Charas.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C., was prepared and filed in the Court. The trial court charged the accused for theirs having committed offence punishable under Section 20 of the NDPS Act, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused were given an opportunity to adduce evidence, in, defence, and they chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgment of acquittal, recorded by the learned trial Court. Shri Ramesh Thakur, learned Assistant Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondent.

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

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

9. The first witness, who, stepped into the witness box to prove the prosecution case, is, PW-1 (Joginder Singh), who deposes that on 25.6.2007, two parcels were handed over to him by MHC Anil Kumar, which were duly sealed and he deposited the same with FSL, Junga, along with seal impressions of T and A on cloth pieces and three NCB forms on 26.6.2007. He continues to depose that he handed over the receipt to MHC on return.

10. PW-2 (HHC Shyam Lal) deposes that on 5.6.2007, one sealed envelope was handed over to him by SI Gulzari, which he deposited in the office of SP with Reader to S.P.

11. PW-3 (MHC Anil Kumar) deposes that on 3.6.2007, SHO R.P.Jaswal handed over to him six parcels, out of which four parcels were containing samples of 25 grams each and the remaining two were carrying the remaining bulk Charas. All these parcels were sealed with seal A at four places each and resealed with seal T at three places each. He further deposes that seal impressions of A and T on cloth pieces as well as NCB form in triplicate were deposited with him and entry in this regard was made in the Malkhana Register. He continues to depose that

two parcels of samples were sent to FSL along with NCB forms and docat through Constable Joginder Singh and he handed over the receipt to him.

12. PW-4 (HC Vinod Singh) deposes that on 3.6.2007, he was accompanying S.I. Gulzari Lal, along with other Police officials, in connection with traffic checking at Ghurlu Pul. He further clarified that they had laid Naka at Ikku Pul. He further deposes that at about 3.10 a.m., a motor-cycle came from Chamunda side, which was being driven by Lal Chand and Gambir Chand was the pillion rider. He continues to depose that on search of the dickeys of the motor-cycle, two polythene bags containing Charas were found. Two samples, 25 grams each, were drawn from both the recovered packets. All the samples and remaining bulk of charas were packed and sealed with seal A at four places. He further deposes that Ruka comprised in Ext.PW-4/A was handed over to him, which he took to Police Station and on the basis of which, F.I.R. Ext.PW-4/B was registered by R.P.Jaswal.

13. PW-5 (ASI Ashwani Kumar Sharma) proved the F.I.R No. 109/2007.

14. PW-6 (HC Kuldeep Chand) deposes that on 3.6.2007, he, along with HC Amarik Singh, HC Vinod, was accompanying S.I. Gulzari Lal. Naka was laid at Ikku Pul from 2.00 a.m. onwards and at about 3.00 a.m., two persons were noticed riding the Motor Cycle which was stopped by SI Gulzari Lal. Search of the Motor-cycle was conducted by SI Gulzari Lal. He further deposes that in two dickeys, Charas was found in two polythene bags, out of which two samples, 25 grams each, were drawn from each packet. All the four samples and bulk Charas of two bags were packed and sealed with seal Mark-A at four places. NCB forms, in triplicate, were also prepared. All the six parcels, duly sealed and packed with seal 'A', were taken into possession vide seizure memo Ext.PW-6/C. He deposes that a copy of seizure memo was supplied to the accused, who is deposed to have appended his signatures on it. He proceeds to depose that the motor-cycle bearing R.C. No.HP-39-3208 was also taken into possession vide seizure memo Ext.PW-6/D on which he, along with HC Amrik Singh, appended their signatures being without documents. He further deposes that Gulzari Lal prepared Rukka Ext.PW-4/A in his presence and the same was sent to Police Station through HC Vinod Kumar for registration of the case.

15. PW-7 Constable Gopal Dass and PW-8 SI Om Parkash are formal witnesses. PW-9 S.I. Gulzari Lal, deposes that he alongwith other police officials proceeded on Patrol and laid a Naka, etc. at Chamunda, near Ikku Khad. He continues to depose that while checking the vehicles at about 3.10 a.m on 3.6.2007 one motor cycle came from Chamunda side which was being driven by accused Lal Chand and Gambhir Chand was the pillion rider. Dickeys of the vehicle were checked by him and during search, two polythene bags Ext.P-2 and Ex.P-6 were found containing some black object. Out of the two bags, two samples each of 25 grams each were taken out. NCB form in triplicate was filled in. He further deposes that motor-cycle, along with its keys, was taken into

possession vide seizure memo Ext.PW-6/D in the presence of Kuldeep and Amrik Singh. He further deposes that no documents of motor-cycle were produced by accused persons. He further deposes that he had carried out the further investigation in the case.

16. PW-10 (Inspector R.P.Jaswal) deposes that on 3.6.2007, Rukka comprised in Ext.PW-4/A, written by S.I. Gulzari Lal, was received through HC Vinod Singh in police station and FIR was written as per his instructions. He deposes to have signed the F.I.R. He further deposes that copy of the F.I.R was sent to Special Judge, SP Kangra and also to ASP Kangra. He further deposes that he has resealed the case property with seal impression T and thereafter he deposited the same alongwith NCB forms in triplicate with MHC.

17. On 3.6.2007, at 3.10 a.m., when accused Lal Chand was allegedly plying motor-cycle and accused Ghambir Chand was atop it as pillion rider, then on their arrival near Chamunda, at place known as Eco Khad, on theirs being stopped by the police party headed by S.I. Gulzari Lal and on consequent checking of the dickey of the motor-cycle, Charas comprised in Ext.P-2 and Ext.P-6 was allegedly recovered there-from. In proof of the prosecution case, it has relied upon the testimonies of the official witnesses. The testimonies of the official witnesses do not suffer from the taint of theirs being imbued with any inter-se or intra-se contradictions. Obviously, when they do not acquire any blemish, they do attain credibility. Nonetheless, the prosecution case is susceptible to skepticism arising from (a) the omission on the part of the Investigating Officer to obtain or collect documents revealing the ownership of the motor-cycle on which both the accused were atop respectively as driver and pillion rider, omission thereof, has constrained the Investigating Officer to locate its owner. Lack of ascertainment of ownership of the motor-cycle would have upsurged an inference qua the valid possession of the motor cycle at the instance of both the accused. Consequently, for lack of ascertainment by the Investigating Officer of the ownership of the motor-cycle as also it not having been hence established by the prosecution that the accused had ever acquired possession of the motor-cycle, concomitantly spurs the conclusion that the Investigating Officer carried out a tainted and slanted investigation, which hence stains the prosecution version of the accused occupying the motorcycle, at the apposite stage with the blemish of untruthfulness. In aftermath, it has to be invincibly concluded that the respondents/accused were never occupying the motorcycle at the apposite stage and they have been falsely implicated by the Investigating Officer. (b) It is the case of the prosecution that a Naka was laid by a team headed by SI Gulzari Lal near Eco Khad commenced at 2 a.m. and that the Naka party had prior to the purported arrival of the motorcycle had carried out checking of the vehicles which passed there-from. If it be so, then the prosecution sustains the projection that even at that time, there was a flow of traffic at the site of occurrence, hence given the factum of flow of traffic at the site of occurrence then any of the passengers, occupying the vehicles, which passed through the Naka point, could have been associated by the Investigating Officer in the proceedings relating to search, seizure and

recovery of contraband from the purported conscious and exclusive possession of the accused so as to imbue the proceedings with the virtue of fairness and impartisanship, omission thereof by the Investigating Officer leads to no other inference than that of his taking to carry out a biased as well as a tainted investigation for smothering the truth qua the occurrence. As such, then the version as propounded by the prosecution cannot acquire credence. Also, then the version as propounded by the prosecution of a Naka having been laid at 2.00 a.m. near Eco Khad by the police party headed by ASI Gulzari Lal, does not also acquire any truth. In sequel, it has to be also concluded that the proceedings relating to search, seizure and recovery of contraband from the exclusive and conscious possession of the accused were carried out at a place other than the place as projected by the prosecution. As a corollary, then the genesis of the prosecution case of the proceedings having been carried out at Eco Khad staggers.

18. The learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

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

Versus

Vikram Kuthiala ...Respondent.

Cr.Appeal No.418 of 2008.
Reserved on: 18/09/2014.
Date of Decision :26/09/2014.

NDPS Act, 1985- Sections 20 and 22**-** Accused was driving the vehicle- On checking the vehicle, 9 strips of Nitrosun and 800 Gms. of charas were recovered- Held, that the NCB form regarding tablet was not filled at the spot which shows that the prosecution version regarding completion of investigation at the spot was doubtful- The seal impression "I" used for sealing the parcel; as well as the parcel containing bulk quantity was previously used by the Investigating Officer which shows S.H.O. had not re-sealed the sample and bulk parcel- Further, the entire proceedings relating to search were carried out at the place of occurrence but the personal search memo was witnessed by two independent witnesses who were not the members of raiding party- This shows that the memo of personal search was not prepared on the spot, but was prepared

somewhere else- therefore, in these circumstances, the prosecution version becomes doubtful-consequently, the accused acquitted.

(Para-20, 21)

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

For the respondent: Mr.Manoj Pathak and Mr.Ashish Sharma, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

1. The instant appeal is directed against the judgement of acquittal, rendered on 25.3.2008, by the learned Special Judge, Shimla, H.P., in Sessions Trial No.1-S/7 of 2007, whereby the respondent has been acquitted for his having committed offence punishable under Sections 20 and 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act').

2. The prosecution story, in brief, is that on 29.3.2006, at about 8.30 p.m., HC Kuldeep Singh, along with Constables Naresh Kumar and Manmohan Singh, was on patrolling and traffic checking and on reaching near Durga Gas Agency, he noticed one Santro Car coming from Sanjauli to Chhota Shimla side. The said vehicle was signaled to stop, however, the vehicle was stopped 15-20 feet ahead. PW-11 HC Kuldeep Singh, along with other police officials, asked the driver to produce the documents of the vehicle. The driver of the vehicle omitted to produce the documents and got afraid on seeing the police. PW-11 had noticed one gathri, on the floor of the car, in front of front seat. Along with the Ghatri, one handkerchief and one packet of nitrosun tablets 10 mg. were also found. On smelling the handkerchief, Charas was found to be kept in it. During the process of checking the Santro Car, one vehicle bearing registration No.HP-02-6307 came from Sanjauli side, in which Jagdish and Surat Chauhan, were traveling and they were associated by PW-11 in the investigation. On asking the name of the driver of the Santro Car, he disclosed his name Vikram Kuthiala (the accused). On weighing the Charas, in the presence of the witnesses, the same was found to be 800 grams. Out of the recovered Charas, two samples of 25 grams each were separated and the samples were sealed in two different parcels and the remaining Charas was packed in a separate parcel. The samples and the bulk Charas were sealed with seal impression M. Out of the nine strips of Nitrosun, two strips containing 10 tablets were separated as samples and were sealed in one parcel, which was sealed with seal M. the remaining seven strips were also put in a separate parcel which was also sealed with seal impression M. Seal impression of seal M was taken on a piece of cloth comprised in Ext.PW-1/A. All the five parcels were taken into possession vide recovery memo Ext.PW-1/B, bears the signatures of witnesses, namely, Jagdish Chand and Surat Chauhan and Constable Manmohan Singh, which was also got signed from accused. Three cloth pieces were prepared on the spot

on which the seal impression M was affixed. NCB Form, comprised in Ext.PW-1/C was filled in by PW-11 HC Kuldeep Singh on the spot. PW-11 HC Kuldeep Singh sent Ruqua Ext.PW-1/E for registration of case to SHO, Police Station, Dhalli through Constable Naresh Kumar, upon which formal F.I.R. Ext.PW-1/F was registered.

3. After completion of the investigation, challan under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial court charged the accused for his having committed offence punishable under Section 20 and 22 of the NDPS Act, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused was given an opportunity to adduce evidence, in, defence, and he chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Assistant Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondent.

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

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

9. The first witness, who, stepped into the witness box to prove the prosecution case, is, PW-1 (Naresh Kumar). He deposes that on 29.3.2006, he, along with HC Kuldeep and Constable Manmohan Singh, was on patrol duty at Kali Dhank near Durga Gas Godown, when a Santro Car came there from Sanjauli side and it was signaled to stop. He further deposes tht the vehicle was stopped at a distance of 15-20 feet ahead and the driver of the said vehicle was asked to show the documents of the vehicle, however, he could not produce any such

documents. He continues to depose that on checking the vehicle from inside, under the front seat, a Ghatri of cloth and one box was also kept aside. On smelling the Ghatri, it was found to be containing Charas and the box was found to be containing Nitrosun tablets of 10 mg each. The accused disclosed his name as Vikram Kuthiala. He proceeds to depose that in the meanwhile, another vehicle came from Sanjauli side bearing registration No.HP-02-6307 and stopped the same. Two persons, namely, Jagdish and Surat Chauhan were sitting inside that vehicle and they were associated with the police party and the Ghatri and the box were shown to them. On weighment of the incriminating articles, Charas was found to be 800 grams and the tablets were 90 in number. He continues to depose that two samples of 25 grams each were separated from the Charas and sealed in separate parcels. The remaining Charas was sealed in a separate parcel. Seal impressions were taken on a piece of cloth comprised in Ext.PW-1/A. He further deposes that the Charas was taken into possession vide memo Ext.PW-1/B. Two strips of tablets were sealed in one separate parcel with seal M and the remaining strips were sealed in a separate parcel with the same seal and taken in possession vide memo Ext.PW-1/B. The accused and the witnesses have been deposed to have signed the memo along with Constable Manmohan and this witness identified his signatures. NCB Form comprised in Ext.PW-1/C was filled in on the spot and the grounds of arrest were disclosed to the accused comprised in memo Ext.PW-1/D and the accused was arrested. This witness proceeds to depose that the Investigating Officer handed over the Ruqua Ext.PW-11/C to him which he took to the police station and FIR comprised in Ext.PW-1/F came to be registered. During his cross-examination, he deposes that the Police Station, Dhalli is about 2 ½ Kilometers from the spot and he went to the Police Station on foot. However, he again stated that he took a free lift in a taxi from near the police post. He denied the suggestion put to him that the accused has been involved in a false case because of a quarrel between the accused and Kuldip Singh earlier.

10. PW-2 (ASI Tej Ram) deposes that on 30.6.2006, HHC Parkash Chand brought special report of the present case to him at about 11.30 a.m. along with a carbon copy and produced the same before the S.P., Shimla immediately, who, after perusing the same, appended report and signed the same. He further deposes that the original was kept by him in the office record and the carbon copy was handed over to HHC Parkash Chand.

11. PW-3 (MHC Parkash Chand) deposes that on 30.6.2006, special report, along with carbon copy, was handed over to me from Police Station to be taken to the S.P. Office, Shimla. He further deposes that he produced the same before the Reader to the S.P.Shimla, who produced original and carbon copy before the S.P.Shimla and after that, the carbon copy comprised in Ext.PW-2/A was delivered to him, which he handed over to MHC P.S.Dhalli and original was retained by the Reader to S.P.

12. PW-4 (C.Shiv Ram) deposes that on 1.4.2006, Ashwani Kuthiala produced registration certificate and insurance of Santro Car No.HP-03A-2304, which is deposed to have been taken into possession vide memo Ext.PW-4/A in his presence and Constable Balvinder Singh, which is deposed to be bearing his signatures.

13. PW-5 (C.Shyam Lal) proved the original Raznamcha of 29.3.2006 and Rapat No.21, copy of which is comprised in Ext.PW-5/A. The same is deposed to be in his hand and the copy of Ext.PW-5/A was prepared by him. During his cross-examination, he denies the suggestion put to him that the entry Ext.PW-5/A is falsely prepared by him to implicate the accused.

14. PW-6 (C.Roop Lal) deposes that on 30.3.2006, MHC PS Dhalli Tek Ram handed over him two sample sealed parcels, out of which, one is stated to be containing 25 grams of Charas and the other 20 tablets of some medicine along with documents, sample of seals, NCB Form vide RC No.42/06. He further deposes that he carried the same to CFSL, Kandaghat and deposited the same in the Laboratory and handed over the receipt of the same on the RC to the MHC on the same day. He continues to depose that so far the case property remained with him, the same remained intact and un-tampered and the parcels were sealed with seal impression 'I'.

15. PW-7 (HC Tek Ram) deposes that on 29.3.2006, at about 11.30 p.m., SI Raj Kumar deposited with him five parcels duly sealed with seal 'I' along with NCB Forms in triplicate and sample seals 'I' and 'M'. He further deposes that he entered the same in the Malkhana Register and the abstract of which is comprised in Ext.PW-7/A. He continues to depose that he sent one sample part duly sealed containing Charas and another sample duly sealed containing tablets along with seal impression, seizure memo, NCB Form etc. on 30.3.2006 through Constable Roop Lal vide RC No.42/2006 to CTL Kandaghat. Constable Roop Lal deposited the same at the Laboratory on the same day and brought back the RC copy of which is comprised in PW-7/B. During his cross examination, he concedes to the suggestion put to him that in the Malkhana Register there is no entry of deposit of sample seals and NCB Forms.

16. PW-8 (SI Raj Kumar) deposes that on 29.3.2006, Ruqua comprised in Ext.PW-1/E was received through Constable Naresh Kumar on the basis of which FIR Ext.PW-1/F was came to be registered which is deposed to be bearing his signatures. He continues to depose that on the same day at about 11.15 p.m., HC Kuldip Singh produced before him five sealed parcels of case property sealed with seal M along with NCB Forms and sample seal impressions and he re-sealed the parcels with seal I and took the seal impressions on a piece of cloth comprised in Ext.PW-8/A. He proceeds to depose that he also took seal impression on the NCB Form and deposited the case property along with the NCB Forms immediately. He deposes to have issued the certificate about re-sealing comprised in Ext.PW-8/A. On receipt of the report of the

Chemical Examiner comprised in Ext.PW-8/C, SHO Vijay Kumar prepared the challan. During his cross-examination, he deposes that his statement was recorded by the Investigating Officer in the present case and he has mentioned in that statement that HC Kuldeep produced the case property before this witness at 11.30 p.m. He further deposes that after reading his statement comprised in Ext.DD, there was no mention of seal impression having been handed over to him by Kuldeep.

17. PW-9 (Jagdish Chand) and PW-10 (Surat Chauhan), since they, during their examination-in-chief, having not supported the prosecution version, they were declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, they were cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from their cross-examination.

18. PW-11 (HC Kuldeep Singh), in his deposition, has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, he concedes to the fact that there was no mention in the Fard comprised in Ext.PW-1/B and the statements of witnesses regarding filling of NCB Form on the spot. The brief facts of the challan were prepared by ShO Vijay Kumar Sharma. He feigns ignorance that the platform of the Santro Car is deep and one cannot see anything from outside.

19. 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, Junga, on the specimen parcels sent to it for analysis, portrays proof of un-broken and un-severed links, in the entire chain of the circumstances, hence it is argued that when the prosecution case stood established, it was legally unwise for the learned trial Court to have acquitted the accused.

20. Besides the testimonies of the official witnesses, though unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, consequently when they enjoy credibility. Therefore, when, hence, the learned trial Court ought to have been constrained to record findings of conviction against the accused, nonetheless it appears that despite lack of any inter-se or intra-se contradictions in the testimonies of the prosecution witnesses, certain pervasive discrepancies as well as infirmities in the prosecution evidence that, too, of an immense propensity tenably led the learned trial Court to record findings of acquittal against the accused. The infirmities, imbuing the prosecution version, which have been tenably concluded by the learned trial Court to be smearing the prosecution case with the vice of prevarication, as such, rendering the prosecution case un-reliable are, (a) of Ext.PZ, the NCB Form qua tablets having not been deposed by PW-11 to have been filled in on the spot, besides PW-1 omits to depose that Ext.PZ qua tablets was filled on the spot, rather, when PW-1 deposes that only the NCB Forms

Ext.PW-1/C relating to Charas was filled on the spot, the obvious conclusion, which ensues is that Ext.PZ was not filled on the spot, rather, was filled elsewhere. Consequently, the prosecution case of the entire proceedings qua both Charas and tablets having been completed at the site of occurrence staggers and falls apart. (b) Seal impressions of M, N and I, existing on Ext.PW-1/C and Ext.PZ, have been scribed thereon by the Investigating Officer, however, seal 'I' has been projected by the prosecution to have been used by S.I. Raj Kumar for re-sealing the sample parcels in the Police Station as well as the parcels containing the bulk quantity, obviously then, in the face of both seal impressions 'M' and 'I' having been previously scribed by the Investigating Officer, as also the aforesaid seal impressions having been embossed therein on re-sealing by the Investigating Officer, hence portrays the fact of re-sealing though enjoined to be done by the SHO of the Police Station concerned, was not done by the later, sequelling transgression of the mandate of law contemplating the act of resealing to be performed by the SHO of the Police Station, concerned**.** Moreover, it also conveys when embossed by the Investigating Officer initially and on re-sealing, the factum of the entire proceedings relating to search the contraband being carried out at a place other than the place of occurrence. Consequently, on the strength of a concocted and invented prosecution version qua the entire proceedings relating to search, seizure and recovery having been purportedly made at the site of occurrence, whereas, it was not made, this Court would remain un-attracted to it.

21. The personal search of the accused has been portrayed by the prosecution to have been made on the spot before arresting him under Memo comprised in Ext.PW-11/D. Both Constables Shiv Kumar and Mohinder Singh are marginal witnesses to it, however, when both were not members of the police party, hence, when they are to be construed to be not present on the spot conveys that Ext.PW-11/D was not either scribed nor completed on the spot, rather, elsewhere. Consequently, the subsequent proceedings relating to search, seizure and recovery of items from the alleged conscious and exclusive possession are to be held to have commenced and completed elsewhere than at the site of occurrence. Consequently, the genesis of the prosecution story is eroded of its truth. The aforesaid discrepancies and infirmities, which existed in the prosecution story, are grave and pervasive and take with their fold the genuineness of or the veracity of the prosecution story. Given the existence of the aforesaid infirmities, the prosecution story receives a jolt inasmuch as the prosecution version is to be construed to be incredible.

22. The learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

Daya Thakur wife of Sh. Dina Ram Thakur ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 940 of 2014
Order Reserved on 23rd September, 2014
Date of Order 9th October 2014

Code of Criminal Procedure, 1973- Section 438- At the time of granting bail, the Court has to see the nature of seriousness of offences, nature of evidence, circumstances peculiar to the accused, presence of the accused in the trial or investigation, reasonable apprehension to witnesses, and larger interests of the State- Grant of bail is the rule and committal to jail is an exception- Since the investigation was complete and the conclusion of the Trial would take some time- hence, bail granted. (Para-6)

Cases Referred:

Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702

For the Applicant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General and Mr. Pushpender Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present application filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 84 of 2014 dated 10.08.2014 registered under Section 498A and 506 read with Section 34 of Indian Penal Code registered in Police Station Ani District Kullu H.P.

2. It is pleaded that daughter-in-law of applicant has lodged a false and frivolous complaint against her. It is further pleaded that said complaint is counter blast to the divorce petition filed by son of the applicant. It is further pleaded that applicant is innocent and further pleaded that applicant will not abscond nor jump the bail and will not

induce or threat to any person. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report, FIR No. 84 of 2014 dated 10.8.2014 registered under Sections 498A and 506 read with Section 34 of Indian Penal Code in Police Station Ani District Kullu H.P. There is recital in police report that marriage between Kamlesh and Sushil was performed in the year 2005 at village Ani District Kullu. There is further recital in police report that for 2/3 years husband of complainant and her mother-in-law behaved properly with complainant and thereafter behaviour of husband of complainant and her mother-in-law changed. There is further recital in police report that Kamlesh tolerated the behaviour of her husband and mother-in-law on the pretext that after lapse of time everything would become normal. There is further recital in police report that husband of complainant Kamlesh and her mother-in-law started quarrelling with Kamlesh and also demanded dowry. There is further recital in police report that husband of Kamlesh is posted in Block Development Office as Junior Engineer since four years. There is further recital in police report that husband of Kamlesh has relations with one girl namely Puja. There is further recital in police report that husband of Kamlesh namely Sushil intends to marry Puja. There is further recital in police report that on dated 23.7.2014 Kamelsh went to meet her husband along with her daughter at Theog but her husband beaten the complainant and threatened to kill her. There is further recital in police report that Puja is harassing through mobile No. 98169-82829. There is further recital in police report that husband of complainant namely Sushil Kumar is forcing complainant Kamlesh to divorce him so that husband of complainant could remarry with Puja. There is further recital in police report that husband and mother-in-law of complainant are mentally and physically harassing Kamlesh. As per complaint the case was registered. Statements of prosecution witnesses recorded and marriage certificate from Gram Pancahyat and family register obtained. There is recital in police report that no investigation from applicant is required.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any offence cannot be decided at this stage. The same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and case will be decided in due course of time and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii)

Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***See 2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that the object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

7. In view of the fact that investigation is complete in present case and in view of the fact that trial will be concluded in due course of time, Court is of the opinion that it would be in the ends of justice to allow the bail application. Court is of the opinion that if anticipatory bail application is allowed then interest of State and general public will not be adversely affected in present case.

8. Submission of learned Additional Advocate General that if bail is granted to applicant then applicant will induce threat and influence the prosecution witnesses and on this ground anticipatory bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that if applicant will flout the terms and conditions of bail order then prosecution will be at liberty to file application for cancellation of bail in accordance with law.

9. In view of above stated facts anticipatory bail application filed by applicant is allowed and interim bail granted on dated 14.8.2014 is made absolute on following terms and conditions. (i) That applicant shall join the investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which she is accused. (v) That applicant will furnish her residential address to the Investigating Officer in written manner. Anticipatory bail application filed under Section 438 Cr.P.C. stands disposed of accordingly including all pending miscellaneous application(s), if any.

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

Kiran Mai wife of Shri Nand Kishore ....Petitioner
Versus
State of H.P. and others ....Respondents

CWP No. 7210 of 2013
Order Reserved on 15th September,2014
Date of Order 9th October, 2014

Constitution of India, 1950- Article 226- The petitioner was engaged as a language teacher as per resolution dated 16.06.2004-After sometimes, she was asked not to come to the school- Respondents contended that the appointment of the petitioner was not in accordance with the recruitment and promotion rules and was merely a stop gap arrangement on temporary basis- it was further contended that she was not appointed as per the procedure and as per the Recruitment and Promotion Rules and her services were rightly terminated- Held, that there was no recital in the resolution dated 16.06.2004 that the applications were invited for the post of language teacher or any advertisement was issued- Appointment to any public post without any notice to the general public is contrary to the Recruitment and Promotion Rules- Appointment of the petitioner to the post of language teacher was a stop gap arrangement which would not confer any right upon the petitioner to continue in the post-petition dismissed. (Para-5)

Cases Referred:

Haribans Misra and others vs. Railway Board and others, AIR 1989 SC 696

J&K Public Service Commission etc. vs. Dr. Narinder Mohan and others, AIR 1994 SC 1808

Dr. Kashinath Nagayya Ibatte vs. State of Maharashtra and others, 1995 Supp (3) SCC 363

State of Haryana and others vs. Piara Singh and others, AIR 1992 SC 2130

For the Petitioner: Mr. Vinod Chauhan, Advocate.

For the Respondents: 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 filed under Section 226 of the Constitution of India. Brief facts of the case as pleaded are that elections of PTA were held for the year 2004-05 in Government High School Beetan

Tehsil Haroli District Una HP. It is further pleaded that vide resolution dated 16.6.2004 petitioner namely Kiran Mai was engaged as language teacher as per remuneration of ` 1700/- per month to be paid out of PTA fund vide Annexure P-4. It is further pleaded that thereafter petitioner worked continuously without any break in the school. It is also pleaded that petitioner was asked not to come to school and petitioner represented her case to respondent Nos. 4 and 5 i.e. Headmaster Government High School and the President Parents-Teachers Association Government High School Beetan Tehsil Haroli District Una for grant-in-aid but the same has not been decided till date. It is further pleaded that respondents be directed to release grant-in-aid w.e.f. 2004 immediately and further pleaded that respondents be also directed not to dispense with services of petitioner.

2. Per contra reply filed on behalf of the respondents pleaded therein that petitioner was not engaged against the post of language teacher as per procedure and norms and further pleaded that petitioner was not engaged as per Recruitment and Promotion Rules prevalent at the time of her appointment. It is further pleaded that petitioner was engaged by PTA Committee of Government High School as stop gap arrangement on temporary basis by way of passing a simple resolution. It is further pleaded that claim of the petitioner for continuation on the post of language teacher is not justified and is contrary to law. It is further pleaded that as petitioner was not engaged as per procedure and norms and was not engaged as per Recruitment and Promotion Rules and her services are rightly terminated by PTA Committee of Government High School Beetan, Tehsil Haroli District Una. Prayer for dismissal of writ petition sought.

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

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

1. Whether petitioner will be allowed to continue in service as language teacher in Government High School Beetan, Tehsil Haroli District Una HP on PTA basis?
2. Whether petitioner is legally entitled for release of grant-in-aid w.e.f. 2004 as alleged?

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner be allowed to continue as language teacher in Government High School Beetan on PTA basis is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that petitioner was appointed as Hindi language teacher as per remuneration of Rs.1700/- per month as per resolution passed by PTA Committee on dated 16.6.2004 (Annexure P-4). Court has perused

Annexure P-4 dated 16.6.2004 carefully. There is no recital in resolution dated 16.6.2004 that applications were invited for post of language teacher by PTA Committee from general public. There is no mention in resolution dated 16.6.2004 that advertisement was issued to the general public for the post of Hindi language teacher. It is held that any appointment on public post without any notice to the general public is contrary to the Recruitment and Promotion Rules. It is held that appointment of petitioner to the post of language teacher was stop gap appointment only. It was held in case reported in **AIR 1989 SC 696 titled Haribans Misra and others vs. Railway Board and others** that person appointed on ad-hoc basis cannot claim lien on post to which he was so appointed. 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 is held that ad-hoc appointee could be allowed to continue till regular appointees are not available. It was held in case reported in **1995 Supp (3) SCC 363 titled Dr. Kashinath Nagayya Ibatte vs. State of Maharashtra and others** that candidates working on ad hoc basis have to give place in accordance with Rules. It was held in case reported in **AIR 1992 SC 2130 titled State of Haryana and others vs. Piara Singh and others** that ad-hoc employee should be regularized in accordance with Rules only and it was held that employee should be eligible and fit person to the post. It is well settled law that ad-hoc appointment is temporary appointment pending regular recruitment. It was held by Hon'ble High Court of H.P. in **CWP No. 7447 of 2013 decided on dated 4.8.2014 titled Ishwar Chand vs. State of H.P. and others** that if no proper procedure was adopted by Parents-Teachers Association for appointment and if appointment was made merely on resolution without conducting any interview of candidates and without giving any notice to general public while appointing them on PTA basis service of appointee should not be regularized.

6. Another submission of learned Advocate appearing on behalf of the petitioner that various other persons engaged in various schools as language teachers without holding interview of candidates and without notice to general public are continuing in service and on this ground petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner did not implead other persons as co-respondents who have been engaged in various schools as language teachers without holding any interview and without giving notice to general public. It is well settled law that no one should be condemned unheard on the concept of audi alterm partem. Point No. 1 is answered in negative.

Findings on Point No.2

7. Submission of learned Advocate appearing on behalf of the petitioner that representation was filed by the petitioner before respondent Nos. 4 and 5 i.e. Headmaster Government High School Beetan District Una and President Parents-Teachers Association Government High School Beetan Tehsil Haroli District Una for claiming

grant-in-aid but till date representation is not disposed of by respondent Nos. 4 and 5 is partly accepted. Respondent Nos. 4 and 5 are directed to dispose of the representation of petitioner qua grant-in-aid within one month after receipt of copy of order strictly in accordance with Grant-in-aid to Parents Teachers Association Rules 2006 (Annexure R-1) dated 20th February 2007 issued by the Director of Elementary Education vide notification No. EDN-H(5)C(10)17/2006-PTA (Elementary). Point No. 2 is decided accordingly.

8. In view of above stated facts it is held that (1) Prayer of the petitioner to regularize her service as language teacher in Government High School Beetan Tehsil Haroli District Una is declined. (2) Representation of petitioner for grant-in-aid will be disposed of within one month after the receipt of certified copy of this order strictly as per Grant-in-aid to Patents Teachers Association Rules 2006. Petition stands disposed of with no order as to costs. All pending miscellaneous application(s) also stand disposed of.

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

Shyam Singh ...Appellant.
Vs.
State of H.P. ...Respondent.

Cr. Appeal No.465 of 2010.
Reserved on: 25.09.2014
Decided on: 09/10/2014

N.D.P.S. Act, 1985- Section 20- Search of vehicle being driven by the accused led to recovery of one bag containing 10 Kg. Charas and other bag containing 9 Kgs. Charas- One person ran away from the vehicle prior to its search- Held, that the police had not made any efforts to associate independent witness - Testimonies of the police officials regarding topography of the area was falsified by the photographs - Testimonies of the police officials that they tried to locate the independent witnesses but could not succeed was not acceptable- therefore, the accused acquitted. (Para-22)

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgment, rendered on 1st October, 2010, by the learned Special Judge, Fast Track Court, Kullu, H.P., in Sessions Trial No. 18 of 2010, whereby the accused Shyam Singh

has been convicted for the commission of offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 and sentenced to undergo rigorous imprisonment for a period of fifteen years and to pay a fine of Rs.1,50,000/- and in default of payment of fine to further undergo simple imprisonment for a period of three years.

2. Prosecution case, in brief, is that ASI Man Singh, along with Constables Vijay Kumar and Varun Mahant, had gone to Naglari on 27.08.2009 in vehicle bearing registration No.HP-34A-0213, which was being driven by Constable Narian Singh. A vehicle bearing registration No. HP-34A-6902 came from Gushani at about 5 a.m. ASI Man Singh signaled the vehicle to stop. When the vehicle stopped, one person got down from the rear seat of the vehicle and ran away. The driver of the vehicle was apprehended by ASI Man Singh and on being enquired, he revealed his name as Shyam Singh, the accused. The driver Shyam Singh revealed the name of the absconding person as Mahinder. On suspicion of possession of some contraband, ASI Man Singh made inquiry in presence of Constable Vijay Kumar and Constable Varun, as to whether the accused wanted to be searched by the Magistrate or a Gazetted Officer. The accused consented to be searched by the police. ASI Man Singh also gave his personal search to the accused. The search of the vehicle was conducted and during which, two bags were found on the front seat located beside the driver. One bag was found to be containing 10 Kgs charas and the other was found to be containing 9 Kgs charas, after weighing. The bag containing 10 kgs of charas was having ten packets, out of which 9 packets were having stick like charas and the tenth packet was having stick like and spheres like charas. The other bag was containing 9 packets, out of which 8 were having stick like charas and 9th packet was having stick like and cub like charas. Each bag was wrapped in a separate piece of cloth. Each bag was sealed with 12 impressions of seal T. Seal impressions were taken separately on five pieces of cloth and NCB-I form was filled in triplicate and the seal was handed over to Constable Vijay Kumar. The vehicle, along with parcels, was taken into possession vide seizure memo and signatures of Constable Vijay Kumar and Constable Varun Mahant and also of the accused were also taken on the seizure memo. Photographs of the site of occurrence were taken by Constable Varun Mahant from official camera.

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

4. The accused was charged for his having committed an offence punishable under Section 20(b)(ii)(C) and under Section 29 of the NDPS Act by the learned trial Court to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined 14 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. In defence, the accused examined two witnesses.

5. On appraisal of evidence on record, the learned trial Court convicted and sentenced the accused for his having committed an offence under Section 20(b)(ii)(C) of the NDPS Act.

6. The appellant Shyam Singh is aggrieved by the judgment of conviction, recorded by the learned trial Court. Shri Anup Chitkara, learned counsel for the accused, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

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

8. With the able assistance of the counsel appearing on either side, this Court, in, a threadbare manner scrutinized the entire evidence on record.

9. The first witness who stepped into the witness box to prove the prosecution case is PW-1 (Vijay Kumar). He in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above, however, in his cross-examination, he admitted that there are no residential houses near the bridge on both the sides and there is a village Gushaini which is at a distance of 1-1½ Km. He further deposes that Constable Varun Mahant was sent towards Gushaini to call independent witness but he returned after about 10 minutes as he did not find any person in village Gushaini. He denied the suggestion that there are residential houses near the bridge and admitted the suggestion that the houses are visible adjacent to the bridge in photograph Mark D1. He further admitted the suggestion that houses are visible in Mark D2 adjacent to Naglari bridge towards Banjar side.

10. PW-2 Varun Mahant deposes that he, along with Constable Vijay Kumar and ASI Man Singh, was present at Naglari bridge in vehicle bearing registration No. HP-34A-0213 which was being driven by C.Narian Singh on 27.8.2009. At about 5 a.m., a vehicle, bearing registration No.HP-34A-6902, came from Gushaini side. ASI got down from the official vehicle and signaled to stop the said vehicle. When that vehicle was stopped, one person got down from the left rear side of the vehicle and ran away. Driver was apprehended in the vehicle. On inquiry, he revealed his name Shyam Singh. He further deposes that ASI told the accused Shyam Singh that he was suspecting the possession of some contraband and search of the accused and his vehicle was to be conducted. He continues to depose that accused was informed that he could give his personal search and the search of the vehicle in the

presence of a Magistrate or a Gazetted Officer. Accused consented to be searched by the police vide memo Ext.PW-1/A. He continues to depose that search of the vehicle was conducted and two bags were recovered from the front seat located besides the driver which was checked by ASI Man Singh. He further deposes that first bag was having ten polythene bags containing charas and the other bag was found to be containing 9 packets of charas. Each polythene bag was weighing one kilogram charas. Each bag was wrapped in a piece of cloth and sealed with 12 impressions of seal T. NCB I form was filled in triplicate. Seal impression was taken separately on five pieces of cloth. Seal was handed over to witness Vijay Kumar. He further deposes that the photographs Ext.PW2/A1 to Ext.PW2/A9 was taken during various stages of investigation. He continues to depose that constable Vijay Kumar was sent alongwith the rukka to the police station.

11. PW-3 Harish Kumar, since he, during his examination-in-chief, having not supported the prosecution version, he was declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, he was cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from his cross-examination. In his cross-examination, PW-3 deposes that

12. PW-4 Constable Ramesh Kumar deposes that accused Satinder Kumar handed over a mobile phone to ASI Man Singh on 31.08.2009. This mobile was seized by the police vide memo Ext.PW-3/A, which is signed by him and Harish Kumar.

13. PW-5 Lok Raj, since he, during his examination-in-chief, having not supported the prosecution version, he was declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, he was cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from his cross-examination. In his cross-examination, PW-5 deposes that the police called telephonically him on 27.8.2009 in Police Station, Banjar and he reached in the Police Station at about 9 – 10 a.m. He further deposes that the police obtained his signatures on some documents which were written, however, he deposes that the same was not read over and explained to him.

14. PW-6 Rajesh Suman deposes that he was posted as JBT in Govt. Primary School, Pekhari-II. The police had filed an application Ext.PW-6/A for obtaining the school leaving certificate of Satinder Kumar. He further deposes that he issued certificate Ext.PW-6/B which is deposed to be in his hand and bearing his signatures.

15. PW-7, ASI Man Singh, in his deposition has deposed a version, which is in square tandem with the genesis of the prosecution version, as referred to herein-above, however, in his cross-examination, he deposes he had not mentioned in the ruqua or documents prepared by him that he had made efforts to associate independent witnesses or to apprehend the absconder. He feigns ignorance that there is adequate

light and visibility between the months of May and September. This witness further deposes that he do not remember the time taken to apprehend the accused or to prepare the notice under Section 50 or to give the personal search. He further deposes that it takes 10-15 minutes to prepare the consent memo and the memo of personal search. He proceeds to depose that he do not remember whether he had made an inquiry about the bags from the accused or not. He denies the suggestion, put to him, that no case property was sealed at Naglari. The key of the vehicle was in the ignition switch and when the vehicle was seized, the key also came in his possession. He feigns ignorance that accused Shyam Singh had a cell phone numbers of various orchardists in connection with his business.

16. PW-8 Davender Verma, PW-9 Prem Thakur, PW-12 Constable Sunil Kumar and PW-13 HC Harbans Kumar are formal in nature.

17. PW-10 Uttam Chand deposes that SHO Lal Singh handed over two parcels, each of which was sealed with 12 impressions of seal T and six impressions of seal H alongwith sample seals T and H, form NCB I in triplicate on 27.08.2009 at 1.25 p.m. He further deposes that he made entry in register No. 19 at Sr. No.131 and case property was deposited in Malkhana. He continues to depose that he handed over both these parcels, copy of F.I.R, copy of seizure memo, sample seals T and H, NCB form in triplicate to HHC Noor Din on 28.08.2009 with the directions to carry these to FSL. During his cross-examination, he denies the suggestion that no case property was deposited with him and he had not sent the same to FSL vide RC No.109/09 on 28.8.2009 through HHC Noor Din.

18. PW-11 Noor Din, since he, during his examination-in-chief, having not supported the prosecution version, he was declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, he was cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from his cross-examination. In his cross-examination, PW-11 admits the suggestion, put to him, that NCB-I form in triplicate and sample seals T and H along with other documents were handed over to him and he had deposited all these articles at FSL.

19. PW-14 S.I. Lal Singh deposes that on 27.08.2009, one Rukka comprised in Ext.PW-7/B was received in the police station written by ASI Man Singh and he recorded an F.I.R. Ext.PW-14/A on the basis of Rukka, which is deposed to be signed by him. He further deposes that on the same day, ASI Man Singh handed over two parcels each of them was sealed with 12 impressions of seal T and he re-sealed each parcel with six impressions of seal H. He continues to depose that he filled in column Nos.9 to 11 of NCB I form Ext.PW-7/A and he handed over the parcels, sample seals T & H, NCB I form to MHC for depositing these in Malkhana and when the result of analysis was received, he prepared the challan and presented the same before the Court. During

his cross-examination, he denies the suggestion that the case property did not remain in safe custody or there was tampering with the same.

20. 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, Junga, 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.

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

22. Nonetheless, even if all the vital links in the chain of circumstances which connect the accused in the alleged commission of the offence stand convincingly established yet a vital flaw which ingrains the prosecution version with a vice of infirmity, is the lack of association of independent witnesses despite their availability by the Investigating Officer in the proceedings relating to search, seizure and recovery of contraband from the alleged exclusive and conscious possession of the accused. The said flaw would not have acquired accentuation so as to concomitantly render the prosecution version to be smeared, unless evidence portrays that the omission on the part of the Investigating Officer to associate independent witness in the proceedings relating to search, seizure and recovery of contraband from the exclusive and conscious possession of the accused, was both deliberate and intentional. However, a keen and circumspect analysis of the depositions of PW-1 and PW-2 does not only portray the factum of the said omission being not only intentional but being also deliberate with the obvious purpose of smothering the truth of the prosecution version. The inference aforesaid is anvilled upon the factum of PW-1 having in his deposition, comprised in his cross-examination, deposed qua the factum of village Gushaini being located at a distance of 1-1½ kilometer from the site of occurrence wherein a residential habitation was located. Obviously, his deposition underscores the factum of availability of independent witnesses in close proximity to the site of occurrence. Now, when he deposes that PW-2 went towards Gushaini to elicit the association of independent witnesses there-from and his having returned there-from after 10 minutes with the information that none could be found, if construed in conjunction with the fact that he further belies the suggestion put to him that residential houses are located on either side of Naglari bridge. Therefore, when he belies the factum of existence of houses on either side of Naglari bridge, inasmuch, as, of no houses existing either towards Banjar or towards Gushaini, which factum when is rather benumbed and overwhelmed by the existence of Mark D-2, which comprises photographic evidence, hence, attains sanctity, constrains this Court to conclude that even, if, assuming PW-2 had

proceeded to village Gushaini to locate independent witness and had been unsuccessful in his concert to secure them for theirs being associated in the apposite proceedings, yet his having deposed to have not visited the village on the other side of Naglari bridge inasmuch, as, towards Banjar side, on the prevaricated score of, no houses existing therein, portrays that the Investigating Officer as well as both PW-1 and PW-2, the official witnesses, were unaware of the topography of the place as well as qua the factum of existence of houses on both sides of Naglari bridge. As a natural concomitant given their ignorance qua the topography of the area where the occurrence took place, as also, as a natural corollary qua the factum of existence of houses in close proximity to the site of occurrence. Therefore, PW-1 appears to have feigned a pretextual extenuation for lack of availability of independent witness towards Banjar side of Naglari bridge. Moreover, the further deposition of PW-2 having visited village Gushaini to locate independent witness too appears to be a mere pretext or a mere prevarication qua his purported visit to there to locate independent witness, whereas PW-2 never went even upto village Gushaini to locate independent witness. Furthermore, the deposition of PW-2, who had purportedly proceeded to village Gushaini portrays utter and blatant prevarication inherently imbuing it, comprised in the fact of his feigning ignorance qua the fact of any habitation existing towards Banjar side of Naglari bridge which factum is proclaimed to be benumbed by photographic evidence comprised in Mark-D-2. Consequently, proclamation of non availability of houses towards Banjar side of Naglari bridge, when too, hence is rendered to be imbued with falsity, in sequel his purported visit to village Gushaini to locate independent witnesses and which visit was fruitless, too appears to be a mere sham especially in the face of his being unaware of the topography of the vicinity of the place where the occurrence took place arising from his ignorance qua lack of availability of houses towards Banjar side of Naglari bridge. Consequently, it has to be concluded that both PW-1 and PW-2 are inventing and concocting a version qua efforts having been made at their instance to locate independent witness and such efforts being unyielding. Furthermore, as a natural corollary, it appears that when they have indulged in blatant lies as well as prevarications to project purported efforts having been made to locate independent witness, such illusory efforts only convey the factum of theirs rather taking to clothe the apposite proceedings with purported truthfulness arising from purportedly concerted genuine efforts having been as such made. However, when despite availability of independent witness in close vicinity to the site of occurrence for reasons aforesaid, neither the Investigating Officer nor PW-1 and PW-2 made any concerted efforts to associate independent witness so as to clothe the apposite proceedings with the hue of impartisanship, as also, to obviate any inference, of the Investigating Officer having conducted a tainted investigation, rather when such non association arises on account of deliberateness, it, hence appears that such deliberateness on the part of the Investigating Officer to omit to associate independent witnesses was occasioned for no reason than that of his proceeding to conduct a

slanted, tainted and partisan investigation, which obviously does not acquire any truth and credibility.

23. In view of the above discussion, the appeal is allowed and the impugned judgment of 1st October, 2010, rendered by the learned Special Judge, Fast Track Court, Kullu, is set aside qua accused Shyam Singh. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused, is ordered to be refunded to him. Since, the accused is in jail, he be released forthwith, if not required in any other case.

24. The Registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the Jail concerned, in conformity with this judgment, forthwith. Record of the trial Court be sent down forthwith.

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

State of H.P. .....Appellant.
Versus
Prem Chand & Others ...Respondents.

Cr.Appeal No.331 of 2008.
Reserved on: 24/09/2014.
Date of Decision:09.10.2014.

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- Deceased was found dead in her home- Father of the deceased had made a generalized statement about the ill-treatment and mal-treatment meted out to her by the accused- Father of the deceased had not attributed any specific role to the accused- No date, month or year regarding beatings was given- No complaint was made by the father on receiving this information from his daughter- No medical examination of the deceased was got conducted regarding injuries suffered by the deceased- The letters stated to have been written by the deceased to her father were not produced, which shows that the version of his father regarding ill-treatment and maltreatment was a concoction- Further his version that the deceased had told him about imminent threat to her life was also not acceptable as she had left for her matrimonial home subsequent to this disclosure.

(Para-25)

Indian Penal Code, 1860- Section 498-A - The prosecution witnesses made generalized and vague statement regarding ill-treatment- No facts which would constitute an instigation to the deceased to take her life were deposed by the witnesses- Held, that the generalized statements are not sufficient to prove that the deceased was subjected to ill-treatment

and maltreatment or she was instigated to commit suicide by the accused- Accused acquitted.

(Para-28)

For the Appellant: Mr.Ramesh Thakur, Assistant Advocate General.
For the respondents: Mr.N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

1. The instant appeal is directed against the judgement of acquittal, rendered on 16.1.2008, by the learned Additional Sessions Judge-II, Kangra at Dharamshala, in Sessions trial No. 5/2007, whereby the respondents have been acquitted for theirs having committed offence punishable under Sections 498-A and 306 IPC read with Section 34 IPC.

2. The prosecution story, in brief, is that on 6.11.2003 on receipt of telephonic information regarding death of a female in suspicious circumstances at village Bandi, the police headed by SI Prem Chand rushed to the spot after incorporating the same into the daily diary and the statement under Section 154 Cr.P.C of one Shri Raghubir Singh was recorded. Raghubir Singh has deposed in his statement that his daughter Reeta Devi was married with Prem Chand resident of Village Bandi on 5.3.2003. He further deposed in his statement that his wife had received a telephonic information in the early morning that Reeta Devi had died and thereafter he alongwith other villagers rushed to the matrimonial house of Reeta Devi at village Bandi, where they found her dead. He further disclosed in his statement that his daughter had already disclosed 3-4 times about the beatings being delivered by her husband and she was being beaten up at the instance of brother and bhabhi of her husband. He further disclosed that his daughter had been killed by giving beatings by the accused persons. His statement was sent to the Police station for registration of FIR and the dead body of the deceased was taken into possession after inquest report and same was sent for postmortem examination. The Doctor had opined the cause of death as asphyxia due to antemortem hanging as no other disease, injury or poison seen over the body. One Nawaar and cloth lying on the spot also taken into possession and site plan of the house of deceased was prepared after taking photographs of the dead body. Opinion of Forensic Expert was sought in which the Forensic Expert opined partial hanging antemortem in nature.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C., was prepared and filed in the Court.

4. The trial court charged the accused for theirs having committed offence punishable under Sections 498-A and 306 IPC read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 13 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused were given an opportunity to adduce evidence in defence, and they chose not to adduce any evidence in defence.

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

7. The State of H.P. is aggrieved by the judgment of acquittal, recorded by the learned trial Court. Shri Ramesh Thakur, learned Assistant Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondent.

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

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

10. The first witness, who, stepped into the witness box to prove the prosecution case, is, PW-1 Dr. D.P Swamy who had conducted the post mortem examination of the deceased. In his opinion comprised in his report, he has attributed the demise of the deceased to antemortem hanging. He has denied in his opinion the factum of death of the deceased being sequelled by any injury or poison.

11. PW-2 Rahubir Singh deposes that the marriage of her deceased daughter was solemnized with accused Prem Chand on 5.3.2003 at village Bandi. He continues to depose that on 5.11.2003 he received telephonic information at about 4 a.m. that her daughter had died. On receipt of information he alongwith his wife and other villagers rushed to the house of her daughter Reeta Devi at village Bandi and found her daughter lying dead in the room. He further deposes about the factum of his deceased daughter on hers visit to her parental home having disclosed to him the factum of beatings delivered to her by the accused. However, he has deposed that he had advised her daughter to keep patience. He further deposes that on 4.11.2003 his daughter had come to his house and she disclosed to him about the beatings delivered by the

accused on her person. He further deposes that his deceased daughter disclosed to him that she might be killed in her matrimonial home and on the next day she was found dead and they came to know that his daughter had died owing to hanging as there was piece of Nawar lying there. He further deposes that piece of Nawar Ex. P-1 is the same which was shown and taken into possession. He further deposes that his statement was recorded by the police over which he appended his thumb impression at encircled portion 'A'. During the course of his cross-examination he deposes that his deceased daughter used to send letters from Patiala to him and used to have telephonic conversation. It is stated to be incorrect that his statement was not recorded by the police. He deposes that his statement was recorded only once and he appended his thumb impression over three places. It is stated to be incorrect that in his statement before the police, he did not mention the name of the brother and wife of the brother of accused Prem Chand. He confronted with his statement Ex. PW-2/A wherein the name of the brother and his wife are not mentioned though it has been mentioned as Jeth and Jethani of the deceased. He further deposes that the letters of deceased received by him were neither shown nor handed over to the police. It is stated to be incorrect that the police had recovered a piece of paper from the place where the deceased was found dead and the same was taken into possession by the police. It is also stated to be incorrect that he was is not in a position till today as to what is the cause of death of his daughter. It is also stated to be incorrect that the deceased was adamant to accompany her husband.

12. PW-3 Shakuntala Devi deposes that her daughter disclosed to her on hers visiting her parental house that accused Prem chand, his elder brother and his wife used to give her beatings. She further deposes that on 4.11.2003 the deceased had come to their house for Tikka to her brother and on being asked she disclosed that she was being beaten up by the accused. She further deposes that on the next morning at about 4 a.m. she had received telephonic information that her daughter had died. Thereafter they rushed to her matrimonial home where she was found lying dead in the house. She further deposes that she might have been killed by the accused. It is stated to be incorrect that her daughter was adamant to live with her husband. It is stated to be correct that the marriage of her deceased daughter with Prem Chand was with her consent. It is also stated to be incorrect that her daughter had no talks with her when she visited their house before her death. It is stated to be correct that they never made any written complaint against the accused.

13. PW-4 Asha Devi deposes that deceased disclosed to her that she was being beaten up by her husband, jeth and jethani. She further deposes that accused Prem Chand used to give beatings to the deceased under the influence of liquor. She further deposes that on 4.11.2003 the deceased had visited her parental house for Tikka to her brother where she disclosed that she was being beaten up in her in-laws house and she was not ready to go back to her matrimonial home. She further deposes that they advised her to go to her matrimonial house and on the

next morning she was found dead there. In her cross-examination she deposes that the deceased never wrote letter to her, however the deceased made telephone conversation with her from Patiala. She further deposes that there is no telephone in her house. It is stated to be correct that the deceased met her on 4.11.2003 on her visit to her parental home and was supposed to go back on the next morning to Patiala.

14. PW-5 Bidhi Chand deposes that he was associated by the police during the investigation. Piece of Nawar and one piece of cloth were deposed to have taken into possession by the Police under memo Ex. PW-5/A, which were put into a sealed packet and sealed with seal SK. He further deposes that he and Ujala Devi signed the same.

15. PW-6 Kasturi Lal deposes that there is no facility of telephone in the house of Shakuntla Devi and his telephone is being used by them. On 5.11.2003 at about 4.00 a.m. a call for Shakuntla Devi came over to his telephone and on attending the same Shakuntla Devi started weeping and on his asking she told that her daughter Reeta Devi had died. Thereafter he accompanied the parents of Reeta Devi alongwith other villagers to the house of Reeta and found her lying dead inside her house. He further deposes that he came to know that she died as a result of hanging.

16. PW-7 Jagdish Chand is the photographer. He deposes that he clicked the Photographs comprised in Ex. PW-7/A to Ex. PW-7/F and negatives thereof are Ex. PW-7/A-1 to Ex. PW-7/F-1.

17. PW-8 is the deposition of Ashwani Kumar who deposes that during the investigation, he was associated by the police. He continues to depose that he prepared the site plan comprised in Ex. PW-8/A, which bears his signatures as well as signatures of Assistant Engineer at encircled portion 'A". The site plan is deposed to be the true and correct as per the original record.

18. PW-9 Purshottam Chand has turned hostile and on being permitted by the Court, he came to be cross-examined by the learned Public Prosecutor. During the course of his cross-examination he deposes that accused Prem Chand is his cousin. He stated it to be correct that he heard a noise coming from the house of the accused on 5.11.2003 at about 10 p.m. It is also stated to be correct that he alongwith his wife and his Bhabi Kailasho Devi rushed to the house of the accused after hearing noise and when they reached in the house, they found the deceased to be dead. It is stated to be incorrect that on making inquiry about the cause of death, it was disclosed by the accused that Reeta Devi died as a result of hanging. It is stated to be incorrect that the accused used to give beatings to the deceased. He denied that he is deposing falsely in order to save the accused being his brotherhood.

19. PW-10 Inspector Sanjeev Chauhan deposes that he prepared the final report after completion of the investigation.

20. PW-11 C . Rakesh Kumar deposes that on 6.11.2003 DD No. 34 was incorporated on the receipt of telephonic information. The copy of which is deposed to be bearing Ex. PW-11/A, which is true and correct to the original.

21. PW-12 SI Prem Chand deposes that on receipt of telephonic information on 6.11.2003 from PP Gagal regarding a female died in suspicious circumstance at Village Bandi, he proceeded to the spot accompanied by LC Sudha, HC Ashok and C. Bhawani Singh. He deposes that he recorded the statement of father of the deceased under Section 154 Cr.P.C comprised in Ex. PW-2/A which was sent to the police vide endorsement Ex. PW-12/A for registration of FIR. He deposes that he prepared inquest reports Ex. PW-1/B and Ex. PW-1/C. He further deposes that on application Ex. PW-1/A he sought postmortem examination of the dead body of the deceased. He has prepared the spot map comprised in Ex. PW-12/B. He deposes that he took into possession one piece of Nawar Ex. P-1 and another piece of cloth Ex. P-2 under memo Ex. PW-5/A and put the same into sealed packet duly sealed with seal SK in the presence of the witnesses. He further deposes that he recorded the statements of the witnesses. He continues to depose that the forensic expert was also called on the spot on 14.11.2003. He further deposes that on completion of the investigation, he handed over the case file to the SHO.

22. PW-13 Dr. Suresh Sankhyan deposes that on 14.11.2003 at about 12. p.m. he visited the place of occurrence at the instance of the police and observed the length of the ligature material, low point of suspension, salivary stains report are suggestive of partial hanging ante-mortem in nature. He further deposes that low point of suspension results in partial hanging which is usually suicidal in nature. His report has been deposed to have comprised in Ex. PW-13/A.

23. PW-1 has proved the Post Mortem Report wherein he recorded his observations qua the body of the deceased as subjected to post mortem examination by him. The said observations are:-

"Antimortem Injury

Ligature Mark

Antemortem reddish colour around mid of neck front side, extending to the upper part of the neck, near both the angles of mandible. Length and breath 7 inches X ½ inches, below up-ward in direction because of evience grazed abrasion from below up-wards including two extra ligature mark each about 1x1/2 inch on the left side of upper part of the neck. Subcutaneous hemorrhages present below the ligature mark. The mark is not seen on the back of the neck because intervening scalp hairs as shown in the diagram

Cranium and Spinal Cord

NAD and only congestion of brain and membranes.

Thorax

1. Walls, ribs and cartiges

2,3,4 and 5 respectively pleure, larynux and trachea, right and left lungs were found congested and froth seen on cut section of lungs.

6.	Heart and vessels	Right side full of dark reddish fluid.

Abdomen

1. and 2 Walls and peritoneum NAD and there was no smell alcohol in peritoneum cavity.

3. Mouth larynx and Esophagus was NAD

4. Stomach and its contents were found 300 cc of mildly digested food as rice, pulses (Grams) pale in colour. No smell of alcohol or poison.

5. Small intestines and their contents were 20 CC of midly digested food in the proximal 6 inches of small intestines.

6. Larger intestines and their contents was full of gases and faecal matter.

7,8,9 respectively Live spleen and kidney were shown congested.

10 Bladder empty and no peculiar smell.

11. Organs of generation NAD No evidence of pregnancy and other foul play.

Muscles, bones and Joints

NAD"

He has in his deposition proved his opinion comprised in it, wherein he has attributed the demise of the deceased to antemortem hanging. He has denied in his opinion the factum of death of the deceased being sequelled by any injury or poison.

24. The father of the deceased while stepping into the witness box as PW-2 has deposed in extremely vague and generalized terms about the factum of his deceased daughter on hers visiting her parental home having disclosed to him the factum of ill-treatment or maltreatment meted out to her by the accused, comprised in theirs belaboring her. However, he has deposed that he had advised her daughter to keep patience. The complaints aforesaid made by the deceased to her father on hers visiting the house of the latter are couched in vague and generalized terms, they lack in specificity qua attributions to each of the accused of specific acts of ill-treatment or maltreatment as also lack in specificity and precision qua the date month and year when such acts were purportedly perpetrated upon her by the accused. Even otherwise the fact as disclosed by the deceased to

her father on hers visiting her father's house, of the accused belaboring her, is rendered unbelievable in the face of:-

i. No complaint having been made by the father of the deceased on his receiving information from his deceased daughter on hers visiting him, wherein she revealed to him the factum of hers being belabored by the accused.

ii. Omission on the part of the father of the deceased as well as the deceased to get the injuries examined from a competent medical practitioner and to obtain MLC from him displaying as well as corroborating the factum of the deceased having been subjected to belaboring by the accused too belies all or any of aforesaid attributions made by PW-2 in his deposition to the deceased

25. Moreover in his cross-examination the father of the deceased has divulged the fact of the deceased having communicated to him through letters about the factum of hers being subjected to ill-treatment and maltreatment by the accused which purportedly instigated and actuated her to commit suicide, however in the face of the letters aforesaid having omitted to be handed over to the police by the father of the deceased, dispels the credibility of the deposition of the father of the deceased of his having been communicated by the deceased through letters about the woes she was undergoing in her matrimonial home. Consequently it emerges that hence the deceased did not communicate to her father through letters about the sufferings she was undergoing at her matrimonial home, which inference as a natural corollary constrains a conclusion that hence, she was not subjected to maltreatment or ill-treatment by the accused at her matrimonial home. As a concomitant it has to be deduced that attributions of maltreatment or ill-treatment made by PW-2 against the accused on revelations made to him by his deceased daughter rather apparently are a mere concoction as well as an invention and are to be construed to be incredible. The prosecution urges that given the fact that the deceased visited her parental home on 4.11.2003 on which date as divulged by the testimony of PW-2 she disclosed to the latter the reasons qua the woes which befell upon her at her matrimonial home, which reasons while portraying the fact of hers being belabored by the accused, hence, hers apprehending an imminent threat to her life while constituting a credible disclosure qua purported instigatory or actuatory factors in close proximity to the fateful incident which occurred on 6.11.2003 constrain a conclusion qua the guilt of the accused. However the said argument necessitates its being repulsed on the score that in case there was a disclosure by the deceased to her father of an imminent threat to her life, it is enigmatic as to what led the father of the deceased to persuade her to leave for her matrimonial home. Consequently if she left for her matrimonial home after 4.11.2003 it has to be hence construed that she had left for that place as there was no grave or imminent threat to her life as portrayed by PW-2 in his deposition for if she faced such a grave threat to her life, PW-2 would have dissuaded her from departing from her parental home to her matrimonial home.

26. The deposition of PW-3 the mother of the prosecutrix corroborates the testimony of PW-2. However, again her testimony alike the testimony of PW-2 being unspecific and imprecise qua the attribution of acts of cruelty meted out by each of the accused to the deceased besides lacking in specificity and precision qua the date, time and year when such acts of ill-treatment or maltreatment were meted by the accused to the deceased. As such, on the strength of a vague and nebulous deposition of PW-3 no capital can be drawn by the prosecution that hence any of such unspecific or generalized acts actuated or instigated the deceased to commit suicide. Moreover besides when the potency and enormity thereof remain omitted to be communicated and when potent evidence portraying the magnitude of the purported instigatory facts would alone have constrained this Court to draw a conclusion against the accused, omission thereof bolsters an inference that the inculpation of the accused remains un-clinched. Besides for the reasons alike the one meted by this Court for dispelling the strength of the testimony of PW-2 while its purportedly conveying that the accused hence belabored the deceased the testimony of PW-3 too necessitates its being discarded.

27. PW-4 too alike PW-2 and 3 has deposed in generalized terms qua the purported acts of cruelty meted by the accused to the deceased. She too deposed that when on 4.11.2003 the deceased visited her parental home and made a disclosure to her of hers being belabored by the accused in her matrimonial home and hers besides having also divulged to her of hers facing an imminent threat to her life, which fact too does not also attain credibility in the face of the aforesaid witnesses, too, alike PW-2 her father, having omitted to despite the purported gravity of threat to the life of the deceased, restrain her from proceeding to her matrimonial home. In case no such restraint was exercised upon the deceased by PW-2 against her proceeding to her matrimonial home where she was purportedly facing an imminent threat to her life, an apposite conclusion which emerges forth is that she was permitted to leave for her matrimonial home as the scenario there was neither grave nor alarming as espoused by PWs No. 3 and 4. Even otherwise she in her cross-examination has deposed that the deceased had telephonic conversations with her from Patiala wherein she disclosed to her the tales of woes and sufferings which had beset her at her matrimonial home. However the facts of any such disclosure over telephonic conversations she had with the deceased stands belied by the fact of hers having conceded in her cross-examination of there being no facility of telephone at her home. Consequently, it appears that this witness is inventing and concocting facts while attributing a false role to the accused.

28. An analysis of the testimonies of the prosecution witnesses made by this Court unveils the fact of the witnesses having abysmally failed to, with precision and exactitude depose qua the date and timings when the purported acts of ill-treatment or maltreatment were perpetrated on the person of the deceased by the accused , as a sequel on the strength of mere generalized attributions, besides omission on the

part of the prosecution witnesses to depose that any of such purported acts acquired such potency or enormity so as to constitute theirs comprising instigatory or actuatory factors for the deceased to take her life, constrains this Court not to draw a conclusion against the accused. Moreover preponderantly when they also omitted to depose qua the purported instigatory and actuatory acts being in immediate proximity to the occurrence renders for the reasons aforesaid the attributions made by the prosecution witnesses to the accused being both prevaricated and invented. As such, the entire genesis of the prosecution story has abysmally omitted to portray the factum of the deceased having been subjected to ill-treatment or maltreatment at the instance of the accused or also besides it has also omitted to emphatically project that the accused at a time proximate to the fateful incident had perpetrated upon her such acts of cruelty which were of such enormity which ultimately drove the deceased to commit suicide. In sequel for omission of portrayal by the prosecution of the accused having hence committed potent instigatory or actuatory acts, of such potency and magnitude which drove the deceased to take her life, the learned trial Court has hence appreciated the evidence in a mature and balanced manner and its findings, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records 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
Ajay Kumar and others .....Respondents.

Cr. Appeal No. 332 of 2008.
Reserved on: 19.09.2014.
Date of Decision :09.10.2014.

Code of Criminal Procedure, 1973- Section 162 - Testimony of PW-12 an eye witness was contradictory and suffered from improvement as he had omitted to disclose to the police that he had received the telephonic call on which he had gone to the spot, that the deceased had assaulted the accused on his face and had subsequently tendered apology to the accused, that the accused were leading a crowd of 30 to 35 persons including the family members of the accused, accused 'M' was carrying Danda and accused 'Y' was wielding Sickle, which would show that his testimony was false and could not be relied upon.

(Para-14)

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- PW-5 'Y' omitting to disclose that he had recognized the accused 'Y' and 'M' in the crowd, his statement is in contradiction to the testimony of PW-12 which would show that PW-5 and PW-12 were not together at the spot and had given the manufactured version qua the incident.

(Para-14)

Indian Evidence Act, 1872- Section 27- Search of house of 'P' was conducted during which one Kudali was recovered- Medical Officer stated that the injury noticed by him could have been caused by Darati- Held, that the recovery of Kudali was not effected pursuant to the disclosure statement or a recovery memo, therefore, the introduction of Kudali had no value in the prosecution case.

(Para-15)

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- Medical Officer stated that the weapons of offence shown to him had broken edges and were not sharp enough to cause injuries noticed by him in dead body, which would suggest that the prosecution version that injuries were caused by the accused by these weapons could not be relied upon.

(Para-15)

For the Appellant: Mr. Ashok Chaudhary, Addl. Advocate General.

For the Respondents: Mr. G.R. Palsra and Mr. T.S.Chauhan, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State, against the impugned judgment, rendered on 8.1.2008 by the learned Sessions Judge, Mandi, Himachal Pradesh in Sessions Trial No. 23 of 2007, whereby, the learned trial Court acquitted the accused/respondents for theirs having committed an offence under Section 302 read with Section 34 IPC.

2. Brief facts, of the case are that complainant Om Chand is the father of deceased Yadav Singh @ Sanjay. His son was working as driver in PWD in Lauhal area prior to his death. He came home on 19.10.2006 and on the morning of 20.10.2006 he had gone to collect the sale consideration of Alto Car which had sold to one Bitu about two months back. Sanju reached home at about 7.45 p.m from Sundernagar. At about 8.30 p.m. his son received a call on his mobile and thereafter he left the house telling his father that he would come soon. Sanju did not come at night and the complainant thought that his son had stayed at the house of his Mausi. Lateron a telephone call was received by Harish (PW-12) younger son of the complainant on his mobile

that somebody has picked up quarrel with his brother Sanju. However, he did not tell about this to his father Om Chand. Next day i.e. on 22.10.2006 at 7 p.m. a telephonic call was received by his nephew Kirnu from Mohindru of village Badyar that a dead body was lying near the bushes by the side of the road and the complainant should verify the same. Thereafter complainant alongwith 4/5 persons went in a car to village Badyal and found the dead body lying in the bushes. In the meantime Pradhan of Gram Panchayat Badyar had informed the police and the police also arrived at the spot and examined the dead body. They noticed injury marks on the dead body. Statement of complainant Om Chand under Section 154 Cr.P.C was recorded on the basis of which FIR Ex. PP was registered. PW-19 SHO Hemant Kumar took the photographs Ex. PW-6/1 to 20 and thereafter he filled up the inquest papers vide Ex. PB. Vide memo Ex. PC articles lying near the dead body were taken into the possession. Site plan Ex. PY of the place where the dead body was lying also prepared. Statements of the witnesses were recorded. The accused were arrested on 22.10.2006. On 24.10.2006 the disclosure statement of accused Ajay was recorded. On the basis of disclosure statement made by accused, Darat Ex. P-2 was recovered from his cowshed and the same was taken into possession vide memo Ex. PG in the presence of the witnesses. The site plan of place of recovery is Ex. PG/1. The disclosure statement of accused Manoj Kumar Ex. PF was also recorded. On the basis of which police got recovered sickle Ex. P-3 vide Ex. PH. The site plan of place of recovery is Ex. PH/1. Mobile phone of the associates of the deceased were also taken into possession vide memo Ex. PAC. On the disclosure statement of accused Yogesh Kumar Ex. PJ, danda Ex. P4 was recovered from the kitchen of his house. The same was taken into possession vide memo Ex. PK and site plan of place of recovery Ex. PK/1 was prepared. The house of father of accused Manoj kumar was searched under memo Ex. PAD. Similarly house of Pawan Kumar was also searched under memo Ex. PA and Kudali Ex. P-7 was recovered. The dimension of the Kudali Ex. P-7 was taken; memo in this regard is Ex. PR. On application Ex. PU, PW-16 has conducted the post mortem and issued a post mortem report comprised in Ex. PV. In his opinion, the cause of death was injury to heart and brain but mainly to the heart. During the course of investigation, the doctor examined the accused Ajay Sharma and noticed three injuries. He has issued MLC Ex. PO and opined that injury No.1 is possible with grip having sharp edged weapon.

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

4. The accused were charged for theirs having committed an offence punishable under Section 302 read with Section 34 IPC, by the learned trial Court, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined 19 witnesses. On closure of the prosecution evidence, the statements of the accused under

Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication.

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

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned Trial Court in favour of the accused/respondents. Mr. Ashok Chaudhary, the learned Additional Advocate General has concertedly and vigorously contended, that the findings of acquittal recorded by the learned trial Court below are not based on a proper appreciation of the evidence on record rather, they are sequelled by gross mis-appreciation of the material evidence on record. Hence, he, contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondent.

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

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 alleged occurrence took place on the night of 21.10.2006. In the said occurrence, deceased Sanjay @ Yadav is alleged to have been assaulted by the accused with Drat, Danda and sickle, etc., for avenging the previous altercation interse him and accused Ajay Kumar at the shop of Kaku chicken vendor. The occurrence aforesaid preceding the alleged occurrence is alleged to have taken place on 21.10.2006 at 8.00 p.m in the presence of Ashok Kumar (PW-6) and (PW-5) Yuvraj. Besides, accused Ajay Kumar who allegedly sustained injuries caused by the deceased reported the matter to the police, comprised in Ext.PL. Consequently, on the score of accused Ajay Kumar hence nursing a motive to avenge the injuries inflicted upon him by the deceased Sanjay Kumar on 21.10.2006 at 8.00 p.m., as such, with the motive reared by him he is alleged to have done to death deceased Sanjay Kumar. The deposition of PW-1 Om Chand, father of the deceased as also the complainant, though does not render a vivid ocular version qua the incident, yet it elucidates the factum of on 21.10.2006 at 7.45 p.m., when deceased Sanjay arrived home at 8.30 p.m., his having received a call over his mobile which led him to leave home with an intimation PW-1 that he would return home soon. However, though deceased Sanjay Kumar had intimated to PW-1 on his departure from home of his intending to return home soon, however, he did not return. Nonetheless, the brother of the deceased, Harish Kumar (PW-12) did receive a call divulging the fact of somebody having had an altercation with the

deceased. In the morning of the succeeding day, at 7.20 a.m., one Mahindru is deposed to have made a call to Kirnu, nephew of complainant Om Chand, disclosing therein that a dead body was lying near the pump house in the bushes. The intimation aforesaid, led PW-1 alongwith his nephew Sanju, Kiran Kumar and Raj Kumar to leave for the spot, where they found the dead body of Sanjay. It is apparent on a reading of the testimony of PW-1 that PW-12 Harish Kumar remained home throughout the night of 21.10.2006. However, a disclosure qua the incident which took place on the previous night was yet not made by PW-12 to PW-1. Obviously, perse when PW-12 remained home throughout the night of 21.10.2006, he, was ill-equipped as well as disempowered to make a disclosure or reveal the details of the incident which took place then. Concomitantly, then any disclosure made by PW-12 to PW-1 about any incident which took place on 21.10.2006 cannot acquire any tenacity.

12. Even otherwise, the inculpatory role, as attributed to the accused by the prosecution fades in the face of PW-1 having not disclosed in his statement comprised in Ext.P-1, the names of any of the accused even in the face of a vivid disclosure enumerating the details of the incident which occurred on the night preceding the recovery of the body of the deceased having been disclosed to him by PW-12. Consequently, an apt inference which flows is that both PW-12 and PW-1 were unaware of the identity of the accused. In sequel, it has to be concluded that the learned trial Court while according weight to the said factum and its prodding it to conclude that the identity hence of the accused who had assaulted the deceased and caused his death had remained un-established, does not suffer from any perversity or absurdity of mis-appreciation of evidence on record.

13. Even an advertence to the testimony of PW-12 is significant. He in his examination-in-chief has deposed that on 21.10.2006 at 8.00 or 8.15 p.m. he received a telephonic call from Yuvraj from Behna that a quarrel had taken place with his deceased brother at Badyal, which led PW-12 to leave for Badyal on a scooter. On his arriving at Badyal, PW-12 found Ghan Shyam, Om Prakash and deceased Sanju quarrelling with each other. However, he interceded and separated them. He continues to depose that Yuvraj inquired from accused Ajay about the telephone number of Kaku Chicken Vendor and Ajay apprised him that he was not aware of the said number. He deposed that there was again an altercation interse the two and he separated them. He also admitted that fact that his deceased brother Sanju gave a blow on the face of Ajay and the former apologized to Ajay for his mis-demeanor. He deposes that he alongwith Sanju, Ghanshyam and Yuvraj when had arrived near the Pump house, then from behind Ajay, Yogesh and Manoj also arrived there. Accused Ajay has been deposed to be carrying a weapon like Darat, accused Yogesh has been deposed to be carrying sickle and accused Manoj has been deposed to be carrying a Danda. Though, he deposes that he concerted to intercede and repulse the assault, however, to no avail. Accused Ajay has been deposed to have chased Sanju on the

road and he deposes his having heard cries of Sanju 'Bhag Gaya'. Subsequently, he deposes that he alongwith the above associates came towards Behna and Ghanshyam left him on the way. On reaching home he found that deceased Sanju was not there. He has also deposed that he alongwith Yuvraj went to Bedyal on scooter to search for Sanju and made a telephonic call on his mobile, which remained unanswered. Lastly, he deposes that he went to bed at 9.30 p.m and omitted to disclose the entire incident to Om Chand PW-1.

14. The deposition of the brother of the deceased PW-12 Harish Kumar comprised in his examination-in-chief, has not got to be accepted at its face value. For unearthing the truth of his deposition, it is imperative for this Court to incisively discern and also read his testimony comprised in his cross-examination so as to look for existence therein of any embellishments or improvements arising from omission on the part of PW-12 to previously state before the police the facts deposed by him during his examination-in-chief. Only in case his testimony is read in a wholesome manner and its omitting to unravel interse contradictions or intrase contradictions vis-à-vis his previous statement recorded in writing would credibility be hence imputed to the deposition of PW-12. An incisive reading of the testimony of PW-12 comprised in his cross-examination unveils the factum of this witness having deposed certain facts in his examination-in-chief which were omitted to be stated by him to the police in his statement recorded under Section 161 Cr.P.C. Obviously, facts deposed for the first time in Court by PW-12 during the course of recording of his examination-in-chief, obviously when omitted to be stated to the police earlier, constitute embellishments and improvements rendering his testimony qua the facts deposed for the first time in Court to be disempowered to attain sanctity. The facts which have been deposed by PW-12 for the first time in Court and which render them to be acquiring the taint of improvements and embellishments are (a) omission in the previous statement of PW-12 made to the police of a telephonic call having been made by Yuvraj from Behna and of his having not stated to have gone to Badyal where Yuvraj, Sanju and Ghanshyam met to him. (b) Lack of occurrence in his previous statement recorded under Section 161 Cr.P.C. comprised in Mark-D of deceased Sanju having assaulted accused Ajay on his face in his presence and of an apology having been made by the deceased to Ajay, (c) lack of narration in his previous statement comprised in mark-D of all the three accused leading a crowd of 30 to 35 persons including the family members of the accused. (d) Omission to narrate in his previous statement that accused Manoj was carrying Danda (Ext.P-4) and sickle (Ext.P-3) was wielded by accused Yogesh. (e) Reticence in his previous statement comprised in Mark-D that owing to Diwali festival, he omitted to disclose the details of the incident to his family members. Lack of occurrence in the previous statement of PW-12 comprised in Mark-D of facts aforesaid existing in his examination-in-chief while for reiteration comprising improvements and embellishments, hence rendering his testimony to be imbued with falsity, are grave, pervasive and immense. They unstrip and unshred the veracity of the version qua the incident

deposed by PW-12 in his examination-in-chief. As a concomitant, the prosecution version anvilled upon the deposition of PW-1 and PW-12 is wholly infected with the vice of untruthfulness, concoction and invention, on which no reliance can be placed by this Court.

15. A perusal of the deposition of PW-5 Yuvraj, the person who was purportedly accompanying PW-12 at the material time while omitting to unravel the fact of his having recognized accused Yogesh and Manoj in the crowd owing to darkness, while comprising an intra-se contradiction vis-à-vis the deposition of PW-12 who, however, has attributed an inculpatory role to both aforesaid, hence renders imbued with the vice of prevarication, the testimonies of both PW-5 and PW-12. Besides it renders untruthful of both having purportedly gathered at the site of the occurrence. For lack of existence of harmony and consistency interse the testimonies of PW-5 and PW-12 qua the genesis of the prosecution case then an apt and ready inference which ensues, is, that hence when both were not together at the site of occurrence then too the concomitant deduction which spurs, is that both are rendering a concocted and manufactured version qua the incident, which cannot gain credence with this Court.

16. The deposition of PW-6 omits to lend support to the prosecution case. Besides the scanning of the testimony of PW-4 Ghanshyam underscores the factum of his having not lent support to the prosecution case. He during the course of his cross-examination by the learned Public Prosecutor on his having come to be declared hostile feigns ignorance qua the presence of the accused in the crowd as also with his having deposed that he did not perceive any Danda wielded by any member of the crowd renders his testimony to be rendering no support or succor to the prosecution version. A perusal of the testimonies of the witnesses aforesaid whose depositions were relied upon by the learned Additional Advocate General to canvass before this Court that hence the charge against the accused stood convincingly established and proved, does rather as aptly concluded by the learned trial Court constrain a conclusion, that their testimonies are infirm and discrepant, ridden with improvements and embellishments vis-à-vis their previous statements recorded in writing, besides theirs turning hostile and hence not rendering support to the prosecution case, renders the prosecution case to capsize.

17. Even the deposition of PW-16 the doctor who conducted the post mortem examination on the body of the deceased omits to give strength to the prosecution version inasmuch, as, (a) on weapons of offence, purportedly wielded by the accused with which the purported lethal blow was delivered on the person of the deceased being Darat, Kudali, Drati and Lathi, when shown to this witness and perceived to be having blunt and broken edges at places and not sharpen enough to cause injuries noticed by him on the body of the deceased (b) his having unequivocally voiced that the sharp injury is not possible with blunt weapon like Lathi. In sequel, his testimony unfolds the fact of the user of none of the weapons shown to this witness being the cause of the

injuries as noticed by PW-16 on the body of the deceased while conducting his post mortem examination. However, Ext.P-21 Kudal, the weapon of offence, purportedly used by the accused for purportedly assaulting the deceased was introduced by the prosecution/Investigating Officer and shown to PW-16 during the course of the recording his testimony. On Ext.P-21 being shown to PW-16, it sequelled elicitation of an opinion of PW-16 that Injury No. 3 as elucidated in his post mortem report Ext.PB is possible with its user. Consequently on strength of the opinion rendered by PW-16 on Ext.P-21 on its having been shown to the former during the course of his examination-in-chief an empathic argument, is, concerted to be built by the learned Additional Advocate General, that, hence the prosecution has been able to clinch the factum of the inculpation of the accused, in the commission of the offence alleged against them. However, the said argument, is, bereft of any force or vigour, inasmuch, as (a) the introduction of Ext.P-21 Kudal is not preceded by preparation of a disclosure statement or a recovery memo in consequence to its recovery thereof having been made at the instance of the accused, for rearing open an inference that hence even when it was shown to PW-16 during the course of the recording of his examination-in-chief it was an efficacious weapon of offence wielded and used by the accused for perpetrating the assault on the deceased. Lack of evidence portraying the factum of its purported recovery at the instance of the accused in succession to a disclosure statement qua the fact of its place of hiding or concealment musters the conclusion that its introduction by the prosecution, is, tainted and besmirched. Consequently, it is an unworthwhile introduction which carries no force in the eyes of law. Also then any opinion rendered by PW-16 qua its having begotten the Injury No. 3, is not edificatory. (b) Even assuming that any injury which purportedly led to the demise of the deceased was sequelled by the user at the instance of the accused of Kudal Ext.P-21 yet with the entire thrust and weight of the oral evidence qua the occurrence being ridden with a plethora of improvements and embellishment as well as blatant interse and intra se contradictions in the testimonies of the prosecution witnesses, as such, discounting the very fact of the occurrence as portrayed by the prosecution to have taken place, strips of in its entirety the factum of user of Ext.P-21, if any, by the accused for perpetrating the assault on the person of the deceased, which assault ultimately led to his death.

18. As such, the impugned judgment does not suffer from any vice, absurdity or perversity of mis-appreciation or non appreciation of evidence. Consequently, reinforcingly, it can be formidably concluded that the findings of the learned trial Court are based on a mature and balanced appreciation of evidence on record and do not merit interference.

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

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

Sushil Thakur son of Sh. Dina Ram Thakur ....Applicant

Vs.

State of H.P. ....Non-applicant

Cr.MP(M) No. 941 of 2014
Order Reserved on 23rd September, 2014
Date of Order 9th October, 2014

Code of Criminal Procedure, 1973- Section 438- At the time of granting bail, the Court has to see the nature of seriousness of offences, nature of evidence, circumstances peculiar to the accused, presence of the accused in the trial or investigation, reasonable apprehension to witnesses, and larger interests of the State- Grant of bail is the rule and committal to jail is an exception- Since the investigation was complete and the conclusion of the Trial would take some time- hence, bail granted. (Para-6)

Cases Referred:

Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702

For the Applicant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Pushpender Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 84 of 2014 dated 10.08.2014 registered under Section 498A and 506 read with Section 34 of Indian Penal Code registered in Police Station Ani District Kullu H.P.

2. It is pleaded that wife of applicant has filed a false and frivolous complaint against the applicant. It is further pleaded that said complaint is counter blast to the divorce petition filed by the applicant. It is further pleaded that applicant is a government employee and is innocent and further pleaded that applicant will not abscond nor jump

the bail and will not induce or threat to any person. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report, FIR No. 84 of 2014 dated 10.8.2014 registered under Sections 498A and 506 read with Section 34 of Indian Penal Code in Police Station Ani District Kullu H.P. There is recital in police report that marriage between Kamlesh and Sushil was performed in the year 2005 at village Ani District Kullu. There is further recital in police report that for 2/3 years husband of complainant and her mother-in-law behaved properly with complainant and thereafter behaviour of husband of complainant and her mother-in-law changed. There is further recital in police report that Kamlesh tolerated the behaviour of her husband and mother-in-law on the pretext that after lapse of time everything would become normal. There is further recital in police report that husband of complainant Kamlesh and her mother-in-law started quarrelling with Kamlesh and also demanded dowry. There is further recital in police report that husband of Kamlesh is posted in Block Development Office as Junior Engineer since four years. There is further recital in police report that husband of Kamlesh has relations with one girl namely Puja. There is further recital in police report that husband of Kamlesh namely Sushil intends to marry Puja. There is further recital in police report that on dated 23.7.2014 Kamelsh went to meet her husband along with her daughter at Theog but her husband beaten the complainant and threatened to kill her. There is further recital in police report that Puja is harassing through mobile No. 98169-82829. There is further recital in police report that husband of complainant namely Sushil Kumar is forcing the complainant Kamlesh to divorce him so that husband of complainant could remarry with Puja. There is further recital in police report that husband and mother-in-law of complainant are mentally and physically harassing Kamlesh. As per complaint the case was registered. Statements of prosecution witnesses recorded and marriage certificate from Gram Pancahyat and family register obtained. There is recital in police report that no investigation from applicant is required.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any offence cannot be decided at this stage. The same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and case will be decided in due course of time and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii)

Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***See 2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

7. In view of the fact that investigation is complete in present case and in view of the fact that trial will be concluded in due course of time, Court is of the opinion that it would be in the ends of justice to allow the bail application. Court is of the opinion that if anticipatory bail application is allowed then interest of State and general public will not be adversely affected in present case.

8. Submission of learned Additional Advocate General that if bail is granted to applicant then applicant will induce threat and influence the prosecution witnesses and on this ground anticipatory bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that if applicant will flout the terms and conditions of bail order then prosecution will be at liberty to file application for cancellation of bail.

9. In view of above stated facts anticipatory bail application filed by applicant is allowed and interim bail granted on dated 14.8.2014 is made absolute on following terms and conditions. (i) That the applicant shall join the investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will furnish his residential address to the Investigating Officer in written manner. Anticipatory bail application filed under Section 438 Cr.P.C. stands disposed of. All pending application(s), if any also disposed of.

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

Balwant Singh ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.209 of 2009
Reserved on : October 7, 2014
Date of Decision : October 10, 2014.

Indian Penal Code, 1860- Section 84- In order to take the benefit of Section 84, the accused has to prove that at the time of commission of offence, the accused by reason of unsoundness his mind was incapable of knowing the nature of act or that he was doing what was either wrong or contrary to law- In the present case, the Medical Officer had admitted that he had not seen the old record of the accused pertaining the period when the offence was committed by the accused- No eye witness had deposed about the mental condition of the accused- The evidence showed that the accused had committed the offence without any provocation and he was fully aware of the consequences, hence the accused was rightly convicted. (Para-8 to 21)

Cases Referred:

State of Madhya Pradesh v. Shmadulla, AIR 1961 SC 998

Mariappan v. State of Tamil Nadu, (2013) 12 SCC 270

State of Rajasthan v. Shera Ram alias Vishnu Dutta, (2012) 1 SCC 602

Elavarasan v. State represented by Inspector of Police, (2011) 7 SCC 110

S.K. Nair v. State of Punjab, (1997) 1 SCC 141

Vijayee Singh and others v. State of U.P., (1990) 3 SCC 190

Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563

Basdev v. State of Pepsu, AIR 1956 SC 488

Sudhakaran v. State of Kerala, (2010) 10 SCC 582

Sidhapal Kamala Yadav v. State of Maharashtra, (2009) 1 SCC 124

Hari Singh Gond v. Statte of M.P., (2008) 16 SCC 109

Bablu alias Mubarik Hussain v. State of Rajasthan, (2006) 13 SCC 116

Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748

T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219

State of H.P. v. Gian Chand, (2001) 6 SCC 71

Oyami Ayatu v. The State of Madhya Pradesh, (1974) 3 SCC 299

Sheralli Wali Mohammed v. The State of Maharashtra, (1973) 4 SCC 79

Ratan Lal v. The State of Madhya Pradesh, (1970) 3 SCC 533

Bhikari v. The state of Uttar Pradesh, AIR 1966 SC 1

Amrit Bhushan Gupta v. Union of India and others, (1977) 1 SCC 180

Paras Ram and others v. State of Punjab, (1981) 2 SCC 508

Bapu alias Gujraj Singh v. State of Rajasthan, (2007) 8 SCC 66

Surender Mishra v. State of Jharkhand, (2011) 11 SCC 495

For the Appellant : Mr. N.K. Thakur, Senior Advocate/ Legal Aid Counsel with Mr. Chaman Negi, Advocate.

For the Respondent: Mr. B.S. Parmar, Mr. Ashok Chaudhary, Additional Advocates General, Mr. Vikram Thakur, Mr. Puneet Rajta, Deputy Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

The short point, which arises for consideration in the present appeal, is as to whether the accused/convict has been able to establish his defence of unsoundness of mind, as is so required under the provisions of Section 84 of the Indian Penal Code and Sections 101 & 105 of the Indian Evidence Act, 1872 or not. Also, as to whether prosecution has been able to establish the guilt of the accused beyond reasonable doubt.

2. Appellant-convict Balwant Singh, hereinafter referred to as the accused, has assailed the judgment dated 18.5.2009, passed by Additional Sessions Judge (2), Kangra at Dharamshala, Himachal Pradesh, in Sessions Trial No.14-D/2008, titled as *State of Himachal Pradesh v. Balwant Singh*, whereby he stands convicted of the offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for two years.

3. On 19.11.2007, Ramesh Chand (PW-1) telephonically informed the police at Police Station, Shahpur, that his brother Balwant Singh (accused) was seen with a *Drat* in his hand. It appeared that accused had killed his wife namely Sunita Devi. Police party headed by SI Bhadur Singh (PW-11) reached village Kiari where they found dead body of Sunita Devi lying inside the house of the accused. Statement (Ex. PW-1/A) of Ramesh Chand, under the provisions of Section 154 of the Code of Criminal Procedure, was recorded on the spot, on the basis of which FIR No.150/07, dated 20.11.2007 (Ex.PW-11/C), under the provisions of Section 302 of the Indian Penal Code was recorded at Police Station, Shahpur, District Kangra, Himachal Pradesh. Police conducted investigation on the spot and sent the dead body for postmortem. Report (Ex. PX) was taken on record by the police. Weapon of offence, i.e. *Drat* (Ex. P-1), sketch of which is Ex. PW-3/H, was taken into possession by

the police. Reports (Ex. PW-11/H & 12/B) from the FSL were also obtained by the police. Stains of blood on the *Drat* and the clothes matched with that of the deceased. Police, during investigation, recorded statements of witnesses. With the completion of investigation, challan was presented in the Court for trial.

4. Accused was charged for having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code to which he did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 12 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication. Significantly, no plea of insanity/unsoundness of mind was taken, except for examining one witness Dr. Dinesh Dutt Sharma (DW-1), who proved medical record (Ex. DW-1/A, 1/B & 1/C), pertaining to treatment of the accused.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced him as aforesaid. Hence, the present appeal by the accused.

7. Significantly, as per the evidence proved on record by the accused, he was undergoing medical treatment for "Psychosis NOS", but then this was for the period subsequent to the commission of crime. During trial, accused was administered psychiatric treatment at the Government Hospital, Tanda. He was certified to have recovered fully. In fact, vide document (Ex. DW-1/C), Dr. Dinesh Dutt Sharma issued the following certificate:

> "This is in reference to the your endorsement No.HFW(MS)G-16=8467 dated 27.09.2008 on above cited subject it is stated that Mr Balwant Singh was examined by me in Psychiatry OPD today on 17.09.2008 and his previous medical records were perused. He is a diagnosed case of 'Psychosis NOS' and has been taking treatment from department of Psychiatry, Dr. RP Govt. Medical College, Kangra at Tanda, Currently he does not have features of active mental disorder and he is fit to face the trial.
>
> This information may please be forwarded onto the concerned quarter."

8. Now in Court, the very same doctor admits that he had not examined the old record of the accused, more so for the period 2007-2008, as none was produced before him. Thus, there is no evidence on record, reflecting, even remotely, the mental condition of the accused, as on the date of commission of crime, i.e. 19.11.2007 or even prior thereto.

9. Section 84 of the Indian Penal Code reads as under:

> "**84. Act of a person of unsound mind**.- Nothing is an offence which is done by a person who, at the time of doing it, by reason

of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

10. Sections 101 and 105 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act), read as under:

"**101. Burden of proof.-** Whosoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.

(b) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which *B* denies, to be true.

A must prove the existence of those facts."

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

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on *A*.

(b) *A* accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control;

The burden of proof is on *A*.

(c) Section 325 of the Indian Penal Code (45 of 1860) provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

> The burden of proving the circumstances bringing the case under section 335 lies on A."
>
> (Emphasis supplied)

11. Apex Court in *State of Madhya Pradesh v. Shmadulla,* AIR 1961 SC 998, has clearly held that burden to establish mental condition of the accused, at the crucial point of time, lies upon the accused, who claims such benefit of unsoundness of mind. (See also: *Mariappan v. State of Tamil Nadu,* (2013) 12 SCC 270; *State of Rajasthan v. Shera Ram alias Vishnu Dutta,* (2012) 1 SCC 602; *Elavarasan v. State represented by Inspector of Police,* (2011) 7 SCC 110; *S.K. Nair v. State of Punjab,* (1997) 1 SCC 141; *Vijayee Singh and others v. State of U.P.*, (1990) 3 SCC 190; *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,* AIR 1964 SC 1563; and *Basdev v. State of Pepsu*, AIR 1956 SC 488).

12. While taking note of provisions of Section 101 as also Section 105 of the Evidence Act, the apex Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,* AIR 1964 SC 1563 held that when a plea of legal insanity is set up, Court has to consider whether at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. *The crucial point of time for ascertaining the state of mind of the accused is the time of commission of offence*. Whether accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed by the crime. [Also see: *Elavarasan (supra)*; *Sudhakaran v. State of Kerala,* (2010) 10 SCC 582; *Sidhapal Kamala Yadav v. State of Maharashtra,* (2009) 1 SCC 124; *Hari Singh Gond v. Statte of M.P.,* (2008) 16 SCC 109; *Bablu alias Mubarik Hussain v. State of Rajasthan,* (2006) 13 SCC 116; *Shrikant Anandrao Bhosale v. State of Maharashtra,* (2002) 7 SCC 748; *T.N. Lakshmaiah v. State of Karnataka,* (2002) 1 SCC 219; *State of H.P. v. Gian Chand,* (2001) 6 SCC 71; *Oyami Ayatu v. The State of Madhya Pradesh,* (1974) 3 SCC 299*; Sheralli Wali Mohammed v. The Statte of Maharashtra,* (1973) 4 SCC 79; *Ratan Lal v. The State of Madhya Pradesh,* (1970) 3 SCC 533; and *Bhikari v. The state of Uttar Pradesh,* AIR 1966 SC 1.]

13. In *Amrit Bhushan Gupta v. Union of India and others,* (1977) 1 SCC 180, the apex Court had the occasion to deal with a case where, based on medical opinion of the convict suffering from schizophrenia, while appreciating the law as laid down in England, rejected the plea of the accused not to undergo sentence, so imposed by the criminal Court.

14. Further, in *Paras Ram and others v. State of Punjab,* (1981) 2 SCC 508, the apex Court held that:

> "2. Just one more observation relevant to the punishment. The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific

ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some bloodthirsty deity. Secular India, speaking through the court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants. In discharge of this high duty, we refuse special leave in these applications against the correct convictions and sentences of the courts below."

15. In *Vijayee Singh and others v. State of H.P.,* (1990) 3 SCC 190, the apex Court, observed that:

"23. At his stage it becomes necessary to consider the meaning of the words "the court shall presume the absence of such circumstances" occurring in Section 105 of the Evidence Act. Section 4 of the Act explains the meaning of the term "shall presume" as to mean that the Court shall regard the fact as proved unless and until it is disproved. From a combined reading of these two Sections it may be inferred that where the existence of circumstances bringing the case within the exception is pleaded or is raised the Court shall presume the absence of such circumstances as proved unless and until it is disproved. In Section 3 of the Act meaning of the terms "proved", "disproved" and "not proved" are given. As per this provision, a fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be "disproved" when, after considering the matters before it the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved".

24. The first part of Section 105 as noted above lays down that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the exceptions or proviso is on him and the latter part of it lays down that the Court shall presume the absence of such circumstances. In a given case the accused may discharge the burden by expressly proving the existence of such circumstances, thereby he is able to disprove the absence of circumstances also. But where

he is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to disprove the absence of such circumstances, then the case would fall in the category of "not proved" and the Court may presume the absence of such circumstances. In this background we have to examine the meaning of the words "the Court shall presume the absence of such circumstances" bearing in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond all reasonable doubt and the benefit of every reasonable doubt should go to the accused.

16. The apex Corut in *Bapu alias Gujraj Singh v. State of Rajasthan,* (2007) 8 SCC 66, held as under:

> "9. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind), i.e., (1) an idiot; (2) one made *non compos* by illness (3) a lunatic or a mad man and (4) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See *Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hale's Pleas of the Grown 34*). A person made non compos mentis by illness is excused in criminal cases from such acts as are-committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.
>
> 10. Section 84 embodies the fundamental maxim of criminal law, i.e*., actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).
>
> 11. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the: defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive

faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in *'History of the Criminal Law of England*, Vo. II, p. 166 has observed that if a persons cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in *Sheralli Walli Mohammed v. State of Maharashtra*, (1973) 4 SCC 79 held that (SCC p.79):

> "The mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary mens rea for the offence."

12. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated *M'Naughton* rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M Naughton's case. (1843) 4 St. Tr. NS 847(HM).* Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

13. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental

ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

(Emphasis supplied)

17. The apex Court in *Sudhakaran (supra)*, further observed as under:

"30. A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law.

31. The aforesaid section clearly gives statutory recognition to the defence of insanity as developed by the Common Law of England in a decision of the House of Lords rendered in the case of R. Vs. Daniel Mc Naughten. In that case, the House of Lords formulated the famous Mc Naughten Rules on the basis of the five questions, which had been referred to them with regard to the defence of insanity. The reference came to be made in a case where Mc Naughten was charged with the murder by shooting of Edward Drummond, who was the Pvt. Secretary of the then Prime Minister of England Sir Robert Peel. The accused Mc Naughten produced medical evidence to prove that, he was not, at the time of committing the act, in a sound state of mind. He claimed that he was suffering from an 2 [1843 RR 59: 8ER 718(HL)] insane delusion that the Prime Minister was the only reason for all his problems. He had also claimed that as a result of the insane delusion, he mistook Drummond for the Prime Minister and committed his murder by shooting him.

32. The plea of insanity was accepted and Mc Naughten was found not guilty, on the ground of insanity. The aforesaid verdict became the subject of debate in the House of Lords. Therefore, it was determined to take the opinion of all the judges on the law governing such cases. Five questions were subsequently put to the Law Lords. The questions as well as the answers delivered by Lord Chief Justice Tindal were as under:-

"Q.1 What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of

insane delusion, of redressing a revenging some supposed grievance or injury, or of producing some public benefit?

Answer

"Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

Q.2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Q.3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

Answers - to the second and third questions

That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to

lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Q.4. If a person under an insane delusion as to the existing facts commits and offence in consequence thereof, is he thereby excused?

Answer

The answer must, of course, depend on the nature of the delusion, but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Q.5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

Answer

We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case

> such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."
>
> A comparison of answers to question no. 2 and 3 and the provision contained in Section 84 of the IPC would clearly indicate that the Section is modeled on the aforesaid answers."

18. In *Surender Mishra v. State of Jharkhand,* (2011) 11 SCC 495, the apex Court held as under:

> "11. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code.
>
> (Emphasis supplied)

19. In this background, we now proceed to discuss the evidence against the accused, in relation to the charged offence.

20. Neither from the testimony of defence witness nor from the cross-examination of the prosecution witnesses, it stands established that at the time of occurrence of crime, accused was in a state of unsound mind. The doctor concerned never had the occasion to see the record of prior medical treatment, if any.

21. We are of the considered view that it is an open and shut case, proving the guilt of the accused, committed without any provocation, fully aware of all consequences, in relation to the charged offence, which clearly stands established and proved through the testimonies of Ramesh Chand (PW-1), Rani Kumari (PW-2), Kamal Kishore (PW-3), Dyali Devi (PW-4), Swarana Devi (PW-5) and Bal Krishan (PW-7).

22. Witnesses Dyali Devi, Swarana Devi and Bal Krishan have proved that the accused, even prior to the incident, used to severely beat up the deceased and at times under the influence of intoxication. The deceased also brought the matter to the notice of the Pradhan (Swarana

Devi) about the atrocities meted out by the accused. She cautioned him not to do so.

23. On the incident in question, we find the testimonies of Ramesh Chand, Rani Kumari and Kamal Kishore, to be absolutely inspiring in confidence.

24. Ramesh Chand states that on 19.11.2007 at about 11.30 p.m., he heard cries of children coming out from the house of the accused. He states that his house is just at a distance of 15 yards from the house of the accused. Hearing the cries, when he went there, he saw the accused standing outside the door of his house with a *Drat* in his hand. The deceased was lying inside the room in an injured condition. There was injury on the neck and blood stood smeared all around. Also, children were crying. He immediately informed the police about the incident. Now, this version of his stands corroborated by Rani Kumari, aged 12 years, daughter of the accused, who further states that she saw her father give beatings with a *Drat* to her mother. He gave blow on the head. She raised hue and cry. She also tried to save her mother, but her father threatened to even kill her. Repeatedly, her father gave blows over the neck of her mother. Hearing her cries, her uncle came, who informed the police. She is an eye-witness to the incident.

25. Crucially, both these witnesses were extensively cross-examined on the question of mental state of the accused and none has admitted him to be of unstable/ unsound mind. In fact, to our mind, accused has taken mutually destructive pleas by putting a suggestion to his daughter that it was he who was incurring all the household expenditure. It is not the case of the accused that he is a moneyed man and had adequate funds to look after his family. Now, if he was monetarily supporting his family, then obviously in a state of unsoundness of mind, he could not have earned and met the household expenditure. Also, the daughter's evidence, fully inspiring in confidence, proves the guilt of the accused, beyond reasonable doubt.

26. Kamal Kishore corroborates the statement of Ramesh Chand and Rani Kumari, by stating that he also reached the spot and saw the accused carrying blood stained *Drat* in his hand. He further states that when the police reached the spot, the *Drat* (Ex. P-1) was taken into possession vide memo (Ex. PW-3/A).

27. Postmortem report (Ex. PX) indicates that deceased died on account of following ante-mortem injuries:

1. A semilunar incised wound size 3cm x 0.5 cm (bone deep) seen on the occipit.

2. An obliquely running incised would on left side of head posteriorily involving ear lobule upto occipital bone of left side size 7 cm zx 1 cm (bone deep).

3. An obliquely running incised would on left side of head posteriorily 5cm below injury no.2 size 21mx2cm (bone deep).

4. An obliquely running incised wound on left side of head involving neck 5cm x 1cm (bone deep) and meeting injury no.3.

5. An obliquely running incised wound on left side of both of neck 8cm x 0.5 cm bone deep.

6. Three patterned abrasions on left side of upper back 17 cm, 15 cm & 13 cm length with variable thickness, having maximum breadth of 2.5 cm, 0.5 cm & 0.5 cm respectively, reddish brown coloured, curvilinear in shape.

7. An incised wound obliquely meeting injury no.6 size 5 cm x 0.5 cm (superficial).

28. It is not disputed before us that these injuries could have been caused with the weapon of offence (Ex.P-1). Also, police has ruled out possibility of deceased Sunita Devi having consumed poison, as report of FSL (Ex. PW-11/H) is on record to this effect. Another report of the FSL (Ex.PW-12/B) establishes that the blood and the hair found on the clothes of the accused, the deceased and the weapon of offence to be same.

29. In the instant case, it has come on record even through the defence evidence that the accused was addicted to alcohol. Prosecution has proved that accused gave several blows with a *Drat* on the vital part of the body of his wife. There was no provocation or reason for him to have done so. In fact, there is evidence to establish his past conduct, for which he was also reprimanded by the Pradhan. As such, it is a clear case of cold-blooded murder, which he committed, fully understanding the consequences of his actions, and as such deserves no sympathy.

30. For all the aforesaid reasons, in our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

31. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

Appeal stands disposed of, so also pending application(s), if any.

****

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

Jagdev Ram .....Appellant.

Versus

State of Himachal Pradesh. ...Respondent.

Cr.Appeal No.2 of 2011.
Reserved on: 26/09/2014.
Date of Decision:10.10.2014.

Indian Penal Code, 1860- Section 302 - The complainant, deceased, his wife and his brother were grazing cattle- The accused came with the gun and abused the complainant and the deceased- Co-accused also appeared and started abusing the complainant and the deceased and rushed towards the fields where he was shot by the accused- Held, that mere omission to state that the accused had commanded the remaining accused to pelt stones at her and that the accused had asked her husband to compromise the previous dispute is not sufficient to doubt the testimony of the complainant, especially when the accused had admitted in his statement that he had killed the accused with the gun. (Para-26)

Indian Penal Code, 1860- Section 100 - Right of Private Defence- The suggestions were put to the prosecution witnesses that the deceased had assaulted the accused with the Darat/ Danda and the accused had shot the deceased- Held, that the right of private defence can be established if there was face to face duel between the accused and the deceased- in the present case, no witness had deposed that the accused and deceased were engaged in a duel, deceased was within a striking distance and had struck a blow on the person of the accused that would suggest that the accused and deceased were not engaged in a duel and there was no reason for the accused to fire a gunshot, therefore, the right of private defence was not available to the accused. (Para-26, 27)

For the Appellant: Mr.Satyen Vaidya & Mr Vivek Sharma, Advocates.

For the respondent: Mr.Ashok Chaudhary, Additional Advocate General and Mr.Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

1. The instant appeal is directed against the judgement of conviction, rendered on 21.12.2010, by the learned Additional Sessions

Judge, Fast Track Court, Chamba, District Chamba, H.P., in Sessions Trial No.1/2010, whereby the accused/appellant has been convicted for his having committed offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

2. The prosecution story, in brief, is that on 27.8.2009, Dhruv Ram (since deceased) and his wife, namely, Dillo (complainant) were grazing cattle near Government Primary School, Sandhi and nearby to them, Amar Nath (brother of the deceased) was also grazing his cattle. Accused Jagdev Ram used to reside in a house at his Nautor land at Sandhi along with his family. At about 2.45 p.m., accused Jagdev Ram came with a gun in his hand and abused complainant Dillo and deceased. Thereafter, co-accused Shivo @ Sheela, Bhuvneshwar Dutt and Naresh Kumar also appeared there and in furtherance of common intention of each other, they also started abusing the complainant and deceased and also criminally intimated them with threats to their life. On their requesting the accused not to abuse them, the accused started pelting stones on complainant, as such, she rushed towards Government Primary School, Sandhi, whereas, deceased rushed towards maize fields in order to save themselves. Accused Jagdev Ram chased deceased with gun and when deceased saw back at about 3.00 p.m., accused Jagdev Ram shot him dead with the gun. On hearing the alarm of complainant, Ward Member Piar Singh came there and she narrated the incident to him. Her brother-in-law Amar Nath also witnessed the occurrence. Said Piar Singh intimated Police Post, Surgani and pursuant thereto, report Ext.PW-9/A was made. A telephonic message was given by Constable Inder Singh No.206 M.C.P.P. Surgani at Police Station, Kihar and pursuant to the information, received from Piar Singh, daily dairy report comprised in Ext.PW-8/A was made and accordingly Inspector/SHO Pritam Singh and other officials rushed to the spot along with camera and other things. On reaching the spot at 9.00 p.m., the dead body was lying on the field and complainant (wife of the deceased) was present there and she made statement Ext.PW-1/A under Section 154 Cr.P.C. An endorsement in the said statement was made by SHO which was then sent to Police Station through Constable Hoshiar Singh where F.I.R. Ext.PW-11/E was registered. The photographs of the dead body Ext.PW-16/A-1 to Ext.PW-16/A-8 were clicked with the digital camera. Inquest reports Ext.PW-2/B and Ext.PW-2/C were prepared. A docket Ext.PW-7/A was prepared and the dead body was sent to Regional Hospital, Chamba for conducting post mortem. Dr.M.M.Marol and Dr.Ram Kamal conducted the post mortem on 28.8.2009 and a circular gun shot wound 10 x 12 x 15 Cms on right side of chest below 4 inches from right clavicle bone corresponding to the hole of shirt of right side of chest was found. X-Rays were also taken. Margins of wound showed singing and were irregular. Multiple fractures of ribs were seen. Pallets were seen in the posterior chest wall. Lungs tissues were found damaged with pallets of gun shot. Pallets and red cork of the gun shot were extracted from the wound. The Medical Officer preserved viscera, pallets, cork and clothes

of the deceased and parceled and sealed them and handed over the same to the Police for forensic examination. It was opined by the Medical Officer that the deceased had died due to a gun shot injury leading to massive intra thoracic hemorrhage leading to peripheral vesicular failure and respiratory failure but the final opinion was reserved till the receipt of report of Chemical Analyst. Post mortem report comprised in Ext.PW-7/E was procured. Spot map Ext.PW-16/B was prepared. Two blood stained sleepers, one blood stained Danda, three stones stained with blood, which were lying at the spot, along with blood stained earth, were taken into possession vide memo Ext.PW-2/A in presence of witnesses Piar Singh and Amar Nath which were separately wrapped in three parcels and sealed with seal H. Blood stained stones and earth were parceled in one parcel. Sample of seal H Ext.PW-3/A was taken separately on a piece of cloth and seal after use was handed over to witness Piar Singh. Accused Bhuvneshwar Dutt, Sheela Devi and Naresh Kumar were arrested on 28.8.2009 vide memo Exts.PW-6/C, D and E. The gun, used for killing the deceased, produced by Goutam Kumar, son of accused Jagdev, was taken into possession vide memo Ext.PW-4/A, which was parceled and sealed and three seals of seal A were affixed on the parcel. Khaka of gun Ext.PW-4/B was also prepared, sample seal was taken and the seal after use was handed over to witness Rajmal. Accused Jagdev Ram was arrested on 29.8.2009 vide memo Ext.PW-16/F. On 31.8.2009, accused Jagdev Ram made disclosure statement comprised in Ext.pW-5/A under Section 27 of the Indian Evidence Act that after gun shot, he had concealed the empty cartridge in the Ghala (grass field) and on the instance of the accused Jagdev Ram, empty cartridge Ext.P-11 was recovered, which was at a distance of 100-150 meters away from the dead body and was taken into possession vide memo Ext.PW-6/A in the presence of witnesses Laxman Kumar and Kanth Ram. Spot map of recovery of cartridge Ext.PW-16/G was prepared. The said cartridge was parceled and sealed with seal T by applying six seals. Specimen sample seal Ext.PW-6/B was also taken. Accused Jagdev also produced gun licence Ext.PW-16/J from his house which was taken into possession vide memo Ext.PW-6/C.

3. All the parcels were deposited with MHC in Police Station. Tatima and Jamabandi comprised in Exts.PW-10/A and B were procured from the Patwari. The MHC made entry in the Malkhana Register at Sr.No.123, the abstract whereof is Ext.PW-11/A after the parcels were deposited with him by SHO on 28.8.2009. On 29.8.2009, Constable Madan Kumar also deposited two parcels along with one envelope duly sealed with three seals RH. The parcel containing viscera was sealed with ten seals and another parcel containing clothes which too was sealed with ten seals and entry in the Malkhana Register was made, the abstract whereof is comprised in Ext.PW-11/B. On 31.8.2009, a parcel containing empty cartridge duly sealed with six seals of impression T was also deposited which was entered in the Malkhana Register at Sr.No.125. On 3.9.2009, all the parcels and envelopes were sent to FSL, Junga through HHC Subhash Kumar vide RC No.29/09 comprised in Ext.PW-

11/D in safe condition. Report of FSL comprised in Ext.PX and Ext.PY were received. No contents of alcohol or poison were seen in the viscera.

4. After completion of the investigation, challan, under Section 173 of the Cr.P.C., was prepared and filed in the Court. The trial court charged the accused for theirs having committed an offence punishable under Section 302 IPC read with Section 34 IPC and accused Jagdev Ram was also charged for an offence under Section 25 of the Arms Act, 1959.

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. In defence, the accused examined one witness.

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

7. The accused/appellant is aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel appearing for the accused/appellant has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of 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 by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

10. The first witness, who, stepped into the witness box to prove the prosecution case, is, PW-1 (Dillo Devi). She in her deposition has deposed a version, which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During the course of her cross-examination, she admits the suggestion, put to her, that accused Jagdev has taken Nautor land at village Sandhi about 33-34 years back and had also built up a four roomed house on the said Nautor land. She further deposes that the case regarding breaking of teeth of her husband is pending adjudication in a Court. She continues to depose that all the accused had come together and accused Jagdev kept on hurling abusive language for about 10-15 minutes. She proceeds to depose that on their asking the accused not to abuse them, the accused asked his family members to pelt stones on her. This witness further deposes that while running, her husband had covered a

distance of 30 feet and she was at a distance of about 100-150 feet from her husband. She further deposes that when her husband fell down, it was a sunny day. She further deposes that on raising an alarm, her brother-in-law Amar Nath came there. She has confronted with Ex.PW-1/A by deposing that she had disclosed to the police that they were grazing the cattle in a drabbad (ground) behind the temple and accused Jagdev had commanded the remaining accused to pelt stones.

11. PW-2 Amar Nath deposes that he was grazing cattle in Jungle at Sandhi. He deposes that at about 2.30-3.00 p.m., he heard a gun shot but he thought that the said fire might have been made in order to deter the crows etc. He continues to depose that his sister-in-law Dillo Devi gave him a call that his brother was shot dead and he should come. On this, he rushed to the spot and found his brother lying dead with injury on his chest. He continues to depose that on his asking, Dillo Devi as to what had happened, she disposed to him that her husband was killed by accused Jagdev by gun shot. Thereafter, he shouted that a murder has been committed. He deputed a boy to summon ward member from the village, the ward member reached the spot and then he intimated the police telephonically about the incident. He proceeds to depose that at about 7 p.m., police also reached the spot. On insistence of the police, he arranged gas lighter of kerosene. He further deposes that police took into possession the blood stained soil, three stones, sothi and chappals from the spot and sealed the same in separate parcels and the seal after use was handed over to the ward Member. The seized articles were taken into possession under memo Ext.PW-2/A, which is deposed to be bearing his signatures. During his cross-examination, he deposes that he had seen the accused Jagdev going towards his house after the gun shot was fired and 2-3 other persons were also with accused Jagdev including one lady, however, he deposes to have seen their back as they were going towards their house. He deposes that he had not heard accused hurling abuses to his brother and sister-in-law. This witness admits the suggestion that he was not in talking terms with accused and his family for the last 5-6 years and that at one point of time, his deceased brother had uprooted the door of his house. He admits the suggestion, put to him, that his deceased brother had been facing several cases in the Court. However, he feigns ignorance that the said cases were criminal.

12. PW-3 Piar Singh deposes that on 27.8.2009, he was called to the spot by the daughter of Dillo and a small child and he visited the spot at Sandhi where the dead body of deceased was lying. He deposes that he informed the police telephonically and the police came to the spot at 9.30 p.m. After inspecting the spot, the police took into possession blood stained stones, soil, Sothi and blood stained Chappal vide memo Ext.PW-2/A which has been deposed to be bearing his signatures. He continues to depose that the articles were separately parceled and sealed and the seal after use was handed over to him and specimen of seal is comprised in Ext.PW-3/A which was taken on cloth and has also been deposed to be bearing his signatures. During his cross-examination, he

denies the suggestion, put to him, that the deceased had created a fear psychosis atmosphere in the village.

13. PW-4 Rajmal deposes that he joined the investigation on 28.8.2009. He further deposes that the gun was taken into possession by the police vide recovery memo Ex.PW4/A in his presence and in presence of Prem Lal.

14. PW-5 Baldev Ram deposes that on 31.8.2009 accused Jagdev had made a disclosure statement to the police pursuant to which he got recovered one empty cartridge from the Ghasni beneath the grass which was taken into possession vide recovery memo Ex.PW-5/A in his presence and in presence of Doom Ram.

15. PW-6 Kanth Ram proved the recovery of empty cartridge at the instance of the accused.

16. PW-7 Dr. Ramkamal deposes that on 18.8.2009 he had conducted the post-mortem of deceased. He further deposes that there was a circular gun shot wound about 10x12x15 cms on right side of chest and four inches below right clavicle. The wound was corresponding to a hole in the shirt and the shirt was soaked with dry blood. He further deposes that the long tissue damage was seen in the wound with pellets of gun shot and multiple fractures of anterior ribs of right side was also seen. He further deposes that before conducting postmortem, the dead body was subjected to x-ray examination and films thereof have been deposed to be Ex.PW7/B and Ex.PW7/C. He further deposes that lung tissues were found burnt with pieces of ribs. The pellets and red-cork of the gun shot were extracted from the wound and sent to the forensic expert for analysis. He continues to depose that the viscera, cloths, pellets and cork were preserved and sealed in a parcel with seal of RH and handed over to the police for being taken to FSL. He deposes that in his opinion, the deceased had died due to gun shot injury leading to massive intra thoracic hemorrhage leading to peripheral vascular failure and respiratory failure. He further deposes that he was assisted by Dr.M.M. Marol in conducting the post-mortem, who also signed the post mortem report Ex.PW7/E. The reports of the FSL have been deposed to be Exts.PW, PX and PY. He further deposes that the probable time, between the injury and death, was 30 minutes and between death and post mortem was 24 hours.

17. PW-8 Satish Kumar proved daily diary report No.19, dated 27.8.2009, Ex.PW8/A which has been deposed by this witness to be correct as per the original brought by him in the Court.

18. PW-9 Inder Singh proved report No.13, Ex.PW9/A which has been deposed to be correct as per the original brought by him in the Court.

19. PW-10 Ghinder Singh proved tatima Ex.PW10/A and Jamabandi of the spot comprised in Ext.PW-10/B.

20. PW-11 H.C. Rakesh Kumar proved the deposit of the case property with him in the Malkhana of Police Station and its further transmission on 3.9.2009 to the FSL through HHC Subhash Kumar vide R.C.No.29/09. He further proved FIR Ex.PW11/E, which has been deposed by this witness to be bearing the signatures of ASI Dhanu Ram.

21. PW-12 SI Dhanu Ram deposes that on 27.8.2009, he was officiating as SHO, P.S. Kihar. He continues to depose that on the said date, a ruqua Ex.PW1/A was received through Constable Hoshiar Singh No.234, on the basis of which FIR Ex.PW11/E was registered which has been deposed by this witness to be bearing his signatures.

22. PW-13 Hans Ram deposes that after perusal of the investigation and taking into consideration reports of FSL Ex. PX and PY, he prepared challan in the case and filed the same in the Court. The challan has been deposed by this witness to be bearing his signatures.

23. PW-14 HHC Subhash Kumar deposes that on 9.3.2009, six parcels and two envelopes duly sealed were handed over to him by MHC Rakesh Kumar along with other documents for being taken to FSL, Junga vide R.C. No.69/09 and he deposited the aforesaid parcels at FSL, Junga on 4.9.2009. He further deposes that on return, he handed over the receipt to the MHC.

24. PW-15 Hoshiar Singh deposes that on 27.8.2009, he had accompanied SHO to the spot at village Ladhwah. He continues to depose that SHO gave him ruqua at 09.30 p.m. and he brought the ruqua to P.S. Kihar and handed over the same to ASI Dhanu Ram. He further deposes that after registration of the case, the file was given to him, which he handed over to SHO at Ladhwah.

25. PW-16 Inspector Prittam Singh in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above. In his cross-examination, he deposes that the telephonic message from Constable Inder Singh was received by him at 7.30 p.m. He further deposes that the gun shot was said to be fired at 3.00 p.m. He further deposes that the land of accused Jagdev was at a distance of 150-200 yards from the place where the dead body was lying. He denied the suggestion that whatever recoveries were got effected by him pursuant to disclosure statements under Section 27 of the Indian Evidence Act. He further denied the suggestions that no blood stains were found by the Chemical Examiner on the said articles. He denied the suggestion that he intentionally omitted to take the darat in possession. He further denied the suggestion that he had recorded the statement of Amar Nath at his own.

26. The genesis of the prosecution story is encapsulated in the ocular version qua the incident rendered by PW-1 Dillo Devi, wife of the deceased. She has in her examination-in-chief forthrightly deposed the factum of, on the fateful day when she alongwith her husband had gone to graze cattle towards Primary School, Sandhi, then at about 1.30 p.m

all the accused appeared and insisted for settling a dispute which had occurred about three years ago, arising from one of the accused Naresh having broken the teeth of the deceased husband of PW-1. The insistence of the accused upon the deceased to compromise the said dispute was not yielded to by the deceased and PW-1 which invoked the anger and wrath of the accused sequelling his hurling invectives upon the accused and of accused Bhuvneshwar Dutt, Naresh Kumar and Sheela Devi taking to pelt stones at PW-1 and her husband. However, this witness and her husband rushed towards the maize fields, yet she deposes that accused Jagdev chased her husband while wielding a gun and requests made by her to accused Jagdev not to kill her husband, bore no fruit, as during the course of chase, when her husband looked back accused Jagdev fired a gun shot with gun Ext. P-9 recovered under memo Ext. PW4/A. The testimony of PW-1, the ocular witness to the occurrence, has voiced a flawless and unblemished version qua the occurrence, which inspires both confidence as also is credible. Despite the fact that she has omitted to in her previous statement comprised in Ext.PW-1/A divulge the fact of accused Jagdev having commanded the remaining accused to pelt stones at her and her deceased husband, may render her version to be tainted as also when she omitted to record the factum of the accused while appearing at the site having insisted upon her and her deceased husband to compromise the previous dispute which had erupted inter se them and which had sequelled one of the accused Naresh breaking the teeth of her husband also, may ingrain with the vice of embellishment and improvement, the genesis of the prosecution story of it having commenced on the deceased and PW-1 having remained unyielding to the demand of the accused to compromise the previous dispute,. Moreover, even the factum of omission on the part of the prosecution to join as witnesses the students or teachers of the school in whose vicinity the occurrence took place, all also cumulatively do not lend any strength to the defence in its, hence, propagating the fact of the Investigating Officer having carried out a slanted and tainted investigation into the offence allegedly committed by the accused rather the effect, if any, of the aforesaid gets effaced in the face of the preeminent fact of the accused in his statement recorded under Section 313 Cr.P.C. having admitted the factum of his having killed the deceased with gun Ext. P9 recovered under recovery memo Ex. PW4/A. Even in the entire trend of cross-examination of the prosecution witnesses by the learned defence counsel, the moot suggestions which have been put to PW-1 and the other prosecution witnesses is of the deceased while wielding a darat/danda having perpetrated an assault on the accused which, however, was repulsed by the accused. On the score of the deceased wielding a danda/darat with which he purportedly perpetrated an assault on the accused which, however, he averted, is espoused to be giving ground or leverage to the accused, to rear an impression in his mind or nurse an apprehension that in case the assault purportedly perpetrated on his person by the deceased, is not averted by his firing a shot from the gun, which he was wielding at the apposite time, grievous injury or even death would accrue. Sinew and succor to the aforesaid propagation would accrue to the defence in case it was established that

there was a face to face duel inter se the accused and the deceased at the relevant stage/time. Besides forthright evidence ought to upsurge portraying the fact of both the accused and the deceased while being engaged in a duel were at a very short distance or in close proximity to each other, on score whereof it could be concluded that the danda or darat wielded by the deceased with which he purportedly struck the accused would have sequelled a grievous or lethal injury, which was avertable only by the user of the gun wielded by the accused, hence, rendering the penal act of the accused to be clothed with the protective cover of it having been prodded in exercise by the accused of his right of private defence of body. However, a close and incisive reading of the testimony of PW-1 omits to divulge the fact that both the accused and the deceased were either in close proximity to each other or were engaged in a duel. Omission of portrayal by PW-1 in her deposition of the accused and the deceased being engaged in a duel in course whereof the deceased while wielding a danda/darat and his while being within striking distance of the accused, his having struck a blow with the danda/darat on the person of the accused which, however, was repulsed/averted by the accused. Omission of the above evidence, fosters the inferences of (a) the accused and deceased being not in proximity to each other and both being not engaged in a duel in course whereof the deceased while not wielding a danda or darat had not struck a blow with them on the person of the accused, hence, did not necessitate its being averted by the latter by his taking to fire a gun shot at the deceased from gun Ex. P-9 and (b) lack of portrayal by PW-1 in her deposition of both the accused and the deceased while being face to face or in close distance to each other, which proximity inter se both facilitated or gave leverage to the deceased while his wielding a danda or darat to concert to deliver a blow with them on the person of the deceased which was avertable by means none other than by the user of gun at the instance of the accused, fillips an inference that hence there is abysmal failure on the part of the defence to facilitate this Court to clinch a finding of either there being a face to face duel inter se the deceased and the accused in which duel the deceased while being within striking distance of the accused had delivered a darat/danda blow on the person of the accused which had been averted by the accused by his firing a shot from gun Ex.P-9, hence, does not render vindicable the penal act of the accused, inasmuch as it does not acquire the protective shroud of it having been actuated in the exercise by him of the right of private defence, especially when his body remained un-endangered.

27. Accentuation to the inference hereinabove of both the accused and the deceased being not face to face nor also the deceased wielded a danda or darat, is lent by the factum of PW-1 in her examination-in-chief having unequivocally deposed of the accused having chased her husband and while he looked back, the gun shot at him having been fired by the accused. Now the said factum had remained un-torn or unshred during her inexorable cross-examination to which she was subjected. The consequent effect, is that the factum of the accused having fired gun shot with Ex.P-9 during the course of his

having chased the deceased stands clinched and repulses the propagation of the defence of a purported duel having erupted inter se the accused and the deceased with both being face to face or being in close proximity to each other which gave an opportunity to the deceased to strike a blow of darat/danda, purportedly wielded by him at the apposite stage, also it blunts the propagation by the defence of the deceased wielding a darat or danda for if, he assumingly wielded so and his being in close proximity of the accused, he would have either hurled/flung the danda at the accused or flung the darat at the person of the accused or would have struck a blow with the danda or the darat on the vital organs of the accused sequelling injuries on the person of the accused. However, when the accused remained uninjured or has received no injuries on his person purportedly in sequel to the deceased having concerted to strike his body with a danda or darat blow, the imminent conclusion which ensues that, hence, the deceased was not wielding a danda or darat, as a corollary, it has to be concluded that there was no imminent or grave threat emanating from the purported act of the deceased with his purportedly wielding a danda or darat and its being of such magnitude so as to cause any danger to the life of the accused, for prodding or constraining him while exercising his right of private defence, take to fire a gun shot with gun Ex.P-9 for averting the purportedly imminent danger. As a further concomitant, it has to be deduced especially when the factum of the deceased being the initial aggressor stands belied that hence the right of private defence canvassed by the defence for extenuating or exculpating the guilt of the accused, is wholly prevaricated as well as invented, as such, it does not acquire any force or strength.

28. Moroever, the learned counsel appearing for the appellant canvases before this Court that the testimony of DW-1 while purportedly voicing and sustaining the propagation by the defence of the accused Jagdev having fired a gun shot with Ex.P-9 in exercise of his right of private defence emanating from the fact of deceased having delivered a danda blow on the person of the accused Jagdev, who yet averted it, thereafter the deceased having again attempted to deliver it has been contended to have been untenably overlooked by the learned trial Court. However, the said contention is rendered rudderless in the face of the fact of his veracity in his examination-in-chief having come to be impeached in his cross-examination wherein he deposed that village Ladhwah and Lakho are situated between the road opposite to which the grazing fields are situated and the distance of the road from the place where the dead body was lying is one kilometer rendering him hence incapacitated to see the occurrence. The fact which further taints the credibility of his deposition is a further admission in his cross-examination of the dead body being not visible from the place where he was grazing his cattle. Obviously then when from the place where he was purportedly grazing the cattle at the relevant time, the dead body of the deceased was not visible, consequently too as a natural corollary the occurrence qua which he renders an eye witness account in sustaining the defence of the accused is too rendered incredible.

29. In view of the above, it is held that the learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ

Oriental Insurance Company ...Appellant.
Versus
Smt. Anita Sharma & others ...Respondents.

FAO No. 205 of 2007
Reserved on : 26.09.2014
Decided on: 10.10.2014

Motor Vehicle Act, 1988 – Section 166- The driver had a valid driving licence to drive the light motor vehicle with TPT endorsement-held, that the driver had a valid and effective licence and the Insurance Company is liable to indemnify the insured.

(Para-16, 17)

Cases referred:

New India Assurance Co. Ltd. versus Walaiti Ram and others, 2006 ACJ 2748

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Mr. Balwant Kukreja, Advocate.

For the respondents: Mr. Sanjay Bhardwaj, Advocate, vice Mr. J.L. Bhardwaj, Advocate, for respondents No. 1 to 3.
Mr. K.R. Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 26th April, 2007, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Case No. 113 of 2004, titled as Smt. Anita Sharma & others versus The Oriental Insurance Company & another, whereby compensation to the tune of Rs. 9,76,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and against the appellant-insurer (hereinafter referred

to as "the impugned award") on the grounds taken in the memo of appeal.

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

3. The only question which is to be determined is – whether the Tribunal has rightly saddled the appellant-insurer with liability or otherwise?

4. In order to determine the issue, the brief facts of the case are to be noted.

Brief facts:

5. The claimants, being the victims of the motor vehicular accident, filed claim petition before the Tribunal for grant of compensation to the tune of Rs.18,00,000/- as per the break-ups given in the claim petition on the ground that the deceased, namely Shri Rakesh Sharma, became victim of the motor vehicular accident, which was caused by the driver, namely Shri Jai Pal, while driving the Maruti Van–Taxi, bearing registration No. HP-01 A-0155, rashly and negligently on 6th November, 2004, at Pashada nullah on NH-22 near Jhakri, Tehsil Rampur, at about 11.00 p.m., deceased sustained injuries and succumbed to the injuries.

6. It is averred in the claim petition that the deceased was earning Rs. 11,000/- as a shopkeeper and Rs.5,000/- from agricultural and horticultural vocations; the claimants have no other source of income and have been deprived of their source of dependency; the widow, Smt. Anita Sharma, has lost her matrimonial home and other claimants have lost their father, are deprived of love and affection.

7. The appellant-respondent No. 1 filed reply and contested the claim petition on various grounds. Respondent No. 2 has also filed reply but virtually has not contested the claim petition.

8. The following issues came to be framed by the Tribunal on 27th April, 2005:

> *"1. Whether Sh. Rakesh Sharma had died on account of rash and negligent driving of driver of vehicle No. HP-01 A-0155? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation and from whom the petitioners are entitled to? OPP*
>
> *3. Whether the claim petition is not maintainable against respondent No. 1? OPR-1*
>
> *4. Whether the petitioner had instituted claim petition in collusion with respondent No. 2? OPR-1*

5. Whether the driver of vehicle No. HP-01 A-0155 had not been in possession of a valid and effective driving licence at the time of the accident? If so, with what effect? OPR-1

6. Relief."

9. The claimants have examined four witnesses including one of the claimant, Smt. Anita Sharma. The owner-insured has stepped into the witness box as RW-2. The appellant insurer has examined an official, namely Shri Hira Lal, from the SDM Office as RW-1 and Shri Vipul Prabhakar as RW-3 in support of its case. After scanning the evidence, oral as well as documentary, the claim petition came to be granted.

Issue No. 1:

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the deceased driver, namely Shri Jai Pal, had driven the offending vehicle rashly and negligently and caused the accident, in which Shri Rakesh Sharma lost his life. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

11. I deem it proper to determine issues No. 3, 4 and 5 before deciding issue No. 2.

Issues No. 3 and 4:

12. The appellant-insurer has examined only two witnesses relating to driving licence. It has not led any evidence to prove that the claim petition was not maintainable and there was a collusion between the claimants and the owner-insured. Thus, the findings returned by the Tribunal on issues No. 3 and 4 are upheld.

Issue No. 5:

13. Learned Senior Counsel for the appellant-insurer argued that the driver of the offending vehicle was not having valild and effective driving licence to drive the offending vehicle and the licence was not obtained as per the procedure contained in Section 7 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act").

14. The argument of the learned Senior Counsel is devoid of any force for the following reason:

15. The appellant-insurer has examined Shri Hira Lal as RW-1, who is an official from the office of Registering and Licencing Authority and has stated that the driver was having licence to driver Light Motor Vehicles and further stated that TPT licence can be issued without having learner's licence.

16. Admittedly, the driver was having driving licence to drive Light Motor Vehicle. This Court in a bunch of appeals, **FAO No.**

141 of 2012, titled as **Bimla Devi versus The Oriental Insurance Company Limited & others,** being the lead case, **FAO No. 376 of 2010,** titled as **National Insurance Company Limited versus Prabhat Singh & others,** decided on 18th July, 2014, and **FAO No. 54 of 2012,** titled as **Mahesh Kumar & another versus Smt. Piaro Devi & others,** decided on 25th July, 2014, held that a driver, who is having driving licence to drive Light Motor Vehicle is not required to have the endorsement to drive passengers vehicle.

17. Even otherwise, the driver was having TPT endorsement on the driving licence and RW-1 has deposed that the licence could have been issued even without having the learner's licence.

18. It was for the appellant-insurer to prove that the driver was not having the valid and effective driving licence to drive the offending vehicle and the accident has occurred due to the reason that the driver of the offending vehicle was competent to drive one kind of the vehicle and was found driving different kind of vehicle, which it has failed to do so.

19. Learned Senior Counsel for the appellant-insurer has placed reliance on a judgment rendered by a learned Single Judge of this Court in **New India Assurance Co. Ltd. versus Walaiti Ram and others,** reported in **2006 ACJ 2748.** The judgment is not applicable in the given facts and circumstances of the case in hand for the reason that the endorsement of heavy goods vehicle-offending vehicle was made in the said licence after the accident had taken place.

20. The Tribunal has rightly discussed issue No. 5 in para 13 of the impugned award, is legally sound, needs no interference. Accordingly, findings returned on issue No. 5 are also upheld.

Issue No. 2:

21. Learned Senior Counsel for the appellant-insurer argued that the amount awarded is excessive. The argument is again devoid of any force. It was for the appellant-insurer to prove the same. Even otherwise, the insurer cannot question the same.

22. The claimants have led evidence to the effect that the deceased was running a shop in the name of *Ashiana Watch Service,* was selling televisions, watches, radio and tapes in the said shop and was an income tax payee. The claimants have also led evidence to the effect that he was having an apple orchard and was having income of Rs. 60,000/- - Rs. 70,000/- per annum from the said orchard. The Tribunal, while taking into consideration the income tax return filed by the deceased, held that the income of the deceased was not less than Rs.90,000/- per annum and after deducting one third, held that the claimants have suffered loss of dependency to the tune of Rs. 60,000/- per annum.

23. The Tribunal has rightly applied the multiplier of '16' while keeping in view the date of birth of the deceased recorded in the copy of the matriculation certificate, in terms of which the deceased was 34 years of age at the time of accident and held that the claimants are

entitled to Rs.9,60,000/- under the head 'loss of source of dependency', Rs.10,000/- under the head 'loss of love and affection', Rs.1,000/- under the head 'taxi charges' and Rs.5,000/- under the head 'funeral charges', total compensation amounting to Rs.9,76,000/-. Thus, the compensation awarded is not excessive in any way, is just and proper, needs no interference.

24. Having said so, the impugned award is upheld and the appeal is dismissed.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Oriental Insurance Company Ltd. ...Appellant

Vs.

Smt.Pratibha Devi and others. ...Respondents.

FAO No.166 of 2007
Decided on: October 10, 2014.

Motor Vehicle Act, 1988 - Section 149- Tribunal had found that the owner had employed the driver after taking his driving test and after perusing the driving licence- Driving license was also renewed by the Registration and Licencing Authority, Paonta Sahib- Held, that the owner had not committed any willful breach – The owner is not required to make enquiries and investigation regarding genuineness of the driving licence. (Para-4)

Cases referred:

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

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

For the Appellant: Mr.Deepak Bhasin, Advocate.

For the Respondents: Nemo for respondents No.1 and 2.
Mr.Karan Singh Kanwar, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (oral):

Subject matter of this appeal is the award, dated 9th March, 2007, passed by Motor Accident Claims Tribunal-I, Sirmaur District at

Nahan, H.P., (hereinafter referred to as the Tribunal), in Claim Petition No.46-MAC/2 of 2005, titled Pratibha Devi and another vs. M/s Renuka Carrier and others, whereby compensation to the tune of Rs.1,56,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants (respondents No.1 and 2 herein) and the appellant-insurer came to be saddled with the liability, (for short, the impugned award).

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

3. The insurer has questioned the impugned award on the ground that the driving licence of the driver, namely, Kalyan Singh (respondent No.4 herein) was fake, but was duly renewed. Thus, it was submitted that the owner has committed willful breach.

4. The Tribunal after examining the record and scanning the evidence held that the insurer has failed to prove that the owner has committed any willful breach and saddled the insurer with the liability. The Tribunal, in paragraph 16 of the impugned award, has categorically held that the owner had employed the driver after taking his driving test and after perusing the driving licence, which was renewed by the Registering and Licencing Authority, Paonta Sahib. Thus, it cannot be said that the owner has committed any willful breach. The owner is not required to move here and there and make inquiries and investigations qua the genuineness of the driving licence.

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

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

to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 *:fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

6. It is also beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

7. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of paragraph 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

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

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

(v).....

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

8. Having said so, the Tribunal has rightly saddled the insurer with the liability.

9. In view of the above discussion, the impugned award merits to be upheld and the same is upheld. Consequently, the appeal is dismissed. The compensation amount be released in favour of the claimants strictly in terms of the impugned award, after proper identification.

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

Seema Devi d/o Sh. Bhagwan Dass .....Appellant.
Versus
Som Raj and others .....Respondents

FAO (MVA) No. 117 of 2008.
Date of decision: 10.10.2014.

Motor Vehicle Act, 1988 –Section 166- Owner-cum-Driver had passed away on the date of accident- Held that, the widow of the deceased had the remedy under the Workmen Compensation Act- No period of limitation has been prescribed for filing the claim petition, therefore, liberty granted to the claimant to withdraw the claim petition with a liberty to seek appropriate remedy- It was further ordered that the time period spent for prosecuting the claim petition and the appeal shall not come in the way of the claimant for seeking appropriate remedy.

(Para-2 to 4)

For the appellant: Mr. B.S. Chauhan, Advocate.
For the respondents: Nemo for respondent No.1.
Mr. V.S. Chauhan, Advocate, for respondent No.2.
Respondent No. 3 ex parte.
Mr. Sunil Awasthi, Advocate, for respondent No. 4.
Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Mr. M.A. Khan, the learned Additional Advocate General has filed affidavit in the open Court, made part of the file. Mr.Khan

stated at the Bar that Mr. Gurdial Singh owner-cum-driver has passed-away on the unfortunate day, i.e., the date of accident.

2. It appears that the claimant/appellant has remedy available in terms of the provisions of Workmen's Compensation Act and, that too, in the capacity of widow of the deceased and not as daughter of Bhagwan Dass. At this stage, the learned counsel for the appellant/claimant prayed that he may be permitted to withdraw the present appeal alongwith the claim petition with liberty to seek appropriate remedy. His statement is taken on record.

3. The Motor Vehicles Act has gone through the sea change. In terms of the Amendment Act 53 of 1994, Section 166 (3) stands deleted which contained the time frame for filing the claim petitions. Thus, the time frame cannot be a ground for dismissing the claim petitions.

4. In this backdrop, I deem it proper to grant liberty to the claimant/appellant to withdraw the appeal as well as the claim petition to seek appropriate remedy. It is provided that the period spent for prosecuting the claim petition as well as this appeal shall not come in the way of the claimant/appellant for seeking appropriate remedy.

5. In the given circumstances, the appeal as well as the claim petition is dismissed as withdrawn with liberty as prayed for.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, CJ.

Oriental Insurance Company Ltd. ...Appellant

Versus

Smt.Biasa Devi and others. ...Respondents.

FAO(WCA) No.309 of 2010
Decided on: October 10, 2014.

Workmen Compensation Act, 1923 - Section 22- Insurance Company is liable to pay the amount as per the schedule appended to the Act with interest- Remaining amount including funeral charges is to be paid by the owner. (Para-2, 3)

For the Appellant: Mr.Ashwani K. Sharma, Advocate.

For the Respondents: Mr.J.R. Poswal, Advocate, for respondents No.1 and 2.

Mr.Tara Singh Chauhan, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (oral):

Challenge in this appeal is to the award, dated 18th May, 2010, passed by the Commissioner under Workmen's Compensation Act, Sadar, Sub Division, Bilaspur, H.P. in Claim Petition No.4 of 2002, titled Biasa Devi and another vs. Sant Ram and others, whereby the Commissioner allowed the Claim Petition filed by the claimants (respondents No.1 and 2 herein) under Section 22 of the Workmen's Compensation Act, 1923, (hereinafter referred to as the Act), and awarded compensation to the tune of Rs.2,26,380/- with interest at the rate of 12% per annum and also a notice was issued to the owner for showing cause as to why a penalty of not less than 50% of the awarded amount be not imposed on him, (for short the impugned award).

2. Mr.Ashwani K.Sharma, learned counsel for the appellant-insurer frankly conceded that the insurer can be saddled with the liability to the tune of Rs.1,69,781/-, say Rs.1,70,000/-, as per the Schedule appended with the Act. The argument is plausible.

3. The owner has not questioned the impugned award on any ground. Thus, I deem it proper to modify the impugned award by providing that the insurer has to satisfy the impugned award to the tune of Rs.1,70,000/-, with interest at the rate of 12% per annum from the date of the impugned award till deposit, while the liability of the owner to satisfy the impugned award shall be to the tune of Rs.56,380/-, which shall also carry interest at the rate of 12% per annum from today. In addition, the owner is also directed to deposit the funeral charges to the tune of Rs.2,500/-, as awarded by the Commissioner. The owner is directed to deposit the amount of compensation falling to his share within eight weeks from today and on deposit, the same shall be released in favour of the claimants. The amount deposited by the appellant-insurer be released in favour of the claimants and the rest of the amount, alongwith interest, be refunded to the appellant-insurer through payee's account cheque.

4. The appeal is partly allowed and the impugned award stands modified, as indicated above. The appeal stands disposed of accordingly.

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

Naresh Kumar Vaidya. ...Petitioner.

Versus

State of Himachal Pradesh and another. ...Respondents.

CWP No. 6967 of 2014-G

Decided on: 8.10.2014

Constitution of India, 1950- Article 226 – Petitioner was appointed as a Clerk – He was to be promoted as Junior Assistant- However, he was charge-sheeted and penalty of censure was imposed upon him- He was again charge-sheeted and penalty of stoppage of two increments was imposed – The petitioner made representations for consideration of his case on the completion of 10 years of service, but it was rejected on the ground that the penalty had been imposed upon him- Held, that the penalty of stoppage of two increments and censure are minor penalties which do not stand against consideration of an employee for promotion.

(Para-2)

Cases referred:

Jagan Narain versus Food Corporation of India and others, 2010 (2) Scale, 497

Delhi Jal Board v. Mahinder Singh, 2000 (7) SCC 210 : (AIR 2000 SC 2767: 2000 AIR SCW 3139

For the Petitioner: Mr. J.L. Bhardwaj, Advocate.

For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. V.S. Chauhan and Mr. M.A. Khan, Addl. A.Gs.

The following judgment of the Court was delivered:

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

Petitioner was appointed as a Clerk on 27.3.1984. He completed ten years' of service on 27.3.1994. He was to be placed as Junior Assistant in the pay scale of Rs.1500-2700. He was served with a charge-sheet on 20.9.1994. The Departmental Promotion Committee met on 21.11.1994. Case of the petitioner was not considered since charge-sheet was issued to him. Penalty of "censure" was imposed upon him. He was again charge-sheeted for willful absence from duty on 18.7.1995. He was imposed minor penalty of stoppage of two increments with effect from 1.3.2000 to 28.2.2002. He was placed as Junior Assistant in the pay scale of Rs. 4400-7000 with immediate effect on 7.10.2002. He made a representation to respondent No.2 for considering his case with effect from 27.3.1994. The representation was rejected on 30.12.2002. He again made representation on 17.12.2005. It was rejected on 7.8.2007. Petitioner approached the erstwhile Himachal Pradesh Administrative Tribunal for the redressal of his grievance. The original application was transferred to this Court after the abolition of Tribunal and was assigned CWP (T) No.16535/2008. It was disposed of on 23.3.2010. Petitioner was permitted to make a representation. He made a representation. Petitioner was not informed about the outcome of the representation. He was informed on 22.8.2014 that the representation made by him pursuant to judgment of this Court dated 23.3.2010 stood rejected on 30.11.2010.

2. We have gone through Annexure P-9 dated 30.11.2010. Petitioner was appointed as a Clerk on 27.3.1984. He completed ten years of service on 27.3.1994. He was required to be placed as Junior Assistant immediately after the completion of ten years. Charge-sheet was issued only on 20.9.1994. Between the relevant period, i.e. 27.3.1984 to 27.3.1994, no charge sheet was issued to the petitioner. Petitioner has been imposed penalty of "censure" and minor penalty of stoppage of two increments. Penalties of "censure" and stoppage of two increments were minor penalties. In case the stoppage of two increments was with cumulative effect, it would have been major penalty. According to para 16.13 of the Hand Book on Personnel Matters Volume-I (Second Edition), the imposition of penalty of censure does not stand against the consideration of an employee for promotion.

3. Their Lordships of the Hon'ble Supreme Court in ***Jagan Narain*** versus ***Food Corporation of India and others***, 2010 (2) Scale, 497 have held that the promotion cannot be withheld due to imposition of minor penalty of recovery of amount. Their Lordships have held as under:

> **"6. Seen in the background of the two Circulars dated 13.12.2001 and 19.12.2001, it is evident that the promotion of petitioner by order dated 24.1.2005 was not the result of any oversight. It should be noticed that as on 24.1.2005, the minor penalty proceeding had come to an end by levying penalty of Rs. 5,000/-. Even as on 8.11.2004 what was pending was only a minor penalty proceeding. Therefore, having regard to the Circulars dated 13.12.2001 and 19.12.2001, neither the pendency of minor penalty proceedings nor the imposition of minor penalty by way of recovery of Rs. 5000/- would come in the way of the employee being considered for promotion or being promoted. It, therefore, follows that there was no justification for cancelling the said promotion dated 24.1.2005. If the appellant was thus entitled to promotion and the cancellation of the promotion was not warranted, the case of the appellant being considered again for the very same promotion and adoption of sealed cover procedure in view of the pendency of subsequent disciplinary proceedings will not arise (vide : Delhi Jal Board v. Mahinder Singh, 2000 (7) SCC 210 : (AIR 2000 SC 2767: 2000 AIR SCW 3139)."**

4. Accordingly, in view of the analysis and discussion made hereinabove the writ petition is allowed. Annexure P-5 dated 7.8.2007, Annexure P-9 dated 30.11.2010 and Annexure P-8 dated 22.8.2014 are quashed and set aside. Petitioner shall be deemed to be placed as Junior Assistant immediately after the completion of ten years, i.e. 27.3.1994 notionally for the purpose of pensionery/retiral benefits after re-fixing his pay. Pending application(s), if any, also stands disposed of. No costs.

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

T.K. Gupta. …Petitioner.

Versus

Union of India and others. …Respondents.

CWP No. 5350 of 2014-E
Decided on: 8.10.2014

Constitution of India, 1950- Article 226 – State Government granted 31 acres of land to the Respondent No. 5 for constructing and starting ESIC Hospital and Medical College at Ner Chowk- Respondent No. 5 submitted an application to the Central Government for establishing new Medical College- An inspection was carried out by the Medical Council of India- The Inspection Committee pointed out certain deficiencies- It was contended that the steps were taken to rectify the deficiencies and the deficiencies were not fundamental in nature- An amount of Rs.7.50 crores had already been spent- Held, that in view of the larger public interest the respondent No. 5 and 7 will remove the deficiencies with a period of three months, re-inspection would be conducted within one month of the submission of the report and the Central Government shall take steps within two weeks from the date of receipt of recommendations.

(Para-4)

For the Petitioner:	Mr. Ajay Vaidya, Advocate.
For the Respondents:	Mr. Ashok Sharma, ASGI for respondent Nos. 1 and 2.
	Mr. Shrawan Dogra, A.G. with Mr. J.K. Verma, Dy. A.G. for respondent No.3.
	Mr. B.C. Negi, Advocate for respondent No.4.
	Mr. S.R. Sharma, Advocate for respondent Nos. 5 and 6.

The following judgment of the Court was delivered:

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

"Key facts" necessary for the adjudication of this petition are that the State Government has granted in the year 2009, 31 acre of land to respondent No.5 on a token lease of Rs. 1.00 for 99 years for constructing and starting ESIC Hospital and Medical College at Ner Chowk in Mandi District. Respondent No.5 submitted an application/scheme under section 10-A of the Medical Council Act, 1956 on 24.9.2013 to the Central Government for establishing new Medical College for the academic session 2014-2015. The scheme was placed before the Scrutiny Committee in its meeting held on 10/11.2.2014. The

recommendations of the Scrutiny Committee were placed before the competent authority and as per the directions, Medical Council of India, vide its communication dated 18.2.2014 followed by subsequent reminders dated 19.3.2014 and 31.3.2014 requested respondent No.5-Medical College to submit the CD/DVD with regard to the standard inspection forms and the declaration forms within three weeks. The Medical College vide its communication dated 24.3.2014 submitted the CD/DVD containing the standard inspection forms and the declaration forms. Thereafter, the file was sent to the Assessment Cell of the Council on 9.4.2014 for appointment of assessors for the inspection of the Medical College. The Medical Council of India after verification of the land and other documents carried out the inspection of the infrastructure and other physical facilities available with the Medical College on 26.5.2014 and 27.5.2014. The inspection report was received from the assessors in the Council Office on 9.6.2014. The inspection/assessment report of the Medical Council of India inspection team was placed before the Executive Committee. Deficiencies were found in the Medical College as per the details given in Annexure P-1 dated 13.6.2014, which were conveyed to the Medical College also. Thereafter, the Council recommended to the Central Government to disapprove the scheme to establish Medical College for the academic session 2014-2015 vide Annexure R-4/6. Central Government after considering the recommendations of the Medical Council of India vide letter dated 9.7.2014 conveyed its decision to disapprove the Medical College's scheme to establish a Medical College for the academic session 2014-2015.

2. We have gone through the decision conveyed to the Medical College on 13.6.2014. The supplementary affidavit has been filed by the State Government. According to the averments made in the affidavit, the State Government was to only issue essentiality certificate and provide the requisite land. The State Government has provided the requisite land for construction of Medical College and Hospital by ESIC and the essentiality certificate was also issued. The State Government has also signed the MOU with the Dean, ESIC, Medical College and Hospital for attachment of Zonal Hospital, Mandi for ESIC Medical College for clinical/practical training of its MBBS students till the completion of the hospital.

3. Respondent Nos. 5 and 6 have filed reply to the petition. According to them, a sum of Rs. 750/- crores has already been spent for the construction of the College. According to the reply filed by respondent Nos. 5 and 6, there were not many deficiencies in the construction and infrastructure. The management of the college to meet the criteria of the Medical Council has carried out the amendments/additions as pointed out in the assessment report dated 13.6.2014.

4. Mr. S.R. Sharma has drawn the attention of the Court to assessment report Annexure R-5/A. We have gone through the same. We have also gone through the shortcomings pointed out by the Medical Council of India vide letter dated 13.6.2014 and the remedial steps taken

by respondent No.5 vide Annexure R-5/A. The deficiencies pointed out are not fundamental in nature. The deficiencies pointed out vide Annexure P-1 to the large extent have been removed by respondent No.5 vide Annexure R-5/A and the remaining deficiencies can be ordered to be removed by respondent No.5 within reasonable period. 500 bedded hospital and 100 MBBS seats are utmost necessary in the larger public interest taking into consideration the terrain of State of Himachal Pradesh. A sum of Rs.750/- crore has already been spent. The College was conceived in the year 2009. The infrastructure available with the State Government at Zonal Hospital, Mandi has been permitted to be utilized by the Medical College on the basis of MOU between ESIC and State Government. However, fact of the matter is that in view of the deficiencies pointed out by the Medical Council of India, we cannot order the opening of College for the academic session 2014-2015 as vehemently argued by Mr. Ajay Vaidya, learned counsel for the petitioner. However, in larger public interest, we direct the respondent Nos.5 and 6 to remove the deficiencies in all respect within a period of three months from today. Thereafter, the assessment report shall be supplied to the Medical Council of India, i.e. respondent No.4. Respondent No.4 would be at liberty to re-inspect the Medical College within a period of one month after the receipt of assessment report. The Medical Council of India on the basis of the re-inspection shall submit the case to the Central Government for issuance of permission to the College. The Central Government shall do the needful within a period of two weeks after the receipt of recommendations of the Medical Council of India. We hope and trust that the Medical College shall start from academic session 2015-2016.

5. Consequently, the present writ petition is disposed of in terms of above directions. Annexure R-4/6 dated 14.6.2014 and Annexure R-4/7 dated 9.7.2014 are quashed and set aside. Pending application(s), if any, also stands disposed of. No costs.

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

Jeet Ram .....Petitioner/Accused.
Versus
State of H.P. .....Respondent.

Criminal Revision No. 103 of 2007
Reserved on: 09.10.2014.
Date of Decision :10.10.2014.

Indian Penal Code, 1860- Section 325, 334, 451- Petitioner was convicted by the Trial Court for the commission of offences punishable under Section 325, 324, 451 IPC- Petitioner filed an appeal which was dismissed by the learned Additional Sessions Judge- Held, that the

prosecution case regarding recovery of weapon of offence was not established as witness of recovery had showed his ignorance regarding place of recovery, which establishes that he was not present at the time of preparation or at the time of recovery- One independent witness stated to have seen the incident was not examined and the prosecution had only examined the plaintiff/injured- Blood smeared darat was not sent to FSL – Darat was not shown to the Doctor for seeking his opinion as to whether injury could have been caused by darat, therefore, under these circumstances, the conviction of the accused was improper and was set aside. (Para-10)

For the Appellant: Mr. Vinay Thakur, Advocate

For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant criminal revision is directed against the impugned judgment rendered on 04.07.2007, by the learned Additional Sessions Judge, Fast Track Court, Shimla, H.P in Cr. Appeal No. 70-S/10 of 2004/2002, whereby, the learned Additional Sessions Judge affirmed the conclusions/findings recorded by the learned Additional Chief Judicial Magistrate, Court No.1, Shimla, H.P. in case No.117/2 of 2001, of 2.12.2002 whereby the petitioner/accused was convicted and sentenced as under:

Sr. No.	ffence	Sentence
1.	325, IPC	To undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- and in default of payment of fine amount to further undergo rigorous imprisonment for a period of three months.
2.	324, IPC	To undergo rigorous imprisonment for six months and to pay a fine of Rs.500/- and in default of payment of fine amount to further undergo simple imprisonment for a period of one month.
3.	451, IPC	To undergo rigorous imprisonment for six months and to pay a fine of Rs.500/- and in default of payment of fine amount to further undergo simple imprisonment for a period of one month.

2. Brief facts of the case are that on 2.9.2001, complainant/victim Rajesh Verma along with his brother Praveen and Neeraj were sitting in the verandah of his house. At about 9.00 p.m., accused while wielding a sickle came there and suddenly inflicted its blow on the right foot of the complainant Rajesh Verma. When Neeraj and Praveen tried to save the complainant from the clutches of the accused, the latter gave a darat blow on the head of Neeraj and administered beatings to Praveen. Thereafter the accused fled away from the spot. The accused is also alleged to have threatened them with their lives. The matter was reported to the police by the complainant. The police conducted the investigation in the case and during the course of investigation, the injured were sent to hospital for their medical examination.

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

4. Accused was charged for his having committed an offence punishable under Sections 451, 325, 324 and 506 of the IPC, by the learned trial Court to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and no evidence was led by him in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant. In appeal preferred by the accused/petitioner, the learned Additional Sessions Judge affirmed the findings/conclusions recorded by the learned trial Court.

7. The accused/petitioner is aggrieved by the judgment of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation and non appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its revisional jurisdiction and be replaced by findings of acquittal.

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

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

10. Both the learned Courts below have recorded findings of conviction against the accused/petitioner. This Court would interfere with the findings recorded by both the learned Courts below only if, in the event of an incisive perusal of the record, it divulges the fact of both the learned Courts below having omitted to take into consideration the germane and relevant material and such omission rendering the impugned judgment of conviction recorded by the learned Courts below to be ingrained with the vice of material irregularity and legal impropriety. While proceeding to discern the record for disinterring the fact of whether both the learned Courts below have omitted to pay reverence to the germane and apposite material personifying the factum of the prosecution case being vitiated, this Court deems it fit and appropriate to refer to the factum of the manner of the recovery of weapon of offence under memo Ex.PW1/C. For the reasons recorded hereainafter, this Court is constrained to conclude that the manner of recovery of weapon of offence i.e. darat, Ex. P-1, under recovery memo Ex.PW1/C is both tainted as well as legally inefficacious. Hence, its legal inefficacy in connecting the accused with the commission of offence having been omitted to be accorded adequate weightage by the learned Court below renders the impugned judgment to be acquiring a tinge of illegality. (a) PW-1 Rajesh Verma, the witness to recovery memo Ex.PW1/C having in its cross-examination feigned ignorance qua the place of preparation of recovery memo Ex.PW1/C, conveys the factum of his being not present at the time of either its preparation or at the time contemporaneous to the effectuation of recovery of the weapon of offence under it, at the instance of accused. While coming to form the above conclusion, the obvious deduction is that the recovery memo Ex.PW1/C was not prepared at the place recited in it nor hence the weapon of offence purportedly recovered at the instance of the accused, was recovered at the latter's instance from the place as recited in it, rather its recovery is a mere invention and concoction and it does not carry probative worth in marking the fact of it, hence, being used by the accused in the commission of alleged offence. What heightens the fact of recovery memo Ex.PW1/C qua the weapon of offence purportedly used by the accused/revisionist in the commission of offence being an invention and concoction, as such, carrying no legal efficacy and probative worth, is comprised in the further communication by PW-1 in the later part of his cross-examination of the entire proceedings including the preparation of the recovery memo Ex.PW1/C having been carried out in the police station. In aftermath, a firm and invincible conclusion which can be formed is that the weapon of offence purportedly used by the accused in the commission of offence and which was purportedly recovered under recovery memo Ex.PW1/C was not as depicted in it so recovered. The concomitant ensuing inference, hence, is that the weapon of offence appears to have been foisted upon the accused even when it was neither used nor wielded by the accused/revisionist in the commission of

offence. Consequently, with the recovery of the weapon of offence under an invented recovery memo qua its recovery comprised in Ex.PW1/C, renders the prosecution case to be gripped with the vice of falsity. What accentuates and heightens the effect of the inference hereinabove formed by this Court is comprised in the admission of PW-2, the other witness to the recovery memo Ex.PW1/C qua the factum of his being apprised about the recovery of 'darat' by the police in the police station. The aforesaid admission too fosters the inference that the recovery memo Ex.PW1/C acquires no legal sinew and vigour. In aftermath, the accused/revisionist remains un-connected with the fact of both his wielding it and using it. Apart from the aforesaid infirmities gripping the prosecution case, the omission on the part of the prosecution to associate an independent witness to the occurrence inasmuch as one Shri Naresh Kumar, who is conveyed by PW-1 in his cross-examination to have at the apposite stage stepped out from his house, is also a vital omission, inasmuch as in the absence of his being associated in the investigation and concomitantly his not having come to be examined as a prosecution witness so as to lend an impartisan version to the prosecution case, the smear or taint with which the prosecution version is gripped with on the score aforesaid acquires a magnifying effect. The reason for concluding so is that in case he had been associated and cited as a witness and stepped into the witness box, he could have unraveled a truthful version qua the occurrence. His non association and non citation as well as his non appearance as a witness obviously appears to have been encouraged by the motivation of the Investigating Officer to smother the truth qua the occurrence. Obviously, the conclusion which is fostered is of the victims/injured PW-1 and PW-2 having alone been deliberately joined as witnesses to the occurrence by the Investigating Officer only for enabling theirs communicating a partisan and slanted version qua it which version is, hence, both construable to be both uninspiring and untruthful. Moreover, the further omission on the part of the prosecution (a) to send the blood smeared darat for rendition of an opinion by the FSL qua the factum of it bearing the blood of the injured/victim for its hence conveying the factum of its user at the instance of the accused and (b) omission of the prosecution to show the darat, the purported weapon of offence, to the doctor who prepared the MLC qua the victim and injured, for eliciting an opinion from him qua the factum of injuries visible on the person of the injured/victim being possible with its user, are such pre-eminent omissions which construed cumulatively in conjunction with the factum of recovery of darat under recovery memo Ex.PW1/C being legally inefficacious and of no probative value, reinforcingly constrain this Court to conclude that the aforesaid omissions were begotten as the Investigating Officer was carrying out a tainted and slanted investigation. Besides, an inference also flows that the weapon of offence as attributed to the accused in the commission of the offence was, as a matter of fact, not used by him nor also, hence, he perpetrated the assault on the victim/injured. For the reasons stated hereinabove the impugned judgments of the learned Courts below are gripped with the affliction of theirs carrying the taint of omitting to appreciate the material and apposite evidence, concomitantly, such

omissions constitute them to be also ingrained with the vice of material irregularity and legal impropriety.

11. For the foregoing reasons, the revision petition is allowed and the judgments of the learned Courts below are set-aside. Accused/revisionist is acquitted of the offences charged. Fine amount, if any, deposited by the accused/revisionist, be refunded to him. Bail bonds furnished by the accused/revisionist stand discharged. Records be sent back forthwith.

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

Manu Sharma .....Appellant

Vs.

Himachal Road Transport Corporation & others

...Respondents

FAO No. 76 of 2007
Decided on : 10.10.2014

Motor Vehicle Act, 1988- Section 166 – An FIR was lodged against the claimant and challan was presented against him before the Court of competent jurisdiction- Held, that the question of law and fact are involved, therefore, it is open for the claimant to seek appropriate remedy.

(Para-5, 6)

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. H.S. Rawat, Advocate, for respondents No. 1 & 2.

Mr. Onkar Jairath, Advocate, for respondent No. 3.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 31st January, 2007, made by the Motor Accident Claims Tribunal (II), Fast Track Court, Hamirpur, (HP), (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 39 of 2004, titled as Manu Sharma versus Himachal Roadways Transport Corporation & others, whereby claim petition came to be dismissed, for short "the impugned award.

Brief Facts:

2. The appellant-claimant has invoked jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor

Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.9,00,000/-, as per the break-ups given in the claim petition.

3. The claim petition was resisted and contested by the respondents.

4. Following issues came to be framed by the Tribunal on 14.06.2005:-

> "*1. Whether the petitioner had suffered injuries on account of rash and negligent driving of respondent No. 3 of vehicle No. HP-14-5324? .....OPP*
>
> *2 If issue No. 1 is proved, to what amount of compensation and from whom is the petitioner entitled to? ...OPP*
>
> *3.* Relief."

5. The claim petition came to be dismissed vide the impugned award, on the ground that FIR No. 87/2003, dated 30.7.2003 was lodged against the claimant and challan was presented against him under Section 173(2) of the Code of Criminal Procedure before the Court of competent jurisdiction.

6. It appears that the questions of law and fact are involved, therefore, it is open for the claimant to seek appropriate remedy.

7. The findings returned by the Tribunal are legal one, need no interference.

8. Having said so, the appeal merits to be dismissed, is dismissed. However, if the claimant seeks an appropriate remedy, this judgment shall not come in his way.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Narender Kumar .....Appellant

Vs

Rajesh Kumar & others ...Respondents

FAO No. 9 of 2012

Decided on : 10.10.2014

Motor Vehicle Act, 1988- Section 149 - The appellant had placed on record the driving license- The Insurance Company verified the same- Driving license shows that the driver had driving license to drive 'Heavy Transport Vehicle'- Insurance company is liable to indemnify the insured. (Para-4,5,7)

For the appellant : Mr. T.S. Chauhan, Advocate,
For the respondents: Mr. Rajan Kahol, Advocate.
Nemo for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 30th July 2011, made by the Motor Accidents Claims Tribunal, Bilaspur, H.P., (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 20 of 2007, titled as Rajesh Kumar versus Narinder Kumar & others, whereby compensation to the tune of Rs.1,86,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and against the owner-insured-appellant herein, for short, the "impugned award".

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

3. The appellant-driver has questioned the impugned award on the ground that the vehicle was insured with respondent No. 3-Insurance Company and it has to satisfy the impugned award. The Tribunal has fallen in error in holding that the driver was not having a valid and effective driving licence at the time of accident.

4. The appellant had laid motion being CMP No. 10 of 2012, under Order 41 Rule 27 of the Code of Civil Procedure, for placing on record the driving licence, which was allowed vide order dated 18.07.2014 and the insurer was asked to obtain verification report of the said licence.

5. Learned Counsel for the insurer-Insurance Company has made statement before this Court on 26.09.2014 that the Insurance Company has obtained verification report to the effect that the driver was having the driving licence to drive 'Heavy Transport Vehicle'. His statement was taken on record. The verification report was also taken on record.

6. In the given circumstances, it is held that the owner has not committed any willful breach.

7. Having said so, the insurer-Insurance Company is saddled with liability and is directed to satisfy the award amount within eight weeks from today. On deposit, the same be released in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payees account cheque.

8. The owner-insured has deposited the statutory amount to the tune of Rs. 25,000/-, is awarded as costs. The Registry to release the same in favour of the claimant.

9. The impugned award is modified, as indicated above and the appeal is disposed of.

10. Send down the records after placing copy of the judgment on record.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Smt. Neelam Kaushal & others .....Appellants
Versus
Sh. Ashok Kumar & others ...Respondents

FAO No. 62 of 2007
Decided on : 10.10.2014

Motor Vehicle Act, 1988- Section 171 - The Tribunal had awarded interest @ 9% per annum from the date of the award- held, that in terms of Section 171, the interest is to be awarded from the date of claim petition and not from the date of award.

(Para-13)

Cases referred:
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellants : Mr. B.C. Verma, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Vishal Panwar, Advocate, for respondent No. 2.
Ms. Devyani Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award dated 23rd December, 2006, made by the Motor Accidents Claims Tribunal (1),

Solan, H.P., (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 119-S/2 of 2005, titled as Smt. Neelam Kaushal & others versus Shri Ashok Kumar and others, whereby compensation to the tune of Rs. 12,20,000/- with interest @ 9% per annum from the date of the award till its realization, came to be awarded in favour of the claimants-appellants herein, for short, the "impugned award".

Brief Facts:

2. The claimants, being victims of a motor vehicular accident, invoked jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.25,00,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Ashok Kumar had driven the offending vehicle-truck bearing registration No. HP-14-3104, rashly and negligently, on 29.08.2005, at about 2.30 p.m., near Konark Hotel, National Highway, Brewery, Tehsil and District Solan, H.P.; hit deceased Shashi Kant Kaushal riding on a scooter bearing registration No. HP-14-8114; was dragged towards Brewery for about 50 feet; sustained injuries and succumbed to the injuries. The claimants have also pleaded in their claim petition that the monthly income of the deceased was Rs.14,286/- and was 46 years of age at the time of accident.

3. The claim petition was resisted and contested by the insured-owner, the driver and the insurer-National Insurance Company.

4. Following issues came to be framed by the Tribunal on 02.09.2006:-

> "*1. Whether the deceased died on account of injuries caused due to rash/negligent driving of the truck by the respondent No. 1.? .....OPP*
>
> *2 If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? ...OPP*
>
> *3. Whether the deceased has died on account of his own negligence driving of the scooter which he was riding? ...OPR-1 and 2.*
>
> *4. Whether the respondent No. 1 was not holding any driving licence and was not entitled to drive the truck on the relevant date? ...OPR-3*
>
> *5. Whether the truck was not validly registered and was being used in contravention? ...OPR-3*
>
> *6.* Relief."

5. The insured-owner, the driver and the insurer-Insurance Company have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

6. The claimants have questioned the impugned award on the ground of adequacy of compensation.

7. There is no dispute regarding the findings returned by the Tribunal on issues No. 1 and 3 to 5. Accordingly, the findings returned by the Tribunal on these issues have attained finality.

8. Now, coming to issue No. 2, the only dispute in this issue is whether the award amount is adequate?

9. The basic pay of the deceased was Rs.8,100/-per month, as per the Last Pay Certificate, Ext. PW-1/A and his gross income was Rs.14,286/- as stated in the claim petition. The Tribunal has rightly taken the average gross monthly income of the deceased as Rs.19,000/-; deducted 1/3rd towards his personal expenses and Rs.9,000/- including the income tax and held the claimants entitled to the tune of Rs.10,000/- towards the loss of dependency.

10. Admittedly, the age of the deceased was 46 years at the time of accident. The Tribunal has rightly applied the multiplier of '10', while keeping in view the mandate of law laid down by the apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

11. The Tribunal has also rightly held the claimants entitled to the tune of Rs.15,000/- as conventional charges and `5,000/- as funeral expenses.

12. Having said so, the amount awarded is not inadequate, in any way, is just and proper.

13. However, the Tribunal has fallen in error in awarding interest @ 9% per annum from the date of the award, i.e. 23rd December, 2006, was to be awarded from the date of the claim petition in terms of the mandate of Section 171 of the Act. The impugned award is modified and the claimants are entitled to interest @ 9% per annum from the date of the claim petition, i.e. 23rd November, 2005.

14. The insurer-Insurance Company is directed to deposit the balance amount before the Registry within two months from today.

15. The Registry to release the awarded amount in favour of the claimants, strictly as per the terms and conditions through payees account cheque.

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

17. Send down the records after placing copy of the judgment on record.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Oriental Insurance Company Limited ...Appellant.
Versus
Pankaj & others ...Respondents.

FAO No. 202 of 2013
Decided on: 10.10.2014

Motor Vehicle Act, 1988- Section 149- Insurance policy shows that the premium was paid for 3+1 persons- Additional premium was paid for driver and employee- Held, that insurer cannot resist the claim against the occupants of the vehicle, whose risk is covered in terms of the policy. (Para-10, 11)

Cases referred:

National Insurance Company Ltd. vs. Balakrishnan and another, 2012 AIR (SCW) 6286

Yashpal Luthra and another vs. United India Insurance Co. Ltd. and another, 2011 ACJ 1415

New India Assurance Co. Ltd. vs. Shanti Bopanna and others, 2014 ACJ 219

New India Assurance Company Ltd. vs. Smt. Anuradha and others, Latest HLJ 2014 (HP) 1

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Mr. Karan Singh Kanwar, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 27th February, 2013, made by the Motor Accident Claims Tribunal, Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 28 of 2010, titled as Pankaj versus Navneet Thakur & another, whereby

compensation to the tune of Rs. 10,56,000/- with interest at the rate of 9% from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and against the respondents jointly and severally with a command to the appellant-insurer to satisfy the same (hereinafter referred to as "the impugned award").

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

3. The appellant-insurer has questioned the impugned award on the ground of adequacy of compensation and that the risk of the claimant-injured was not covered in terms of the insurance policy being Act Policy.

4. One of the questions to be determined in this appeal is – whether the Tribunal has rightly saddled the appellant-insurer with liability or otherwise? The answer is in affirmative for the following reason:

5. The offending vehicle, i.e. Maruti Alto, bearing registration No. HP-34 A-4561, was being driven by its driver, namely Shri Chhering Chhaspa, rashly and negligently on 2nd December, 2009 near 15 miles, caused the accident in which the claimant-injured sustained injuries and became permanent disabled. The driver of the offending vehicle also died in the accident.

6. The argument of the learned counsel for the appellant that the risk of the claimant-injured is not covered is devoid of any force for the reason that neither the appellant-insurer has taken

the said ground in the memo of objections nor such issue has been framed. Even otherwise, the appellant-insurer has not led any evidence in rebuttal to prove that the risk of the claimant-injured was not covered.

7. The appellant-insurer has placed on record the insurance policy, which stood exhibited as Ext. R-3. In terms of the insurance policy, four persons have been covered, i.e. driver + three persons. Admittedly, the claimant-injured was travelling in the offending vehicle as an occupant and sustained injuries in the accident.

8. I have gone through the insurance policy, Ext. R-3. The perusal of the same do disclose that risk was covered and also premium amount has been paid for 3 + 1 persons, details of which have been given in the schedule of premium. Additional premium has been paid for the driver and the employee also. Thus, it cannot lie in the mouth of the appellant-insurer that the risk of the claimant-injured was not covered. The Tribunal has rightly discussed this issue while determining issues No. 3 and 4 in paras 29 and 30 of the impugned award.

9. I have gone through the insurance policy, which, on the face of it, covers the risk, is an eye opener for the appellant. It is apt to reproduce relevant portion of the insurance policy, Ex. R-3 herein:

"MOTOR INSURANCE CERTIFICATE CUM POLICY SCHEDULE

PRIVATE CAR LIABILITY ONLY POLICY – ZONE B

.....

LIMITS OF LIABILITY

Under Section II-1(i) in respect of any one accident: as per Motor Vehicles Act, 1988.

Under Section II-1 (ii) in respect of any one claim or series of claims arising out of one event is Rs. 750000.

.....

LIABILITY TO THIRD PARTIES

Subject to the Limit of liability as laid down in the schedule hereto, the Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle anywhere in India against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of

i) death of or bodily injury to any person so far as it is necessary to meet the requirements of the Motor Vehicles Act."

10. The learned counsel for the appellant was asked to explain and thrash out how the insurance company is not liable, failed to do so. The recent circulars/ guidelines issued by the IRDA dated 16.11.2009 and 3.12.2009 were also brought to his notice mention of which is made in **National Insurance Company Ltd. v. Balakrishnan and another,** reported in **2012 AIR (SCW) 6286.**

11. The Insurance Regulatory and Development Authority (IRDA) has laid down some guidelines. In terms of that guidelines, the insurer cannot resist the claim petition against the occupants of the vehicle, whose risk is covered in terms of the policy. This issue came up for consideration before the High Court of Delhi in a case titled as **Yashpal Luthra and another versus United India Insurance Co. Ltd. and another,** reported in **2011 ACJ 1415,** and all these guidelines were discussed.

12. I have also discussed this issue while dealing with a case of like nature as Judge of the Jammu and Kashmir High Court at Jammu titled as **New India Assurance Co. Ltd. versus Shanti Bopanna and others,** reported in **2014 ACJ 219,** whereby award of ` 1,68,09,089/- with interest was made and it was held, after discussing all circulars / guidelines, effect of 'Act Policy', 'Comprehensive Policy' and 'Package Policy', that the occupant is covered by the 'Comprehensive Insurance Policy'. It is apt to reproduce paras 1, 2 and 16 of the judgment herein:

"1.Does the 'Comprehensive policy of insurance' exempt the Insurance Company from its liability of

paying compensation to the victim of a vehicular accident who is travelling in a vehicle which is covered under such policy, at the time of accident? This is the only important point raised in the instant appeal which seeks setting aside of award dated, 26.4.2012 (for short, 'the impugned award'), passed by the Motor Accidents Claims Tribunal, Samba (for short, 'the Tribunal').

2. 'No' is possibly the only answer for the reasons that would flow from the narration of events below."

3 to 15.....

16. Having regard to the ratio laid down by the Hon'ble Apex Court, Hon'ble High Courts of Delhi and Punjab and Haryana read with statement of the insurance official, S.K. Gupta, the appellant has rightly been saddled with the liability."

13. This Court in cases titled **New India Assurance Company Ltd. versus Smt. Ritu Upadhaya and others,** being FAO (MVA) No. 135 of 2011, decided on 10th January, 2014, **New India Assurance Company Ltd. versus Smt. Anuradha and others,** reported in **Latest HLJ 2014 (HP) 1; United India Insurance Company Ltd. versus Smt. Kulwant Kaur & another,** being FAO No. 226 of 2006, decided on 28th March, 2014 and in a bunch of appeals, **FAO No. 560 of 2009,** titled as **Oriental Insurance Company Limited versus Smt. Bantu (since deceased) and others** being the lead case, decided on 22nd August, 2014, decided the same issue and has held that the insurer is liable.

14. Having said so, the argument of the learned counsel for the appellant-insurer fails and the Tribunal has rightly saddled the appellant-insurer with liability.

15. The argument of the learned counsel for the appellant-insurer that the compensation is excessive, is not tenable for the reason that the claimant-injured has become permanently disabled, his physical frame has been shattered, has lost the charm and other enjoyments of his life and has virtually become burden on his family. The compensation cannot be substitute for the enjoyment of life.

16. Keeping in view the facts and circumstances of the case, the amount awarded is inadequate, the claimant-injured has not questioned the same, thus, I deem it proper to uphold the same.

17. Viewed thus, the impugned award is upheld and the appeal is dismissed.

18. Send down the records after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ

Pramod Kumar .....Appellant
Versus
Himachal Roadways Transport Corporation & another
...Respondents

FAO No. 189 of 2007
Decided on : 10.10.2014

Motor Vehicle Act, 1988-Section 166- Claimant suffered 25% permanent disability- Held, that the claimant had undergone pain and sufferings, his physical frame had been shattered, he is not in a position to do any sport activity- He has lost charm of his life and is deprived of amenities of life -Amount of ₹1,00,000/- was awarded under the head pain and sufferings, ₹50,000/- under the head loss of amenities of life, ₹3,60,000/- under the head loss of income, ₹9,100/- under the head expenditure on medical treatment and ₹2,000/- under the head expenditure on attendant. (Para-22, 23)

Cases referred:

R.D. Hattangadi vs. M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Ward v. James, 1965 (1) All ER 563

C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376

Arvind Kumar Mishra vs. New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa vs. The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita vs. Deepak and others, 2012 AIR SCW 4771

For the appellant : Mr. Sanjay Bhardwaj, Advocate vice Mr. J.L. Bhardwaj, Advocate.
For the respondents: Mr. H.S. Rawat, Advocate, for respondent No. 1.
Mr. Lalit Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The appellant-claimant has questioned the award, dated 30th June, 2006, made by the Motor Accidents Claims Tribunal-II, Solan, H.P., (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 12-S/2 of 2005, titled as Shri Pramod Kumar versus Himachal Roadways Transport Corporation & another, whereby compensation to

the tune of Rs.1,21,100/- with interest @ 9% per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimant, for short, 'the impugned award'.

Brief Facts:

2. The claimant has invoked jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.5,00,000/- as per the break-ups given in the claim petition, on the ground that he became victim of the vehicular accident on 27th September, 2002, which was caused by driver, namely, Suresh Chand, while driving offending vehicle-bus bearing registration No. HP-24-4665, rashly and negligently; was traveling in the said vehicle; sustained injuries and became permanently disabled.

3. The respondents contested the claim petition on the grounds taken in their objections. Following issues came to be framed by the Tribunal on 28.03.2006:

> "1. *Whether the accident and consequent simple and grievous injuries sustained by the petitioner on 27.09.2002 were attributed to rash and negligent driving of offending HRTC bus bearing No. HP-24-4667 by respondent No. 2, as alleged, if so its effect? ..OPP*
>
> *2. Whether the petitioner is entitled to compensation, if so, to what extent and from whom? ..OPP*
>
> *3. Relief."*

4. The claimant examined Dr. Ashish Sharma, (PW-1), Shri Rajesh Gautam (PW-3) and Shri Ramesh Chand Thakur (PW-4). Claimant Pramod Kumar also appeared in the witness box as PW-2. Respondents examined Shri Gian Chand (DW-2). Driver Suresh Chand also appeared in the witness box as DW-1.

5. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved both the issues and granted compensation to the tune of `1,21,100/- with interest @ 9% per annum from the date of the claim petition till its realization to the claimant and respondent No. 1-Himachal Roadways Transport Corporation was asked to satisfy the same.

6. The insured-owner and the driver have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

7. The claimant has questioned the impugned award, by the medium of this appeal, in hand, on the ground of adequacy of compensation.

8. The findings returned on issue No. 1 is not in dispute. Accordingly, the findings returned by the Tribunal on the aforesaid issue are upheld.

9. The claimant has suffered 25% permanent disability, which has affected his earning capacity, career, charm of life and other amenities of life. He was player of '*kho-kho*' game and has earned so many certificates, which have been placed on record from pages 55 to 57 of the claim petition.

10. PW-1, Dr. Ashish Sharma has deposed that the disability suffered by the claimant has affected his earning capacity and is not in a position to play '*Kho-Kho*' game. It is apt to reproduce the statement of the aforesaid doctor herein:

> *"Stated that I am posted as Medical Officer, Z.H. Solan since August, 2004. On 19.11.2005, I examined Parmod Kumar son of Shri Shiv Ram petitioner present in the court today regarding disability being members of the Medical Board and disability certificate Ext. P1 is issued by the Board which is signed by me as member of board as an expert. The disability was 25% with respect to right lower limb which is permanent in nature. It is correct that petitioner cannot do heavy work involving long walking on hilly terrain. The petitioner cannot do sport activities involving running and this permanent disability has also affected the career of the petitioner regarding his recruitment in armed forces.*
>
> *xxxxx by Sh. Uday Bhanu, Adv xxxxx*
>
> *This permanent disability is not qua the whole body of the petitioner. It is correct that it will go down if it is assessed qua whole body."*

11. It is also profitable to reproduce the statement of PW-3 Shri Rajesh Gautam in cross-examination herein:

> *"I was standing in the middle of the bus HRTC on the date of accident. It is incorrect that petitioner was standing on the stairs of the rear door of the bus. It is also incorrect that there is blind curve at the spot of accident. It is also incorrect that the bus driver while giving pass to the truck took his bus towards hill side and the petitioner himself struck against the hill and accident took place. It is also incorrect that now a days the father of the petitioner is looking after the agriculture work of his land. It is also incorrect that I was traveling in HRTC bus on the date of accident. It is also incorrect that I being intimate with the petitioner came to depose in the court in his favour on twisted facts."*

12. While going through the pleadings and the evidence available on the record, one comes to an inescapable conclusion that the claimant has undergone pain and sufferings; has to undergo it for ever; his physical frame has been shattered; is not in a position to do any sport activity including playing "*kho-kho"* game; has lost charm of his life and is deprived of amenities of life.

13. The Tribunal, while considering a case for grant of compensation, in the injury case, has to do some guess work.

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

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.*
>
> *11. In the case Ward v. James, 1965 (1) All ER 563, it was said:*
>
> > *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for*

his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

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

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

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

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

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.*
>
> *The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."*

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

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

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

> "*8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the*

basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

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

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

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

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

"Pecuniary damages (Special damages)

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

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

(a) Loss of earning during the period of treatment;

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

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

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

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

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

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

17. .....

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

18. I have also laid down the same principle, while dealing with a case of similar nature being **FAO No. 64 of 2007,** titled as **Raksha Devi versus United India Insurance Company Limited & others**, decided on 5th September, 2014.

19. Keeping in view the ratio laid down by the Apex Court and this Court in the judgments, *supra,* I am of the considered view that the Tribunal has fallen in error in awarding compensation under the heads 'pain and sufferings', 'loss of amenities' and 'loss of income'.

20. The amount awarded under the heads 'medical expenses' and 'attendant charges' is maintained.

21. While making guess work, I deem it proper to award Rs.1,00,000/- to the claimant under the head 'pain and sufferings' and Rs.50,000/- under the head 'loss of amenities of life'.

22. By guess work, it can be held that at least the claimant has lost Rs.2,000/-per month from the sport activities, which he stands

deprived of. His age was 23 years at the time of accident and the multiplier to be applied would not have been less than '15'. Thus, he is entitled to Rs.2,000/- x 12= Rs.24,000/- x 15 = Rs.3,60,000/- under the under 'loss of income'.

23. Having said so, the claimant is entitled to compensation as follows:-

i)	Expenditure on medical treatment.	Rs. 9,100/-
ii)	Expenditure on attendant.	Rs. 2,000/-
iii)	Pain and suffering.	Rs. 1,00,000/-
iv)	Loss of amenities of life.	Rs. 50,000/-
v)	Loss of income.	Rs. 3,60,000/-
	Total	Rs. 5,21,100/-

Accordingly, the claimant is entitled to total compensation to the tune of Rs. 5,21,100/- with 9% interest per annum from the date of the claim petition till its realization.

24. The compensation amount is enhanced and the impugned award is modified, as indicated above.

25. Respondent No. 1-Himachal Roadways Transport Corporation is directed to deposit the enhanced amount within eight weeks before the Registry of this Court. On deposit, the award amount be released in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payees account cheque.

26. The appeal is disposed of.

27. Send down the records after placing copy of the judgment on record.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Rameshwar Singh ...Petitioner

Versus

State of Himachal Pradesh & others ...Respondents

CWP No. 1757 of 2012-F
Decided on : 10.10.2014

Constitution of India, 1950- Article 226 - The case of the petitioner is covered by the judgment dated 7.8.2012 passed in CWP (T) No. 12595 of

2008 and upheld in LPA No. 535 of 2012- Writ petition is disposed of with the direction to examine the case of the petitioner in the light of the judgment within a period of six weeks.

(Para-1 & 2)

For the petitioner: Mr. Neel Kamal Sood, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Mr. Neel Kamal Sood, learned Counsel for the petitioner stated at the Bar that the case of the petitioner is squarely covered by the judgment dated 7.8.2012 passed in CWP (T) No. 12595 of 2008, titled ***Dr. Amin Chand vs. State of HP and others***, and upheld in LPA No. 535 of 2012 titled ***State of HP and others versus Dr. Gopal Sharma.*** His statement is taken on record.

2. In the given circumstances, I deem it proper to dispose of this writ petition by directing the respondents to examine the case of the petitioner, in light of the judgments, referred to above, and do the needful within six weeks from today. Ordered accordingly.

3. The writ petition stands disposed of alongwith pending applications, if any.

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

Ravinder Kumar. ...Petitioner.

Versus

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

CWP No. 3561 of 2014-G
Reserved on: 8.10.2014
Decided on: 10.10.2014

Constitution of India, 1950- Article 226 –An advertisement was issued for filling the post of constable- The petitioner was placed at serial No. 1 in the waiting list- One post for Scheduled Caste category of ward of freedom fighter remained unfilled- The reserved post for Scheduled Caste category of freedom fighter, if not consumed was to be filled up from the

scheduled caste category (sub-category unreserved)- The petitioner made a representation for consideration of his case, which was rejected- Held, that the post of ward of freedom fighter was added to the un-reserved category in other districts- Case of the petitioner was to be treated at par with these candidates, Hence the petition is allowed and the respondents are directed to appoint the petitioner as Constable under Scheduled Caste category (sub-category unreserved).

(Para-3 to 5)

For the Petitioner: Mr. Ajay Mohan Goel, Advocate.

For the Respondents: Mr. Shrawan Dogra, A.G. with M.A. Khan, Addl. A.G. and Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Superintendent of Police, Sirmaur District at Nahan issued an advertisement on 13.7.2012 for filling up 46 posts of Constables (male) and 16 posts of Constables (Female) in the pay scale of Rs.5910-20200 plus grade pay of Rs. 1,900/-. Petitioner also participated in the selection process. He was placed at Sr. No.1 in the waiting list. Petitioner belongs to Scheduled Caste category (sub-category unreserved). One post reserved for Scheduled Caste category of ward of freedom fighter remained unfilled. The reserved seat for Scheduled Caste category of freedom fighter if not consumed was to be filled up from the scheduled caste category (sub-category unreserved). Petitioner made a representation seeking his appointment due to non-fulfillment of vacant post of sub-category of ward of freedom fighter. The representation was rejected on 22.1.2014.

2. Case of the petitioner was required to be considered as per the instructions, which were in vogue at the time when the selection process commenced. Respondents have relied upon instructions dated 20.11.2013 whereby it has been clarified that in the event of non-availability of children/grand children of freedom fighter against the vacancies reserved for them, the vacancy shall be carried forward for subsequent three recruitment years where after the same will automatically lapse and be filled up from the respective residuary category to which point belongs. Letter dated 20.11.2013 would apply prospectively and would not be applicable to the selection process which had already commenced before the issuance of this letter.

3. Petitioner has given the instances from District Kangra whereby one post of wards of freedom fighter has been added to female general (unreserved) category on the basis of letter dated 1.1.2011. Similarly, one post of OBC wards of freedom fighter has been added to male OBC category on the basis of letter dated 1.1.2011. Out of 7 posts

reserved for general (HHG) category, only one candidate had qualified and the remaining 6 posts were filled up from general (unreserved) category in Mandi District. Out of 2 posts reserved for General (OSSP) category, only one candidate had qualified and the remaining one post has been filled up from general (unreserved) category on the basis of letter dated 18.6.2010. Out of three posts reserved for SC (HHG) category, only one candidate had qualified and the remaining two posts were filled up from SC (unreserved) category. Thus, total 13 posts have been filled up from scheduled caste (unreserved) category. Two posts of OBC (HHG) category were filled from OBC (unreserved) category due to non-availability of candidates.

4. Case of the petitioner was to be treated at par with these candidates. The representation of the petitioner has been rejected on the basis of letter dated 20.11.2013 instead of deciding the same as per letters dated 18.6.2010 and 1.11.2011. One candidate Sh. Pardeep Kumar, who belonged to scheduled caste (unreserved) category was not awarded marks for NCC "C" certificate. The Board on its own has decided to give him 3 marks, which led to placing the name of petitioner at Sr. No.1 of the waiting list. Petitioner has sought information under Right to Information Act. According to the information supplied to him, one post reserved for scheduled caste category of wards of freedom fighter is lying vacant.

5. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Annexure P-15 dated 22.1.2014 is quashed and set aside. Respondents are directed to appoint the petitioner as Constable under Scheduled Caste category (sub-category unreserved) within a period of four weeks from today. Pending application(s), if any, also stands disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ

United India Insurance Company Ltd. …Appellant.

Versus

Gurmit Singh & another …Respondents.

FAO No. 492 of 2007

Decided on: 10.10.2014

Motor Vehicle Act, 1988- Section 166**-** Claimant had wrongly recorded the registration number of offending vehicle- Held that the procedural wrangles & tangles and mystic maybes cannot come in the way of granting compensation to the victims- The claimant was permitted to make correction in the registration number of the vehicle.

(Para-3 to 6)

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondent No. 1.
Mr. Lalit K. Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Tara Singh Chauhan, learned counsel for the claimant-injured, stated at the Bar that the claimant-injured being a rustic villager was not in a position to record the correct number of the offending vehicle and inadvertently, mistake has crept in while recording the number of the offending vehicle as HR-38-1204 and prayed that the said mistake cannot take away settings of law and cannot be made the basis to throw the claimant-injured out of the Court. He further argued that the registration number of the offending vehicle is HR-38 G-1204, as held by the Motor Accident Claims Tribunal, Bilaspur (hereinafter referred to as "the Tribunal") and prayed for permission to grant leave to rectify the said mistake by table amendment.

2. Heard. Considered.

3. The procedural wrangles & tangles and mystic maybes cannot come in the way of granting compensation to the victims, who were the bread earner of the family and are on streets and in order to save them from starvation and other social evils.

4. Keeping in view the aim and object of granting the compensation to the victims of the motor vehicular accidents read with the fact that granting of compensation is just to ameliorate the sufferings of the victims, I deem it proper to allow the claimant-injured to make necessary correction by allowing table amendment.

5. Having said so, the registration number of the offending vehicle-tempo be read as HR-38 G-1204.

6. Learned counsel for the appellant-insurer argued that the offending vehicle was not insured with it. He has made this argument on the ground that the claimant has recorded the registration number of the offending vehicle as HR-38-1204. The argument is devoid of any force as the Tribunal has discussed this issue in detail in paras 9, 10 and 15 of the impugned award.

7. I have examined the record. It is pertinent to record herein that the owner-insured and the insurer-appellant have not led any evidence in rebuttal, thus, the evidence led by the claimant has remained unrebutted.

8. Viewed thus, the Tribunal has rightly held that the offending vehicle was HR-38 G-1204 and rightly saddled the appellant-insurer with liability.

9. Learned counsel for the appellant-insurer also argued that the amount awarded is excessive. Admittedly, the claimant-injured has suffered permanent disability to the extent of 60% and has examined the Doctors, namely Shri G.D. Khullar as PW-7 and Dr. Ravjit Singh as PW-9, who have given details how the claimant-injured has suffered, how he has become permanent disabled forever and virtually has lost every enjoyment of life. Having said so, the amount awarded is meager, cannot be said to be excessive.

10. Having glance of the above discussions, the appeal is dismissed and the impugned award is upheld.

11. Registry is directed to release the awarded amount in favour of the claimant-injured strictly in terms of the terms and conditions contained in the impugned award through payee's account cheque.

12. Send down the records after placing copy of the judgment on Tribunal's file.

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

State of H.P & another .....Appellants.

Versus

Smt. Madhu Bala & another ....Respondents.

RFA No. 296 of 2005
Reserved on : 8.10.2014
Decided on : 13.10.2014

Medical Negligence – Sterilization operation was performed upon the plaintiff- Subsequently she conceived and gave birth to a child- Held, that a duty has been cast upon a Doctor to act with a reasonable degree of care and skill in performing a sterilization operation- Presumption of negligence arises, when a child is born despite sterilization operation, which can be rebutted by the proof of the fact that the Doctor had adopted the permissible state of art/ latest techniques in vogue to obviate an unwanted pregnancy-since no such evidence was led therefore, payment of compensation was proper. (Para-10)

Cases referred:

Fulla Devi alias Fullo Devi versus State of Haryana and Others, 2003(4) RCR (Civil) 671

Bolam v. Friern Hospital Management Committee (1957) 2 ALL ER 118

For the Appellants: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Vinod Chauhan, Advocate, vice counsel for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur (Judge)

The instant appeal has arisen out of the judgment and decree rendered on 5.3.2004 by the learned District Judge, Una, H.P., in Civil suit No. 14 of 2000, whereby the suit of the plaintiff is decreed for a sum of Rs. 1,00,000/- (Rupees one lac only) with 6% interest from the date of filing of the suit till its realization.

2. Brief facts of the case are that plaintiff/respondent No. 1 has filed a suit for recovery of Rs.4,90,000/ with 18% interest per annum, against the defendants. The plaintiff is a house wife and owing to low source of income, she opted for sterilization operation as she already have two children. She consulted the Doctor at Primary Health Centre, Takka, where she had been advised to consult the doctors at District Hospital, Una. Thereafter, plaintiff visited the District Hospital, Una and defendant No.3 asked the plaintiff for sterilization operation under Family Planning Scheme of Govt. of Himachal Pradesh. Consequently, on the advise of defendant No. 3 on 14.6.1996 laproscopic sterilization procedure was performed upon her. A certificate was also issued regarding the success of operation of the plaintiff. The defendant No. 3 also assured the plaintiff that she would not conceive in future. Lateron, the plaintiff suspected the pregnancy owing to stoppage of menstruation cycle. She went for her medical check up on 22.3.1999 in the hospital where the urine test was conducted and the report was shown to be negative. Thereafter plaintiff got herself checked up from Nurse (Daee) and was shocked to know that she was pregnant. The plaintiff suffered serious shock, mental agony, harassment and pain as she was already having two children and was not desirous for any other child. She gave birth to third female child on 4.11.1999. The birth of the child is result of the negligency on the part of defendant No.3. The plaintiff has claimed damages of Rs. 4,90,000/- from the defendants as she never wanted any more child and opted for operation in accordance with the policy prepared by the Govt. of Himachal Pradesh.

3. The suit of the plaintiff was resisted and contested by the defendants. Defendants No. 1 and 2 filed a joint written statement taking preliminary objections that the suit is time barred, not legally maintainable, estoppel and no legal and valid notice has been served as required under Section 80 CPC upon the defendants. It is alleged on merits that the consent of the plaintiff was obtained for sterilization operation as she disclosed that she is labourer by profession having income of Rs. 700/- per month. It has been admitted that sterilization

operation was performed upon her with her consent by the doctor. Defendant No.3 had also suggested to her other methods of contraception but the plaintiff voluntarily agreed for sterilization operation. She was also apprised of the risk of failure and to take necessary precautions. It has also been alleged that on 22.3.1999 she had come to District Hospital and was advised pregnancy test, which was found to be negative after analysis as she had not given the proper sample of urine. It has also been alleged that the pregnancy could have been got terminated by her under MTP Act. There is no fault of the doctor in performing the sterilization operation, since there are always chances of failure in such like operations and this fact was well within the knowledge of the plaintiff and as such, she is not entitled for any amount of damages. Defendant No. 3 filed a separate written-statement, wherein he had denied most of the averments made in the plaint. It has also been alleged that he had left the services of Govt. of Himachal Pradesh, as such cannot say anything much regarding the averments made in the plaint. It is admitted by him that the number of operations were being performed by different teams of doctors during family welfare operations. After sterilization operation the plaintiff never visited him nor consulted him. He further alleged that the during his career he has performed so many operations and all were successful. He further averred that he is a qualified surgeon and in case the patient does not take the precautions, during the follow up period, there are chances of failure of operation.

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

5. On the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. *Whether the plaintiff is entitled to the recovery of Rs.4,90,000/- from the defendants for medical negligence under the law of Torts as alleged? OPP*
2. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD 2*
3. *Whether the suit is time barred as alleged? OPD 1 & 2.*
4. *That the suit is not maintainable in the present form as alleged? OPD 1 & 2.*
5. *Whether the plaintiff is estopped from filing the suit by her acts and conduct as alleged ? OPD 1 & 2.*
6. *Whether no legal and valid notice u/s 80 CPC has been served upon the defendants as alleged? OPD 1 & 2.*
7. *Relief.*

6. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff.

7. Now the defendants No.1 and 2/appellants have instituted the instant Regular First Appeal before this Court, assailing the findings recorded by the learned trial Court in its impugned judgment and decree. The learned Deputy Advocate General has concertedly, and, vigorously contended, that, the findings recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the judgment and decree passed by the learned District Judge be quashed and set aside.

8. On the other hand, the learned vice counsel appearing for plaintiff/respondent No.1, has, with considerable force and vigour, contended that the findings recorded by the Court below, are, based on a mature and balanced appreciation of evidence on record, and, do not necessitate interference, rather merit vindication.

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

10. The plaintiff/respondent No. 1 admittedly underwent sterilization operation as divulged by medical certificate comprised in Ex. PW-2/A. However, despite her having undergone a sterilization operation, she begot a child named Kumari Shikha. The factum of Kumari Shikha having been born subsequent to the plaintiff having undergone a sterilization operation, is proved by Ex. PW-3/C, which is the birth certificate of the aforesaid. In the face of the sterilization operation conducted on the plaintiff/respondent No.1 by defendant No.3/ Performa respondent having failed, she has been enjoined with the burden to nurse and maintain an unwanted child. Consequently, she proceeded to file a suit for compensation/damages arising from the purported tort of negligence of defendant No.3/performa respondent in carrying out a failed sterilization operation. The judgment of the Hon'ble Court in ***Fulla Devi alias Fullo Devi*** versus ***State of Haryana and Others***, 2003(4) RCR (Civil) 671 enjoins the trite legal principle of there being an enjoined duty cast upon a Doctor to act with a reasonable degree of care and skill in performing a sterilization operation. Besides the aforesaid judgment also postulates a perse presumption of negligence attachable/imputable to the Doctor in performing a failed sterilization operation or when despite its performance, its sequels the birth of an unwanted child. However the said presumption would have come to be rebutted or the Doctor performing a failed sterilization operation would not invite culpability for committing the tort of negligence, only in the event of cogent and satisfactory proof having been brought on record by the Doctor, demonstrative of the fact of his having adopted the permissible state-of-art/ latest techniques in vogue to obviate an unwanted pregnancy. However, an incisive perusal of the evidence adduced does not constitute evidence personifying the fact that the Doctor as a matter of fact did adopt the 'legation method' which comprises the latest technique for obviation of an unwanted pregnancy. In a case reported in State of M.P Versus Smt. Sundari Bai and another,

AIR 2003 Madhya Pradesh 284, the Hon'ble Court had exculpated the liability of a Doctor who performed a failed sterilization operation on the score that the performing Doctor had by adopting legation method had hence observed a reasonable degree of care and caution in carrying out the operation. The relevant paragraph is extracted hereinafter:-

> "*16. Now examining the facts of the present case on the touchstone of the above mentioned principles it can be safely held that there was no negligence on the part of the Doctor. In the present case the plaintiff had two sons when the sterilization was performed. Her physical condition was not good. The Legation method which is a well recognized mode of sterilization was adopted. This method was used by the doctor in hundreds of cases and there was no failure of this mode. Even in case of the plaintiff this method worked well for six years and the pregnancy was prevented. Thus the doctor acted with reasonable degree of care and skill. There were more than one "perfectly proper standards" and if the doctor chose one then she cannot be said to be negligent. There might have been an error of judgment while acting with ordinary care and skill and that cannot be equated with negligence. It is one thing to say that it would have been better if 'Section method" had been chosen for sterilization but the adoption of "legation method" on the facts of the present case is not negligence per se. The defendant No. 1 though quite experienced was working in a Primary Health Centre and she used a fair, reasonable and competent degree of skill."*

11. However, in the instant case, with the judgment reported in State of Haryana versus Smt. Santra, AIR 2000 SC 1888, postulating the imputation of perse rebuttable presumption of perse negligence to the Doctor who carries out a failed sterilization operation. However, when there is neither apt nor cogent evidence demonstrative of his having rebutted the said presumption comprised in his having proved to have adopted a latest in vogue state of art/technique, to obviate an unwanted pregnancy, in as much as his having adopted the permissible exculpatory 'legation technique'. Consequently, with evidence on record portraying that he had not adopted the in vogue state of art technique in as much as he has omitted to adopt the legation method, to carry out the sterilization operation, hence, in sequel, the presumption of perse negligence attracted to the act of the doctor who performed a failed sterilization operation, in the instant case, stands un-rebutted. As a natural corollary, the presumption of perse negligence attachable or attractable to his act of performing a failed sterilization operation stands invincibly established. The relevant paragraph of the aforesaid judgment is extracted hereinafter:-

> ..9. Negligence is a 'tort'. Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would

use a fair, reasonable and competent degree of skill. In Bolam v. Friern Hospital Management Committee (1957) 2 ALL ER 118, Mc Nair, J. summed up the law as under:-

> *"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonable competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards then he is not negligent."* (P. 1891)

12. In aftermath, it has to be also concluded, as aptly done by the learned court below, that the performing doctor had omitted to adhere to standards of reasonable care and caution in performing the sterilization operation, as a corollary, it resulted in its failure. The said failure has wholly arisen on account of commission of tort of negligence on the part of performing doctor. Further obviously for the lack of adherence by the performing doctor with the standards of due care and caution, he has to be held liable for the tort of negligence. However, since he was at the relevant time under the employment of defendants No. 1 and 2/appellants, consequently on the principle of liability of master for the tort of negligence of servant as the defendant No.3 was under the appellants No.1 and 2, both of whom are respectively his masters, the latter have been aptly adjudged by the trial Court to be vicariously liable for defrayment of compensation to the plaintiff/respondent No.1, arising from the aforesaid tort of negligence committed by Performa respondent during the course of his employment under the appellants. Even though the learned Deputy Advocate General contends before this Court that with the awakening of the plaintiff/respondent No.1 to the factum of failure of sterilization operation which she underwent as marked by Ex. PW-3/B, the appellants are liable to be exculpated from the vicarious tort of negligence committed by defendant No.3. However, the said instruction comprised in Ex. PW-3/B is rather countervailed and overcome by the, findings/conclusion arrived at, hereinabove which abundantly portray the sheer negligence of the performing doctor in his conducting and carrying out the failed sterilization operation upon the plaintiff/respondent No.1. Moreover the contention of the learned Deputy Advocate General that there was non-observance by the plaintiff/respondent No.1 with the precautions enjoined to be adhered to by for subsequent to the performance of a sterilization operation which she underwent as such, for such non-adherence on her part, with the enjoined instructions the operation failed. Consequently, it is further argued that in sequel the liability of the appellants in purportedly having committed the tort of negligence remains un-attracted. The above submission gathers no momentum in the face of it having divulged by

DW-1, Health Worker, Health Centre, Takka, that the plaintiff/respondent No.1 had repeatedly consulted her. In aftermath, the aforesaid evidence when marking the fact of hence, plaintiff/respondent No.1 having impliedly obeyed and adhered to the precautions comprised in Ex. PW-3/B, she hence is not to be concluded to have contributed towards the failure of sterilization operation. With the forming of the above conclusion, the obvious inference is that the responsibility for failure of sterilization operation in its entirety is to be fastened upon the performing doctor in as much as his having omitted to perform it while adhering to the standards of due care and caution. The manner of computation of compensation payable as damages to the plaintiff/respondent No. 1 by the learned trial Court is anvilled upon a close studied scrutiny as well as on an incisive application of apposite case law to the apposite factual matrix. Consequently, the computation of damages payable to the plaintiff/respondent No.1 by the learned trial Court for hers being enjoined to rear/nurse an unwanted child arising from the failure of sterilization operation cannot be faulted. That apart the learned trial Court in recording its findings on all the issues over which the parties were at contest has appreciated the evidence apposite to them in a studied, careful and balanced manner. The manner of appreciation of evidence as done by the learned court below, hence does not suffer from any absurdity or perversity of mis-appreciation or non-appreciation of evidence on record. In aftermath, this Court does not deem it fit and appropriate that the findings, recorded by the learned trial Court, merit inference. Consequently, the appeal, preferred by the appellants is dismissed and the judgment and decree, rendered by the learned trial Court, is affirmed and maintained. No order as to costs.

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

State of Himachal Pradesh .....Appellant.
Versus
Madan Lal and others. .....Respondent.

Cr. Appeal No. 333 of 2008.
Reserved on: October 10, 2014.
Decided on: October 13, 2014.

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34 – As per prosecution, the deceased was subjected to cruelty by the accused- Mother of the deceased asserted that her daughter was admitted in the Hospital and when she went to the hospital, her daughter was dead- PW1 admitted that he had not lodged any complaint with Gram Panchayat, Pradhan or Namberdar regarding cruelty meted out to his granddaughter- Mother of the deceased admitted in her cross-examination that her daughter was not happy as her father-in-law had

not given the property to her husband- She further admitted that she had reported the matter to the police out of anger- Deceased had never told her that her father-in-law and mother-in-law had beaten her- Her husband had taken her to hospital immediately after the incident-Held, that the acquittal was justified in these circumstances.

(Para-13, 14)

For the appellant: Mr. Ramesh Thakur, Asstt. Advocate General.
For the respondents: Mr. T.S.Chauhan, Advocate.

The following judgment of the Court was delivered

Justice Rajiv Sharma, J.

The State has instituted this appeal against the judgment dated 23.2.2008, rendered by the learned Addl. Sessions Judge, Ghumarwin, Distt. Bilaspur, H.P. in Sessions Trial No. 12/7 of 2006/05. The respondents-accused (hereinafter referred to as the accused) who were charged with and tried for offences under Sections 498-A and 306 read with Section 34 IPC, were acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that the marriage of the deceased Meeran Devi was solemnized with accused No. 1 Madan Lal, resident of Village Kothi, PO Chandpur, Distt. Bilaspur. She gave birth to two sons. She was subjected to cruelty by the accused. The complainant PW-4 had gone to purchase domestic articles at Bilaspur Bazar where she was told by one Ram Singh resident of Tared that her daughter Meeran Devi was admitted in the Hospital and when she arrived there she found her daughter dead. The statement of PW-4 Dashodhan Devi was recorded under Section 154 Cr.P.C. vide memo Ext. PW-4/A on 20.6.2002. On the basis of the statement Ext. PW-4/A, FIR Ext. PW-6/A was registered. The plastic bottle was seized from the spot. The site plan was prepared and the deceased was medically examined on 20.6.2002 at Zonal Hospital, Bilaspur by Dr. Anita vide MLC Ext. PA. The post mortem was conducted on 21.6.2002. The viscera etc. was also sent for chemical examination at FSL Junga. The report is Ext. PC. According to the doctor, Meeran Devi died due to asphyxia due to consumption of phosphite poisoning. The matter was investigated and the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 8 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C to which they pleaded not guilty. The learned Trial Court acquitted the accused on 23.2.2008. Hence, the present appeal.

4. Mr. Ramesh Thakur, learned Asstt. Advocate General has vehemently argued that the prosecution has proved its case. On the other hand, Mr. T.S.Chauhan, Advocate, appearing for the accused has supported the judgment of the learned trial Court dated 23.2.2008.

5. We have gone through the impugned judgment dated 23.2.2008 and records of the case carefully.

6. PW-1 Kasu Ram, is the grand father of the deceased. He deposed that the deceased was married 2-2 ½ years back. According to him, when Meeran used to meet him, she used to tell him that her father-in-law, mother-in-law, and sister-in-law torture her and also used to beat her. In his cross-examination, he admitted that he did not lodge any complaint with the Gram Panchayat, Pradhan or Namberdar etc. He also admitted that the father of the Madan Lal had made a '*Will'* in favour of his grand sons.

7. PW-2 Hans Raj, deposed that Meeran was his aunt's daughter. Meeran told him that her in-laws used to beat her. She has told him that she was beaten up since she did not do domestic work at home. In his cross-examination, he admitted that he has never worked in the house of Prem Lal at Village Balh.

8. PW-3 Asha Ram, deposed that the police has recovered a bottle from the sleeping room in upper storey of the house of Meeran Devi in his presence. It was seized vide seizure memo Ext. PW-3/A.

9. PW-4 Dashodhan Devi, is the material witness. According to her, the marriage of Meeran was solemnized 12 years back with Madan Lal. Whenever her daughter used to visit her house, she used to say that her in-laws subject her to cruelty as she did not work. Her sister-in-law Nirmala and the husband after taking wine used to subject her to cruelty. Her daughter has prevented her from lodging any report with the police. Her daughter had visited her house for the last time two days before her death. She did not stay at her house. She had come to *Pansari's* shop at Bilaspur to purchase medicine during day time. Ram Singh told her that her daughter was admitted in the hospital at Bilaspur. She visited the hospital and found her daughter dead. She asked the accused Madan as to how her daughter died. Accused Madan told her that she had consumed poison. Her daughter consumed poison as she was subjected to cruelty. The police recorded her statement in the hospital Ext. PW-4/A. In her cross-examination, she admitted that accused Nirmala was married five years before the marriage of her daughter at village Delag. Accused Nirmala was living with her husband at Nalagarh for the last 10-12 years. She also admitted that the father of the accused had bequeathed his entire property to his wife and grand sons. Her daughter was not happy finding that her father-in-law had not given any property to her husband. Her father-in-law has died. She also admitted that the accused Madan Lal immediately rushed Meeran Devi to hospital on the day she became ill. She also admitted that her daughter was simpleton and used to get angry. She also admitted specifically that father and mother-in-law did not beat her. Her daughter has never told her that her husband Madan used to beat her. Towards the end of her cross-examination, she deposed that she did not want to lodge case with the police but because she was not told about the incident, hence she had instituted the case due to anger.

10. PW-5 Ramesh Kumar, testified that his sister was married with accused Madan Lal 12 years back. Whenever she used to visit their house, she used to tell that her father-in-law, mother-in-law and sister-

in-law subject her to cruelty. In his cross-examination, he admitted that her sister used to get angry when her in-laws used to point out the shortcomings.

11. PW-6 HC Ram Lal and PW-7 SI Ram Swaroop are formal witnesses.

12. PW-8 Nazirkhan, has carried out the investigation of the case. He visited the spot. He took into possession the bottle vide memo Ext. PW-3/A. He recorded the statement of the witnesses. He obtained post mortem report, MLC and FSL report from Junga. He admitted in his cross-examination that he did not record the statement of any witness from Village Kothi. He also admitted that as per the report of the FSL Ext. P-1 was found containing Mobile oil.

13. The marriage of Meeran Devi and Madan Lal was solemnized 12 years back. However, according to PW-1 Kasu Ram, the grand father of the deceased, the marriage was solemnized 2-2 ½ years back. Similarly, PW-2 Hans Raj deposed that marriage of Meeran and Madan Lal was solemnized approximately 7-8 years back. PW-1 Kasu Ram has admitted in his cross-examination that he has not lodged any complaint with the Gram Panchayat or Pradhan or Nambardar about the cruelty meted out to his grand daughter. PW-4 Dashodhan Devi, as noticed by us hereinabove, has admitted in her cross-examination that her daughter was not happy since her father-in-law has not given the property to her husband. He has given the property to his wife and grand maternal sons Om Prakash and Som Prakash. She also admitted that her daughter was short tempered. She also admitted that the father and mother-in-law of the deceased did not beat her though stated in PW-4/A. According to her she lodged a report with the police out of sheer anger as she was not told about the incident. Similarly, PW-5 has also deposed that her sister used to get angry when shortcomings were pointed out by her in-laws. According to the post mortem report Ext. PB also, the deceased has died due to asphyxia by consuming phosphite.

14. The accused Nirmala was staying with her husband at Nalagarh. She used to visit her parents only on festivals. PW-4 has stated that her father-in-law and mother-in-law have never beaten her daughter. Even her daughter has never told that accused Madan Lal has ever beaten her. Rather Madan Lal had taken the deceased immediately to the hospital. The accused have never aided nor abetted the commission of suicide by the deceased.

15. The prosecution has thus miserably failed to prove that the accused had subjected the deceased to cruelty. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court. Accordingly, there is no merit in this appeal and the same is dismissed.

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

M/s Carnoustie Eco-Resorts Pvt. Limited and others ... Petitioners
Versus
Sanjay Kumar and others .....Respondents

CMPMO No. 4137/2013
Reserved on: 8.10.2014
Decided on : 14. 10.2014

Code of Civil Procedure, 1908- Order 39, Rule 1 & 2- plaintiffs/applicants claimed that the Forest Department had constructed 14-15 feet wide road by spending 7.00 lakh and that the Defendants are threatening to dig and close the same- The defendants denied that any road was constructed and asserted that the plaintiffs had started creating a new jeepable road- Held, that there was no entry of the road in the revenue record, which would falsify the case of the plaintiffs that any road was constructed by the Forest Department- Forest land cannot be used for non-forest purposes without seeking permission under the provisions of Forest Conservation Act, 1980, therefore, the plaintiffs are not entitled for the relief of injunction. (Para-9, 10)

For the petitioners: Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate and Mr. Dalip K. Sharma, Advocate.

For the respondents : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate and Mr. Raman Parashar, Advocate, for respondents No. 1 to 3.
Mr. Parmod Thakur, Addl. AG, for respondent No. 4 and 5.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral):

This petition is instituted against judgment dated 31.5.2013 rendered by the Addl. District Judge, Sirmaur District at Nahan in CMA No. 18-N/14 of 2012 in Civil Suit No. 120/1 of 2012.

2. "Key facts" necessary for the adjudication of the present petition are that the petitioners-plaintiffs (herein after referred to as 'plaintiffs' for convenience sake) have filed a Civil Suit against the respondents-defendants (herein after referred to as "defendants" for convenience sake) and proforma defendants. Plaintiff No. 1 has taken on lease property measuring 18-16 Bighas comprised in Khata Khatauni No. 20/34 Khasra No. 450/8, 10, 12/2, 14, 452/17, 333/12 Kita-6 total measuring 9-16 Bighas, Khata Khatauni No. 41/65 Khasra No. 3, 4, 7, 9, 11, 13, 131/2 Kita-7, total measuring 4-14 Bighas situated at Village

Berh Jamolie Hadbast No. 86, Tehsil Rajgarh, District Sirmaur and Khata Khatauni No. 9 Min/20, Khasra No. 18 Kita -1, measuring 4-06 Bighas, situated at village Thandi Dhar, Hadbast No. 15, Tehsil Rajgarh, District Sirmaur, from Smt. Seema Devi i.e. defendant No. 3. Plaintiff No. 1 is constructing an Eco-resort on the suit property. Plaintiffs No. 2 and 3 are having agricultural land in both the villages. Their properties are connected with road, namely, Surva Thandi Dhar via Kanera road. Road was constructed by the Forest Department through D.F.O. Rajgarh. A sum of Rs.7.00 Lakh was spent towards construction of the road. Length of the road is 3 kms. Road was 14-15 ft wide. Contesting defendants have no right, title or interest in any manner whatsoever to obstruct or block the road by putting any blockage or construction. Defendants are threatening to dig the road and close the same.

3. The suit was contested by defendants No. 1 to 3. According to them, plaintiff No. 1 i.e. Company has taken the permission in April, 2010 to construct an Eco-resort in a highly illegal manner. Plaintiffs No. 2 and 3 were hands in glove with plaintiff No.1. They have caused damage to the fragile ecology of the area. There was no road known as Serva Thandi Dhar via Kanera road. There was a bridal path which starts from Serva and culminates at Kanera and Thandi Dhar. The bridal path was known as inspection path. Proforma defendants No. 4 and 5 in connivance with plaintiff No. 1 started making bridal path as a jeepable road. There are no documents to prove construction of the road. Defendants No. 1 and 2 have already constructed shed over the suit land possessed by them. According to the revenue record, land is possessed by defendants No. 1 and 2. Plaintiffs have no right, title or interest over the same. No portion of the road passes through Khasra No. 44, 45, 308/49, 309/49 and 313/59.

4. Plaintiffs have also moved an application under Order 39 Rules 1 and 2 of the Civil Procedure Code seeking interim injunction. Defendants filed reply to the same. It is averred by the proforma defendants that the road was constructed by the Forest Department in the year 2004-05 and a sum of Rs. 7.00 Lakh was spent. Learned Civil Judge (Junior Division) allowed the application vide order dated 6.11.2012 and defendant Nos. 1 to 3 were restrained from interfering or obstructing the Serva-Thandi Dhar road in any manner. The defendants feeling aggrieved filed an appeal bearing Civil Misc. Appeal No. 18-N/14 of 2012 before the Addl. District Judge, Sirmaur at Nahan. He allowed the appeal on 31.5.2013. Hence, the present petition.

5. Mr. K.D. Sood, learned Senior Advocate has supported the order passed by learned Civil Judge (Junior Division) on 6.11.2012.

6. Mr. G.D. Verma, learned Senior Advocate has supported judgment dated 31.5.2013 passed by learned Addl. District Judge, Sirmaur at Nahan.

7. I have heard the learned counsel for the parties and also gone through the order and judgment carefully.

8. Plaintiffs have not placed on record any tangible evidence to suggest specifically the Khasra numbers to pinpoint location of the road on the spot. According to the revenue record i.e. copy of Jamabandi for the year 2009-10, defendant Nos. 1 and 2 are joint owners of Khasra No. 308/49 and 362/49. The land is shown as Banjar Kadeem. There is no entry of any road on this portion of the land. In case there was any road constructed by the Forest Department, the same ought to have been reflected in the revenue record. Presumption of truth is attached to the jamabandi, though rebuttable.

9. The plaintiffs have not led any evidence to rebut the revenue record i.e. Jamabandi for the year 2009-10. It is not the case of the proforma defendants that they have acquired the land of the defendants. Learned Addl. District Judge has rightly discarded the demarcation report dated 27.6.2012, the same being not in accordance with law. There is no survey report placed on record. In case, Forest Department has constructed the road, there would have been sufficient record including Survey Report.

10. What emerges from the facts placed on record is that there was a bridal path in existence. Proforma defendants could not construct road over the land of the defendants No. 1 and 2. Forest land could not be used for non-forest purposes without seeking permission under the provisions of the Forest (Conservation) Act, 1980. There is substance in the submission of Mr. G.D. Verma, learned Senior Advocate that effort has been made by the proforma defendants to help the plaintiffs by providing approach road to connect to the Eco-resort through forest. Public funds should be used for the public purposes and not for other purposes. There is neither any illegality nor irregularity in the judgment passed by learned Addl. District Judge, Sirmaur at Nahan.

11. In view of the discussion and analysis made hereinabove, there is no merit in the petition and the same is dismissed. However, it is made clear that the observations made herein above, shall have no bearing on the merits of the main case. Pending applications, if any, are also disposed of.

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

State of Himachal Pradesh. ...Appellant.

Versus

Brijesh Tiwari. ...Respondent.

Cr.A.No. 334 of 2008
Reserved on : 10.10.2104
Decided on: 14.10. 2014

NDPS Act, 1985 - Section 20 –Accused was found in possession of bag wrapped with his waist under his garments containing 1.250 Kgs. of Charas- Held, that the police had not complied with the mandatory provisions of Section 50 of the Narcotic Drug and Psychotropic Substances Act, 1985, therefore, the accused is entitled to be acquitted.

(Para-18)

For the Appellant: Mr. Pramod Thakur, Addl. A.G.

For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

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

This appeal is instituted against the judgment dated 24.12.2007 rendered by the Special Judge (Additional Sessions Judge), Mandi in Sessions Trial No. 12 of 2007 whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 16.1.2007, police party headed by ASI Shiv Chand alongwith HHC Birbal Singh, Constable Pankaj Kumar, Constable Bhup Singh, HHG Yub Raj and HHG Chet Ram was present at Zero Chowk, Bali Chowki. At 11.30 A.M., the police party saw the accused coming on foot from Banjar side. Accused got frightened and returned back. He was intercepted. On inquiry by Shiv Chand, accused disclosed his name and address. Two local persons Pardeep Sharma and Sanjeev Kumar were associated by the police. Personal search of the accused was conducted. Bag Ex.P-2 was recovered from the possession of the accused. It was wrapped by the accused with his waist under his garments. It contained charas in the shape of marbles. It weighed 1 kg 250 grams. ASI Shiv Chand drew two samples of charas of 25 grams each out of the recovered charas. He sealed the samples in two separate parcels. The remaining charas was packed and sealed with seal having impression 'A'. NCB form was filled in. Rukka was sent through Constable Bhup Singh to Police Station, Aut in order to register the FIR against the accused. The sample was sent to C.F.S.L. Chandigarh. 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 denied the case of the prosecution in entirety. Learned trial Court acquitted the accused.

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

5. Mr. G.R. Palsra 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 Pankaj Kumar has deposed that on 16.1.2007 at about 11.30 A.M. accused came on foot from Banjar side. He saw the police party. He tried to run away. He was over powered. Pardeep Sharma and Sanjeev Kumar were associated, who were already present at Zero Point. ASI gave his personal search. Personal search of the accused was conducted. One cloth bag was recovered from below his garments. It was tied with his waist. On checking the bag, it was found containing charas in the shape of marble. It weighed 1 kg 250 grams. ASI separated two samples of 25 grams each out of the recovered charas and the samples were packed in separate parcel and sealed with seal impression 'A'. The remaining charas was also packed in separate parcel and sealed with seal impression 'A'. Two sample parcels were marked as A-1 and A-2. ASI filled in NCB form in triplicate. Recovery memo was also prepared on 17.1.2007. ASI Shiv Chand handed over to him one special report in an envelope. He took the same to the office of Additional Superintendent of Police, Mandi and handed over the same to the Additional Superintendent of Police, Rajesh Dharmani in his office at 11.25 A.M. In his cross-examination, he has deposed that they left the Police Post in the morning at 9.00 A.M. for Nakkabandi. He was at Police Post at 8.00 A.M. and ASI Shiv Chand was also there. The report was recorded in the daily diary at 9.00 A.M. about their departure. According to him, bag Ex.P-2 was tied and stitched by the accused with his waist below his garments. The I.O. was carrying traditional scale with him in the I.O. kit.

8. PW-2 Pardeep Kumar was declared hostile. He has not supported the case of prosecution.

9. PW-3 HC Parkash Chand has deposed that on 16.1.2007, Inspector/SHO Pritam Chand deposited with him case property of the case. He has proved Malkhana register Ex.PW-3/A. He sent one parcel containing sample charas and docket vide RC No.12/2007 through Constable Param Dev No.127 to C.F.S.L. Chandigarh. In his cross-examination he has admitted that the case property was deposited with him on 16.1.2007 at 8.00 P.M. by the S.H.O. He has not mentioned date and time of deposit of the case property with him in Malkhana register Ex.PW-3/A.

10. PW-4 Constable Param Dev has deposed that on 29.1.2007, MHC Parkash Chand handed over to him one sealed parcel containing sample charas, copy of search and seizure form, copy of FIR, copy of NCB

form and specimen seal impression vide RC No.12/2007. He took the articles to the office of Chemical Examiner, C.F.S.L. Chandigarh.

11. PW-5 Constable Bhup Singh has deposed the manner in which the accused was apprehended and sampling and seizure process was completed at Bali Chowki. According to him, they left Police Post at 5.30 A.M. to lay Nakabandi on the spot. They were already informed during the previous evening to join duty at 5.30 A.M. They remained at Zero point till 11.30 A.M. Thereafter, he was sent with Rukka to Police Station. He returned to the spot from the Police Station at 3.30 P.M.

12. Statement of PW-6 HC Pal Singh is formal in nature.

13. PW-7 SI Managat Ram has deposed that on 16.1.2007 Constable Bhup Singh brought one Rukka mark 'X' sent by ASI Shiv Chand. On the basis of mark 'X' FIR Ex.PW-7/A was recorded.

14. PW-8 Pritam Chand has deposed that on 16.1.2007, ASI Shiv Chand handed over to him one big parcel and two small parcels sealed with seal impression 'A' which were stated to be contained charas. He resealed all the three parcels with his own seal having impression 'T'. ASI Shiv Chand handed over to him NCB form in triplicate. He had also taken specimen seal impression 'T' vide Ex.PW-8/A. He embossed seal impression 'T' on NCB form Ex.PW-8/B. He deposited the case property, i.e. three sealed parcels, NCB form, specimen seal impression with the MHC of Police Station, Aut.

15. Statement of PW-9 LHC Narpat Ram is formal in nature.

16. PW-10 ASI Shiv Chand has deposed the manner in which the accused was apprehended and sealing and seizure process was completed. He conducted the personal search of the accused and on checking a bag like cloth wrapped on his waist was found. In his cross-examination, he has deposed that they had proceeded on foot at 5.30 A.M. from the Police Post. There were several persons at about 11.30 A.M. at Zero Point, Bali Chowki. Rukka was written by him at 1.00 P.M. and the same was sent immediately after writing to the Police Station. He has prepared the Rukka. The case file was brought by Constable Bhup Singh to the spot at about 2.30 P.M. The photographs were developed at Mandi.

17. PW-1 Constable Pankaj Kumar has deposed that they left the Police Post in the morning for Nakkabandi at 9.00 A.M. PW-5 Constable Bhup Singh has deposed that they left at 5.30 A.M. PW-10 ASI Shiv Chand has deposed that they proceeded from Police Post, Bali Chowki at 5.30 A.M. on Nakkabandi duty. Thus, there is variance in the statements of PW-1 Pankaj Kumar, PW-5 Bhup Singh and PW-10 Shiv Chand about the time of departure from the Police Post for laying Nakkabandi. PW-5 Bhup Singh has deposed that he took the Rukka to the Police Station at 11.40 A.M. and came back at 3.30 P.M. PW-10 Shiv Chand has deposed that he has written Rukka at 1.00 P.M. and the same was sent through PW-5 Bhup Singh. Case file was brought by Bhup Singh to the Police Post at 2.30 P.M. According to the prosecution,

accused was intercepted and apprehended with contraband at 11.30 A.M. However, as per the contents of NCB-1 form, charas was seized on 16.1.2007 at 4.30 A.M. at Zero Chowk Bali Chowki. There is no consistency in the statements of PW-1 Pankaj Kumar nor PW-5 Bhup Singh nor PW-10 Shiv Chand.

18. According to the prosecution case, a bag like cloth was concealed by the accused below his garment. It was wrapped with his waist below his apparel as per the statements of PW-1 Pankaj Kumar, PW-5 Bhup Singh and PW-10 Shiv Chand. The police has not complied with the mandatory provisions of section 50 of the Narcotic Drug and Psychotropic Substances Act, 1985. The prosecution has failed to prove that contraband was recovered from the exclusive and conscious possession of the accused.

19. 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.

20. Consequently, the appeal is dismissed.

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

State of H.P. ..Appellant.

Vs.

1.Subhash Chand S/o late Anant Ram

2.Rajinder Paul S/o late Anant Ram ..Respondents.

1. Cr. Appeal No. 72 of 2008 filed Under Section 378 of the Code of Criminal Procedure 1973.

2. Cr. Appeal No. 119 of 2008 filed under Section 11(2) of Probation of Offenders Act 1958.

Judgment reserved on:6.8.2014
Date of Decision: October 14,2014,

Indian Penal Code, 1860- Section 307 - Accused inflicted a single blow upon the head of injured with Fauda, a sharp edged weapon- Held, that a single blow was given on the head of the injured- Injured became unconscious and fell on the ground- No further injury was inflicted upon the injured and the accused left the spot- The fact that the accused had not inflicted the injured despite opportunity to do so clearly shows that they had no intention to kill the injured- No case is made out for the commission offence punishable under Section 307 IPC. (Para-10)

Cases referred:

Hari Kishan & State of Haryana Vs. Sukhbir Singh and others, AIR 1988 SC 2127

Vasant Vithu Jadhav Vs. State of Maharashtra, 1997 (2) crimes 539

Ansaruddin Vs. State of MP and others, 1997 (2) crimes 157 MP

State of Madhya Pradesh Vs. Saleem alias Chamaru and another, 2005 SC 3996

Sarju Prasad Vs State of Bihar, AIR 1965 SC 843

Abhayanand Mishra Vs. State of Bihar, AIR 1961 SC 1698

State of Maharashtra Vs Mohd. Yakub and others, AIR 1980 SC 1111

Om Parkash Vs. State of Punjab, AIR 1961 SC 1782

For the appellant: Mr. B.S.Parmar & Mr.Vikram Thakur, Dy.AG and Mr.J.S.Guleria, Assistant Advocate General.

For the respondents: Mr.Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Both appeals are filed against the same judgment and sentence passed by learned trial Court in Sessions Case No. 18-D/VII/05/03 titled State of Himachal Pradesh Vs. Subhash Chand and another decided on 29.8.2007 hence both appeals are consolidated and disposed of vide same judgment as they arise out of the same judgment passed by learned trial Court.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 14.11.2002 at about 12.30 PM accused persons in furtherence of common intention voluntarily caused hurt to Smt Kamla Devi wife of Sh Amin Chand. It is further alleged by prosecution that accused persons also intimidated injured Smt Kamla Devi to cause her heath. It is further alleged by prosecution that on dated 14.11.2002 injured Smt Kamla Devi and other family members were working in their field and were cleaning water channel at about 3 PM. It is further alleged by prosecution that co-accused Rajinder Pal inflicted injuries upon the head of Smt Kamla Devi with 'Fauda' (Sharp edged weapon) and thereafter she fell down on the ground and became unconscious. It is further alleged by prosecution that thereafter beatings were given to Smt Kamla Devi by accused persons. It is further alleged by prosecution that Smt Kamla Devi suffered number of injuries upon her body. It is further alleged by prosecution that Anil Kumar and Sanjeev Kumar tried to rescue Kamla

Devi but they also sustained injuries in the scuffle. It is further alleged by prosecution that statement of Sanjeev Kumar Ext PW4/A was recorded. It is further alleged by prosecution that police prepared site plan Ext PW12/A. It is further alleged by prosecution that medical examinations of Smt Kamla Devi, Anil Kumar and Sanjeev Kumar were conducted. It is further alleged by prosecution that as per disclosure statement Ext PW5/B made by co-accused Rajinder Pal 'Fauda' (Sharp edged weapon) was recovered by the police. It is further alleged by prosecution that police took into possession salwar Ext P2 and scarf Ext P3 of injured Kamla Devi and seizure memo Ext PW4/B was prepared. Charge was framed against accused persons under Sections 323, 307 and 506 read with Section 34 IPC on dated 14.5.2003. Accused persons did not plead guilty and claimed trial

3. The prosecution examined as many as fourteen witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Dr.Anupama
PW2	Dr.Naresh Gupta
PW3	Smt Kamla Devi
PW4	Sh Sanjeev kumar
PW5	Sh Anil Kumar
PW6	Smt Raj Kumari
PW7	Sh Ami Chand
PW8	Sh Madan Lal
PW9	Smt Asha Devi
PW10	Sh Gopal Singh
PW11	Sh Surinder Singh
12	Sh Vinod Kumar
13	Sh Gulzari Lal
14.	Sh Ram Parkash

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

Sr.No.	Description:
Ext PW1/A	X-ray report

Ext PW2/A	MLC of injured Kamla Devi
Ext PW2/B	Application
Ext PW2/C	Application
Ext PW2/D	MLC of injured Sanjeev Kumar
Ext PW2/E	Application
Ext PW2/F	MLC of injured Anil Kumar
Ext PW4/A	Statement of injured Sanjeev Kumar U/S 154 Cr PC
Ext PW4/B	Memo
Ext PW5/A	Memo
Ext PW5/B	Disclosure statement
Ext PW5/C	Recovery memo
Ext PW8/A	Rojnamcha
Ext PW8/B	Endorsement
Ext PW9/A	FIR
Ext PW12/A	Site Plan
Ext PW13/A	Application
Ext PW14/A	Rojnamcha D.D No.12
Ext PW14/B	Rojnamcha D.D. No.17

5. Learned trial Court convicted accused persons under Sections 323, 325 and 506 IPC read with Section 34 IPC. Learned trial Court released the convicted persons under Section 4 of Probation of Offenders Act on their furnishing bonds to the tune of Rs.25,000/- each to maintain good conduct and be of good behaviour for a period of two years. Learned trial Court also directed accused persons to pay compensation to the tune of Rs.20,000/- (Twenty thousand) each to the injured persons. Feeling aggrieved against the judgment passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala two present appeals filed under Section 378 of the code of criminal procedure 1973 and under Section 11(2) of Probation of Offenders Act 1958.

6. We have heard learned Additional Advocate General appearing on behalf of the appellants and learned Advocate appearing on behalf of respondents and also gone through the entire record carefully.

7. Question that arises for determination before us in both appeals whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court committed mis-carriage of justice.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

8. PW1 Dr Anupama Radiologist has stated that she was working as Registrar in RPGMC Dharamshala since September 1999. She has stated that injured Kamla Devi was referred to her vide MLC 651/2002. She has stated that x-ray of injured Kamla Devi was conducted and as per x-ray report she did not see any fracture. She has stated that x-ray of the skull of injured Kamla Devi shows depressed fracture. She has stated that fracture could be possible with a blow of any hard object. She has stated that she issued x-ray report Ext PW1/A which bears her signature.

8.1 PW2 Dr Naresh Gupta has stated that he was posted as Medical Officer in Zonal Hospital Dharamshala since June 2001. He has stated that on dated 14.11.2002 at about 2.45 PM he examined injured Kamla Devi wife of Ami Chand resident of village Tangroti and observed following injuries. (1) There was contusion deep red in colour and 12 cm x 6 cm in size on the front of upper left leg and there was soft tissue swelling at the site and x-rays were advised. (2) There were multiple abrasions and lacerations along with soft tissue swelling on the middle of front of right thigh. (3) There was a split wound about 4 cm in length and ¾ cm in depth on the scalp in the middle and on the left side and the margins were irregular and averted. (4) On examination there was no external injury, no swelling and no tenderness were found. The injured was referred to Surgeon for examination and opinion. The injuries were caused with blunt weapon within a period of three hours of the examination. He has stated that x-ray examination reveals depressed fracture of left parietal bone. He has stated that injuries No. 1 and 2 were simple in nature and injury No.3 was grievous. He has stated that he issued MLC Ext PW2/A which bears his signature. He identified injured Kamla Devi in Court. He has stated that injuries sustained by Smt Kamla Devi could have been dangerous to life. He has stated that he also examined injured Sanjeev Kumar and observed following injuries. (1) There was a contusion deep red in colour on the front of lower half of right thigh and it was 6 cm x 4 cm in size. (2) There was contusion 6 cm x 4 cm in size and deep red in colour on the front of lower half of right thigh. He has stated that both injuries were simple and he issued MLC Ext PW2/D which bears his signature. He has stated that he also examined injured Anil Kumar and observed that there was swelling of the soft tissue on the outer aspect of upper half of left leg and pain in front of the neck. He has stated that both injuries were simple in nature caused with blunt weapon. He has stated that injuries could be possible with the blows of 'Fauda' (Sharp edged weapon) Ext P1 and with sticks and fist

blows. He has stated that injury No.3 could be possible by way of fall on hard surface like a stone. He has stated that injuries mentioned in MLC of Anil Kumar and Sanjeev Kumar are superficial in nature. He has stated that injuries sustained by injured persons could have been dangerous to their life.

8.2 PW3 Smt Kamla Devi has stated she is illiterate. She has stated that her husband is working in CRPF at Ayodhya. She has stated that she has two sons. She has stated that younger son is working at Chandigarh and her elder son Anil Kumar is residing at village Ramehar Tangroti. She has stated that when she returned from village Pathiyar in the evening then her sister in law Sangindra Devi told her that accused persons namely Rajinder Pal and Subhash Chand abused her and thereafter she reported the mater to police. She has stated that on dated 14.11.2002 accused persons were summoned by the police at police Chowki Yol at 3 PM. She has stated that at about 12.30 PM she and her sister in law Raj Kumari were in the field and her son Anil Kumar and Sanjeev Kumar were cleaning water channel to the field. She has stated that she and Raj Kumari were talking to each other while working in the field. She has stated that co-accused Subhash Chand came in the field armed with sticks and co-accused Rajinder Pal armed with 'Fauda' (Sharp edged weapon). She has stated that co-accused Rajinder Pal threatened her that why she filed complaint against them in Police Chowki Yol and she replied that accused persons have abused her. She has stated that thereafter co-accused Rajinder Pal came to her and gave a blow of 'Fauda' (Sharp edged weapon) on her head and she fell down on the ground and became unconscious. She has stated that her son and her nephew were also present at the spot. She has stated that she regained her consciousness at CMC Ludhiana. She has stated that she was medically examined and she identified the accused persons in Court. She has denied suggestion that she has sustained injury on account of fall on the ground. She denied suggestion that false case has been filed against accused persons. She denied suggestion that co-accused Rajinder Pal did not threat her in the field. She denied suggestion that co-accused Rajinder Pal was not armed with 'Fauda' (Sharp edged weapon). She denied suggestion that Sanjeev Kumar and Anil Kumar were not cleaning water channel in the field.

8.3 PW4 Sanjeev Kumar has stated that on dated 14.11.2002 at about 12.30 PM he was irrigating his field. He has stated that Anil Kumar and Kamla Devi were also irrigating their field adjacent to his field. He has stated that when Kamla Devi and Raj Kumari were talking to each other in the field then co-accused Rajinder Pal came and inquired from Kamla Devi as to why she has filed complaint against him in police station Yol. He has stated that co-accused Subhash Chand was also present at the spot. He has stated that thereafter Kamla Devi replied to accused persons that because accused persons have quarreled with her in the evening and on account of quarrel she filed complaint in police chowki Yol. He has stated that thereafter co-accused Rajinder Pal had given blow of 'Fauda' (Sharp edged weapon) on the head of Kamla Devi and co-accused Sanjeev Kumar had given beatings to Kamla Devi with

sticks. He has stated that he and Anil Kumar and Raj Kumari had tried to rescue Kamla Devi from the clutches of co-accused Subhash Chand. He has stated that accused persons have also beaten him. He has stated that blood started oozing out from the wound of Kamla Devi and thereafter Kamla Devi fell down on the ground and became unconscious. He has stated that thereafter co-accused Rajinder Pal and co-accused Subhash Chand left the place of occurrence and also threatened with dire consequences. He has stated that thereafter injured Kamla Devi brought to zonal hospital Dharamshala for medical treatment. He has stated that police recorded his statement Ext PW4/A. He has stated that he was also medically examined by the doctor vide MLC Ext PW2/D which bears his signature. He has stated that Kamla Devi and Anil Kumar were also medically examined. He has stated that blood stained clothes of Kamla Devi were produced which were took into possession by police vide memo Ext PW4/B. He denied suggestion that co-accused Rajinder Pal did not cause any injury on the head of Kamla Devi by way of 'Fauda' (Sharp edged weapon). He denied suggestion that co-accused Subhash Chand did not give any beating with sticks. He denied suggestion that he and Anil Kumar did not try to rescue Kamla Devi from the clutches of accused persons. He denied suggestion that accused persons did not cause any injury to him and Anil Kumar. He denied suggestion that he was not present in his field. He denied suggestion that he did not see any verbal altercation between accused persons and Kamla Devi.

8.4 PW5 Anil Kumar has stated that on dated 14.11.2002 at about 12.30 PM he and his mother Kamla Devi were irrigating the field. He has stated that Sanjeev Kumar was also irrigating his field. He has stated that he and Sanjeev Kumar were cleaning water channel for smooth flowing of water in the canal. He has stated that his mother was talking with Raj Kumari. He has stated that accused persons came at the spot and asked his mother as to why she had filed a complaint against them in police post Yol. He has stated that his mother replied that she filed complaint in police post because accused persons have quarreled with her in the evening. He has stated that co-accused Rajinder Pal was armed with 'Fauda' (Sharp edged weapon) in his hand. He has stated that both accused persons came into their field where his mother was standing. He has stated that thereafter co-accused Rajinder Pal gave a blow of 'Fauda' (Sharp edged weapon) on the head of his mother and co-accused Subhash Chand gave beating to his mother with sticks. He has stated that his mother sustained injury and blood started oozing out from the head of his mother. He has stated that he, Sanjeev Kumar and Raj Kumari tried to rescue his mother. He has stated that thereafter accused persons also gave beatings to him and his brother Sanjeev Kumar. He has stated that he and Sanjeev Kumar sustained injuries. He has stated that accused persons also threatened them with dire consequence. He has stated that when his mother sustained injury on her head she fell down on the ground and became unconscious. He has stated that thereafter Sanjeev Kumar and other members of his family took his mother to zonal hospital Dharamsala for medical treatment. He

has stated that thereafter injured persons were medically examined. He has stated that co-accused Subhash Chand handed over one stick to police officials vide memo Ext PW5/A. He has stated that co-accused Rajinder Pal gave disclosure statement Ext PW5/A to the police that he could recover 'Fauda' (Sharp edged weapon) which was hidden in his house. He has stated that police has recovered 'Fauda' (Sharp edged weapon) vide recovery memo Ext PW5/C. He has stated that salwar Ext P2 and scarf Ext P3 were the same which were worn by his mother Kamla Devi at the time of occurrence. He has stated that stick Ext P5 which was in possession of co-accused Subhash Chand and 'Fauda' (Sharp edged weapon) Ext P1 was in possession of co-accused Rajinder Pal at the time of incident. He has stated that co-accused Rajinder Pal lodged report at Police Post Yol on dated 14.11.2002. He has stated that he does not know that Kamla Devi had caused injury on the knee portion. He has stated that he does not know that Raj Kumari and Rattani Devi had given fist blows on the chest of co-accused Rajinder Pal. He has stated that he does not know that co-accused Rajinder Pal was brought to Primary Health Center Chamunda for medical examination. He has denied suggestion that co-accused Subhash Chand did not cause any injury to Kamla Devi by way of stick. He denied suggestion that he and Sanjeev Kumar did not rescue Kamla Devi from the clutches of accused persons. He denied suggestion that he was not present in the field. He denied suggestion that he did not see any fight between accused persons and Kamla Devi. He denied suggestion that being a son of Kamla Devi he deposed falsely.

8.5 PW6 Smt Raj Kumari has stated that on dated 14.11.2002 at about 12.30 PM she and Kamla Devi were talking with each other in the field. She has stated that Sanjeev Kumar and Anil Kumar were irrigating their fields. She has stated that co-accused Rajinder Pal asked from Kamla Devi as to why she filed criminal complaint. She has stated that Kamla Devi replied that because accused persons quarreled with Kamla Devi in the previous evening then she filed criminal complaint against accused persons. She has stated that co-accused Rajinder Pal was armed with 'Fauda' (Sharp edged weapon) and co-accused Subhash Chand was armed with stick and thereafter accused persons started beating to Kamla Devi. She has stated that co-accused Rajinder Pal had given blow of 'Fauda' (Sharp edged weapon) on the head of Kamla Devi. She has stated that co-accused Subhash Chand given beatings to Kamla Devi with stick blows. She has stated that when Anil Kumar and Sanjeev Kumar tried to rescue Kamla Devi from the clutches of accused persons then both accused persons also gave beatings to Anil Kumar and Sanjeev Kumar. She has stated that Kamla Devi received injuries on her head by way of 'Fauda' blow and blood started oozing out from her wound. She has stated that Kamla Devi fell down on the ground and became unconscious. She has stated that accused persons have also threatened Kamla Devi with dire consequences when they left the place of incident. She has denied suggestion that Sanjeev Kumar and Anil Kumar were not irrigating their field. She denied suggestion that co-accused Rajinder Pal did not talk with Kamla Devi. She denied suggestion that co-accused

Rajinder Pal had not given any blow of 'Fauda' (Sharp edged weapon) on the head of Kamla Devi. She denied suggestion that co-accused Subhash Chand had not given any blow of stick to Kamla Devi. She denied suggestion that she was not present in the field. She denied suggestion that she did not see any dispute. She denied suggestion that accused persons did not cause any injury to Anil Kumar and Sanjeev Kumar. She denied suggestion that on account of close relation with Kamla Devi she deposed falsely against accused persons.

8.6 PW7 Ami Chand has stated that he was working as Havaldar in CRPF at Chandigarh. He has stated that at the time of incident he was posted at Faizabad . He has stated that on dated 14.11.2002 he was informed telephonically by his son that co-accused Subhash Chand and co-accused Rajinder Pal had beaten his wife. He has stated that thereafter on dated 16.11.2002 he reached at home. He has stated that he was informed that his wife was took to CMC Ludhiana for medical treatment and thereafter he left to CMC Ludhiana. He has stated that his wife was not in a position to speak. He has stated that from 15.11.2002 to 30.11.2002 his wife remained admitted in CMC Ludhiana and thereafter she was discharged from hospital. He has stated that he took his wife to his house on dated 1.12.2002. He has stated that in his house the condition of his wife again became deteriorated and she was again admitted in CMC Ludhiana. He has stated that he handed over blood stained salwar Ext P2 and scarf Ext P3 of his wife to the police vide memo Ext PW4/B which bears his signature.

8.7 PW8 HC Madan Lal has stated that on dated 14.11.2002 vide DD No.12 Ext PW8/A he went to zonal hospital Dharamshala where he recorded the statement of Sanjeev Kumar Ext PW4/A as per his version. He has stated that thereafter statement along with his endorsement Ext PW8/B was sent to Police Station Dharamshala for registration of case through Constable Parkash Chand. He has stated that he prepared an application for medical examination of injured Kamla Devi and Sanjeev Kumar and medical officer has opined that injured Kamla Devi was not fit to give any statement. He has stated that he obtained MLC report of Sanjeev Kumar Ext PW2/B and MLC Ext.PW2/A of Kamla Devi.

8.8 PW9 Asha Devi has stated that in the year 2002 she was posted as Investigating Officer at Police Station Dharamshala. She has stated that on dated 14.11.2002 a telephonic message was received from Medical Officer Zonal Hospital Dharamshala that two persons were brought to hospital in an injured condition. She has stated that information was recorded in daily diary No.12 Ext PW8/A. She has stated that Constable Madan Lal along with other police officials were deputed to Zonal Hospital Dharamshala. She has stated that she received statement of Sanjeev Kumar under Section 154 Cr PC through HHC Parkash Chand. She has stated that she made endorsement on the same and recorded FIR Ext PW9/A which bears her signature and thereafter she handed over case file to HHC Parkash Chand.

8.9 PW10 HC Gopal Singh has stated that in the year 2002 he was posted as Head Constable at police station Dharamshala. He has stated that he brought roznamcha register on dated 14.11.2002. He has stated that rapat No. 12 and 17 were received from police on the basis of which FIR was recorded. He has stated that case property and one parcel containing clothes were deposited with him by SI Gulzari Lal. He has stated that case property was intact till remained with him.

8.10 PW11 Surinder Singh has stated that in the year 2002 he was posted as Station House Officer at police station Dharamshala. He has stated that on completion of investigation he prepared challan and submitted the same in Court.

8.11 PW12 Vinod Kumar has stated that in the year 2002 he was posted as Incharge in police post Yol. He has stated that he received case file on dated 14.11.2002. He has stated that he recorded the statements of three witnesses namely Sanjeev Kumar, Anil Kumar and Raj Kumari. He has stated that he proceeded to the spot on dated 15.11.2002 and prepared site plan Ext PW12/A. He has stated that after perusal MLC of Kamla Devi he added Section 307 IPC. He denied suggested that he has recorded false statement of Kamla Devi.

8.12 PW13 Gulzari Lal has stated that in the year 2002 he was posted as SI at Police Station Dharamshala. He has stated that on dated 16.11.2002 he received case file for investigation. He has stated that he recovered stick from co-accused Subhash Chand and he arrested co-accused Subhash Chand. He has stated that stick was taken into possession vide memo Ext PW5/A. He has stated that stick was identified by Sanjeev Kumar. He has stated that on dated 2.12.2002 co-accused Rajinder Pal was arrested by him. He has stated that clothes of Kamla Devi were also took into possession. He has stated that Salwar Ext P2 and scarf Ext P3 were took into possession vide memo Ext PW4/B. He has stated that on dated 4.12.2002 co-accused Rajinder Pal made a disclosure statement stating that he had hidden weapon of offence in his office. He has stated that stick and 'Fauda' (Sharp edged weapon) were handed over to MHC during investigation. He has stated that information of arrest was provided to accused persons. He has stated that he also obtained opinion of the doctor. He has stated that he recorded the statements of the witnesses as per their deposition. He has stated that he was not aware that a report was lodged by co-accused Rajinder Pal against the complainant party in police post Yol. He has stated that he does not know that co-accused Rajinder Pal was medically examined. He has denied suggestion that he has suppressed material facts from Court. He denied suggestion that no disclosure statement was given by accused persons. He denied suggestion that stick was not recovered.

8.13 PW14 HHC Ram Parkash has stated that he was posted as Constable at police post Yol. He has stated that on dated 14.11.2002 Anil Kumar came to him and told that he was beaten by accused persons. He has stated that he made entry in the daily diary Ext PW14/A. He has stated that he sent Anil Kumar for medical examination through

Constable Pardeep Kumar. He has stated that he informed Anil Kumar that injury was simple and does not disclose cognizable offence. He has stated that on dated 14.11.2002 co-accused Rajinder Pal had lodged a report in police post Yol regarding beatings.

9. Statements of accused persons were recorded under Section 313 Cr PC. Accused persons have stated that they have been falsely implicated in the present case.

(A) Finding in Criminal Appeal No. 72 of 2008 titled State of HP Vs. Subhash Chand filed under Section 378 of the Code of Criminal Procedure 1973.

10. Submission of learned Additional Advocate General appearing on behalf of State that intention of the accused persons was to kill Smt Kamla Devi because injury was inflicted upon the head of injured Kamla Devi with 'Fauda' (Sharp edged weapon) and accused persons be convicted under Section 307 read with section 34 IPC is rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in AIR 1988 SC 2127 titled Hari Kishan & State of Haryana Vs. Sukhbir Singh and others that intention or knowledge of the accused must be such as is necessary to constitute murder. It was held in case reported in 1997 (2) crimes 539 titled Vasant Vithu Jadhav Vs. State of Maharashtra that question of intention to kill or the knowledge of death in terms of Section 307 IPC is a question of fact and not one of law and it was held that it would dependent on the facts of case. It was held in case reported in 1997 (2) crimes 157 MP titled Ansaruddin Vs. State of MP and others that it is not necessary that injury capable of causing death should have been inflicted. It was held that material to attract the provisions of Section 307 IPC is the guilty intention or knowledge with which the act was performed irrespective of its result. It was held that intention and knowledge should be inferred from the totality of circumstances and cannot be measured merely from the results. It was held in case reported in 2005 SC 3996 titled State of Madhya Pradesh Vs. Saleem alias Chamaru and another that Court has to see whether the act irrespective of its result was done with the intention or knowledge to cause death. It was held in case reported in AIR 1965 SC 843 titled Sarju Prasad Vs State of Bihar that intention or knowledge should be gathered from the following factors.(1) Nature of the weapon used (2) Intention of the accused at the time of act. (3) Motive of the accused. (4) Portion where the injury caused. (5) Severity and persistence of blows given. It was held in case reported in AIR 1961 SC 1698 titled Abhayanand Mishra Vs. State of Bihar that attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence which is a step towards the commission of the offence. It was held in case reported in AIR 1980 SC 1111 titled State of Maharashtra Vs Mohd. Yakub and others that attempt under Section 307 IPC is a mixed question of fact and law depending largely on the circumstances of each particular case. It was held in case reported in AIR 1961 SC 1782 titled Om Parkash Vs. State of Punjab that offence under

Section 307 IPC is committed when the accused has an intention to commit murder and in pursuance of that intention does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. In the present case it is proved on record that one single blow injury was given upon the head of injured Kamla Devi by co-accused Rajinder Pal. It is also proved on record that thereafter injured Kamla Devi became unconscious and fell down on the ground. It is also proved on record that thereafter accused persons did not inflict any injury upon Kamla Devi and left the place of incident. The fact that accused persons did not give another blow to injured Kamla Devi when she fell down upon the ground despite having opportunity to do so clearly proves beyond reasonable doubt that accused persons have no intention or knowledge to kill the injured in the present case. Even as per testimony of PW1 Dr Anupama only depressed fracture was observed. PW2 Dr Naresh Gupta has stated that depressed fracture upon left parietal bone was observed. In view of the above stated facts we hold that learned trial Court has rightly held that accused persons have no intention and knowledge to kill injured kamla Devi and we hold that learned trial Court has rightly acquitted the accused persons qua offence punishable under Section 307 IPC. We also hold that learned trial Court has properly appreciated oral as well as documentary evidence placed on record qua offence punishable under Section 307 IPC.

(B) Finding in Criminal Appeal No. 119 of 2008 titled State of HP Vs. Subhash Chand and another filed under Section 11(2) of Probation of Offenders Act 1958.

11. Submission of learned Additional Advocate General appearing on behalf of the appellants that learned trial Court has illegally granted benefit of Probation of Offenders Act 1958 to the convicted persons in the present case is rejected being devoid of any force for the reason hereinafter mentioned. Power of the Court to release certain offenders on probation of good conduct has been defined under Section 4 of the Probation of Offenders Act 1958. As per section 4 of the Probation of Offenders Act 1958 when any person is found guilty of having committed an offence nor punishable with death or imprisonment for life then benefit of Probation of Offenders Act 1958 can be granted by the Court. In the present case the accused persons have been convicted under Sections 323, 325 and 506 read with Section 34 IPC. The maximum sentence of imprisonment under Section 323 IPC is one year, under Section 325 IPC is seven years and under Section 506 in Part II is seven years. It is held that offence punishable under Sections 323, 325 and 506 IPC read with Section 34 IPC are covered under the Probation of Offenders Act 1958. Learned trial Court had granted the benefit of Probation of Offenders Act 1958 to the convicted persons after obtaining the report of District Welfare-cum-Probation Officer Kangra at Dharamshala. Learned Probation Officer has submitted in his report that convicted persons bear good moral character and antecedents. Learned District Welfare-cum-Probation Officer Kangra at Dharamshala has recommended for the release of the convicted persons under the Probation of Offenders Act 1958. Learned Probation Officer had also

sought the report of Pradhan Gram panchayat Tangroti District Kangra HP and also recorded the statement of local people where the convicted persons are residing. In view of the recommendation of the Probation Officer learned trial Court has rightly granted the benefit of Probation of Offenders Act 1958 to the convicted persons in the present case.

12. Submission of learned Additional Advocate General that learned trial Court has not granted adequate compensation to injured persons keeping in view the fact that injury was inflicted upon the head of Kamla Devi by way of 'Fauda' (Sharp edged weapon) and keeping in view the medical report injured Kamla Devi had sustained depressed fracture upon her head on account of injuries inflicted by convicted persons is accepted for the reason hereinafter mentioned. Learned trial Court had directed the convicted persons to pay compensation amount to the tune of Rs.20,000/- (Twenty thousand) each to three injured persons. We hold that learned trial Court has not granted adequate compensation to injured persons keeping in view the injuries sustained by injured persons. We hold that enhancement of compensation amount is essential in the present case in the ends of justice.

13. In view of the above stated facts we hold that adequate compensation has not been awarded to injured persons in the present case by learned trial Court. Hence considering the nature of injuries sustained by the injured persons we enhanced compensation amount to the tune of Rs.1,00,000/- (One lac). Out of total compensation amount Rs.60,000/- (Sixty thousand) will be paid to injured Smt Kamla Devi and remaining amount of Rs.40,000/- will be paid to both injured Sanjeev Kumar and Anil Kumar equally. Sentence part of learned trial Court modified to this extent only and we affirmed judgment part of learned trial Court. Both appeals are disposed of. A certified copy of the judgment will be placed in Criminal Appeal No. 119 of 2008 titled State of HP Vs. Subhash Chand. Records of learned trial Court be sent back forthwith along with certify copy of judgment for compliance forthwith. Pending application(s) if any are also disposed of.

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

Ravi Kumar .....Petitioner.

Versus

Reeta Devi and another ...Respondents.

Cr. Revision No. 197 of 2014

Date of decision : 14th October, 2014

Indian Evidence Act, 1872- Section 112- The wife had given birth to a child within six months of marriage- The husband claimed that DNA test

should be conducted on the child to prove the paternity- The husband had earlier filed a petition for annulment of the marriage in which it was held that the husband had failed to prove that he had no access to wife prior to the marriage- Held, that the wife had taken a specific stand that husband had access to her prior to marriage- This stand had gone un-rebutted and the findings recorded by the Additional District Judge have attained the finality, therefore, the court could not order the DNA Test as a matter of course- The court has to exercise the discretion of ordering DNA Test cautiously after weighing all pros and cons and satisfying the test of imminent need for such an order- The court cannot allow the father to bastardize the child on his mere asking.

(Para-12, 13)

Cases referred:

Narayan Dutt Tiwari vs. Rohit Shekhar and another (2012) 12 SCC 554

Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another AIR 2014 SC 932

For the Petitioner : Mr. Vikram Thakur and Mr. Vivek Thakur, Advocates.

For the Respondents: Ms. Rita Goswami, Advocate, with Ms. Komal Chaudhary, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Section 397 of the Code of Criminal Procedure is directed against the order dated 19.4.2014 passed by learned Additional Chief Judicial Magistrate, Joginder Nagar, District Mandi, H.P. in Cr.M.A. No. 226-IV/2013 whereby he has ordered the petitioner to pay interim maintenance of Rs.1,000/- each to the respondents and has declined the request of the petitioner for DNA test upon the respondent No.2.

2. The facts, in brief, may be noted. The marriage between the petitioner and respondent No.1 was solemnized according to Hindu rites on 12.12.2002 at village Patta, Tehsil Joginder Nagar, District Mandi, H.P. The respondent No.1 gave birth to respondent No.2 on 30.6.2003 at Sanjivan Hospital, Mandi. It is the allegation of the petitioner that the child was born after full term delivery, while only a period of six months had elapsed after the marriage of the petitioner and respondent No.1 and accordingly when the petitioner asked for an explanation, respondent No.1 and her parents started pressurizing the petitioner to accept the respondent No.2 as his son. It is further claimed that in order to increase the magnitude of harassment towards the petitioner, respondent No.1 and her parents got registered a false case against the petitioner under

Section 498-A IPC at Police Station, Joginder Nagar, District Mandi, in which case he was acquitted.

3. It is further claimed that in order to get out of the repeated harassment faced by the petitioner, he filed a petition under Section 12-D read with Section 13-1 (a) of the Hindu Marriage Act for dissolution and annulment of marriage, which was dismissed by the learned Additional District Judge (Fast Track Court), Mandi on 31.3.2012.

4. The respondents on the other hand, filed a petition under Section 125 of the Code of Criminal Procedure for grant of maintenance at the rate of Rs.5,000/- per month to each of the respondents and also sought litigation expenses amounting to Rs.20,000/-.

5. The petitioner filed reply and disowned respondent No.2 to be his son and he further contended that DNA test should be conducted on the respondent No.2, so as to prove his paternity and that the respondent (petitioner) was ready to bear all the expenses qua the DNA test. Vide order dated 19.4.2014, the learned Additional Chief Judicial Magistrate, Joginder Nagar, Mandi allowed the petition for grant of maintenance, which order is impugned in these proceedings as being against the facts and law.

6. The respondents further contended that in the proceedings filed by the petitioner under Section 12-D for annulment and dissolution of marriage, it had been specifically pleaded that respondent No.2 had not been born out of the marriage inter se the petitioner and respondent No.1. After the parties led their evidence, the learned Court below has given specific findings that the petitioner had failed to prove that he had no access to respondent No.1 prior to solemnization of marriage and, therefore, had failed to displace the presumption under Section 112 of the Evidence Act. It was further found that the evidence on record did not support the case of the petitioner that at the time of marriage he was ignorant about the pregnancy of the respondent No.1. It was further submitted that in the above stated position, the order passed by the learned Additional District Judge (Fast Track Court) having attained finality, it did not lie in the mouth of the petitioner to question the paternity of respondent No.2 repeatedly.

7. I have heard Mr. Vikram Thakur, assisted by Mr. Vivek Thakur, learned counsel for the petitioner and Ms. Rita Goswami assisted by Ms. Komal Chaudhary, learned counsel for the respondents and have also gone through the records carefully.

8. The petitioner has agitated that this is a fit case where in order to know the real biological father of respondent No.2, it was necessary, he be subjected to a DNA test because admittedly the child was born within 200 days of the marriage and no presumption of legitimacy under Section 112 of the Evidence Act could be invoked in the present case.

9. Learned counsel for the petitioner in support of first submission has relied upon the judgment of the Hon'ble Supreme Court

in ***Narayan Dutt Tiwari vs. Rohit Shekhar and another (2012) 12 SCC 554.*** In that case, the Hon'ble Supreme Court affirmed the order passed by the Delhi High Court directing Sh. Tiwari to undergo a DNA test, so as to establish the relationship of father and son between the petitioner and respondent therein.

10. The learned counsel for the petitioner would then rely upon the judgment of the Hon'ble Supreme Court in ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another AIR 2014 SC 932*** to contend that when the presumption of Section 112 of the Evidence Act is not applicable, then the only basis by which the Court can come to know about the parentage of person by adopting scientific test of DNA. He has relied upon the following observations of the Hon'ble Supreme Court:

> *"16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.*
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> *17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.*
>
> *18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those*

circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice. "

11. The argument of the learned counsel for the petitioner though appears to be attractive, but it only merits rejection because in the proceedings for dissolution and annulment of marriage, it was the specific stand of the respondent No.1 that the petitioner had access to her prior to marriage as would be clear from the following averments made in the rejoinder to those proceedings:

"1. That the para No.1 of reply is not admitted to be correct, except admission of the replying respondent pertaining to marriage. Be it stated here that from the very inception of the marriage, the petitioner is/was regularly residing in the conjugal society of respondent in the house of respondent, situated in Village Makrana and respondent is/was serving as carpenter at Place Balakrupi, one and half K.M. from the residential house of respondent. It is not out of place to mention here that betrothal ceremony inter alia the parties to lis has commenced on dated 13.10.2002 by that time the petitioner was undergoing the course of tailoring at place Mandi, Palace Colony, Mandi (H.P.) and was residing at Khaliyar, the respondent persistently requested the petitioner for dating, and in the intimate moments the respondent has commenced sexual intercourse, despite the decline for the same by petitioner, who was made to understand by respondent that as the marriage has already been fixed on dated 12.12.2012, as such, he has got prerogative of being would be husband upon the petitioner, doth petitioner could not dare to annoy the respondent, resultantly petitioner conceived the child, which fact was duly in the knowledge of respondent and on similar facts the H.M.P. No. 30/2005 (16/2004) has since been dismissed, wherein the bone of contention was based on the same false accusation of adultery but factum of access of respondent with petitioner has since been proved, consequently petition was dismissed and now having no prima-facie case and no plausible reason to assail and re-allege the adultery and call for DNA test is only pretext to make out the false defence, which even otherwise exists none in fact or law and respondent cannot be allowed to take the advantage of his own

wrong doings. It is reasserted to be correct that out of the wedlock of petitioner No.1 and respondent one son namely Ankit Kumar, petitioner No.2 was born on 30.06.2003, it is altogether wrong and denied that the petitioner No.1 after the marriage allowed the respondent to have sexual intercourse with her for two months and thereafter the petitioner No.1 refuse to have the same with the respondent and started making excuses to have pain in her stomach as alleged in this para of reply. It is partly correct that on 30.6.2003 petitioner reveal her mother in law that she is suffering pain in her stomach and she was hospitalized in Govt. Hospital, Joginder Nagar where petitioner alongwith respondent use to periodically got her check up and concerned doctor solicited that though the days for delivery are yet to be there but he observed, since it is a case of premature delivery, as such with the same endorsement referred the case to Zonal Hosital Mandi but respondent and his parents malafidely in connivance with their relations got master Ankit delivered in Sanjeevan Hospital, Mandi (H.P.) with the sole motive to create the concocted record, respondent in camouflage manner have twisted the real facts who is/was in know of the actual facts, that it is on account of his own bodily urge that prior to commencement of marriage he being having access to petitioner has gone through her, as such there was no occasion for any kind of surprise qua the pregnancy, it is totally wrong and denied that respondent before marriage never met with the petitioner and it is all baseless that before the solemnization of marriage the respondent has never any sexual intercourse prior to solemnization of marriage i.e. 12.12.2002 especially in view of the facts elucidated hereinabove, it is categorically denied that respondent inquired the matter from petitioner No.1 and her parents and they started pressurizing the respondent to accept the newly born child as child of respondent but respondent refuse to accept the child to be the child of respondent, whereas true matrix is that respondent is the father of child master Ankit, since the petitioner is suffering from titubations under this pretext respondent use to pass sarcastic remarks off and on and make the petitioner realise that respondent and his family are ashamed of her physique and use to call the petitioner as tharakmundi, not only this much but the respondent and his family members have tortured the petitioner, maltreated her which has resulted in the registration of the criminal case, though on technicalities all the accused were acquitted, the repeated allegations that petitioner No.1 was already pregnant at the time of marriage and it was concealed by the petitioner from the respondent and petitioner No.2 was not fathered by respondent all these allegations are without bases since respondent has regularly gone through the petitioner No.1 and enjoyed the matrimonial society was already in know of the facts that it is he who is the father of child and was knowing the fact of pregnancy, it is all whimsical that respondent did not smell that petitioner was pregnant, as such allegation to contrary as contained in this para of reply being wrong are denied."

12. These allegations of the petitioner have gone unrebutted and the findings recorded by the learned Additional District Judge (Fast Track Court) based on these pleadings dismissing the claim of the petitioner for annulment and dissolution of marriage, have attained finality and in such circumstances, this Court cannot order the DNA test in a matter of course as this would amount to having a roving inquiry and in fact Court would not risk this exercise which will virtually have the effect of branding the child as a bastard and mother as an unchaste woman.

13. In directing a person to undergo DNA test, there may not be a violation of the right to life or privacy of a person, but then the power of the Court to DNA test has to be exercised cautiously after weighing all "pros and cons" and satisfying that the "test of 'eminent need'" for such an order, is fulfilled. It cannot be directed on the mere asking of a party, the Court cannot allow a father, who is resisting parenthood at the cost of bastardizing the child on his mere asking.

14. In view of the specific findings recorded by the learned Additional District Judge (Fast Track Court) whereby it was held that the petitioner had access to respondent No.1 even prior to the marriage and the same admittedly have attained finality and after balancing the interest of the parties and after due consideration of the material on record, I do not find that it is a fit case where a DNA test is eminently needed or even call for.

15. Accordingly, there is no merit in this petition and the same is dismissed leaving the parties to bear their own costs.

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

Anand Chauhan ...Petitioner.

VERSUS

The Commissioner of Income Tax ...Respondent.

CWP No.5173 of 2014, with Ors.
Reserved on: 24.09.2014
Pronounced on: 15.10.2014.

Constitution of India, 1950- Article 226- The case of the petitioner was transferred from Shimla Circle-I to Chandigarh- Respondents contended that in view of the transfer the writ petition had become infructuous- Held, that merely because an order has been implemented

will not make the writ petition infructuous- Further held that the time spent from the date of passing of the stay order till the decision shall not be counted while computing the period of limitation.

(Para-16, 17)

Cases referred:

Nagar Mahapalika (Now Municipal Corpn.) vs. State of U.P. and others, (2006) 5 SCC 127

Nagesh Datta Shetti & Ors. vs. State of Karnataka & ors., (2005) 10 SCC 383

Union of India and others vs. Narender Singh, (2005) 6 SCC 106

Union of India vs. Ram Kumar Thakur, 2008 AIR SCW 7638

Union of India v. G.R. Prabhavalkar & Ors. [1973(4) SCC 183]

State of H.P. & ors. Vs. Prem Lal, CMP(M) No.1121 of 2014

For the Petitioner(s): Mr.N.K.Sood, Senior Advocate, with M/s Yashwardhan Chauhan, Neeraj Sharma and Pranay Pratap Singh, Advocates.

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

The following judgment of the Court was delivered:

Justice Mansoor Ahmad Mir, C.J.

In all these writ petitions, the petitioners have questioned the show cause notice, dated 25th June, 2014 and the order, dated 14th July, 2014, passed by the Commissioner of Income Tax, Shimla, H.P., whereby the cases of the petitioners have been ordered to be transferred from DCIT, Circle Shimla to ACIT/DCIT Central Circle-I, Chandigarh, on the grounds taken in the memo of Writ Petitions.

2. Precisely, the case of the petitioners is that the respondent i.e. the Commissioner of Income Tax, Shimla has, without any rhyme or reason, transferred their cases from Shimla Circle to Central Circle-I, Chandigarh, which is illegal and has affected and deprived the petitioners from effective hearing. Further, it is pleaded that they would not be in a position to contest/defend their cases.

3. Respondent has filed the reply(ies) and resisted the writ petitions on various grounds.

4. Mr.Vinay Kuthiala, learned Senior Advocate appearing for the respondent, raised a preliminary objection vis. a vis. maintainability of the writ petitions on the ground that the orders, impugned in the writ petitions, already stand implemented and therefore, he submitted that the writ petitions have become infructuous. The learned Senior Counsel

further submitted that the interim direction i.e. stay order granted is adversely affecting the respondent because the respondent is not in a position to draw proceedings as per the mandate of law and by efflux of time, the said proceedings would become time barred.

5. On the other hand, Mr.N.K. Sood, learned Senior Advocate, appearing for the petitioners, argued that the petitioners have questioned the impugned show cause notices and orders on various grounds taken in the writ petitions and the Court has to determine all such issues which have been raised and in case the Court comes to the conclusion that the impugned show cause notices and the orders are illegal and bad in law, then mere execution/implementation of the said impugned orders cannot be a ground to dismiss the writ petitions.

6. Learned counsel for the parties have only addressed arguments on the above preliminary issue, without entering into the merits of the cases.

7. The moot question to be answered at this stage is – Whether the execution/implementation of the orders would be a ground for dismissing the writ petitions at the threshold stage? The answer is in the negative for the following reasons.

8. The writ petitioners have questioned the impugned show cause notices and the orders on the ground that these are unconstitutional, illegal, bad in law and have resulted in depriving the petitioners from contesting their cases conveniently at Shimla.

9. The question - whether the show cause notices and the orders impugned are bad in law, are liable to be quashed or otherwise and whether the writ petitions would lie - is to be determined after hearing the parties on merits.

10. For determining the preliminary objection, the rival contentions of the parties have to be tested on the principles laid down by the Apex Court.

11. The Apex Court in **Nagar Mahapalika (Now Municipal Corpn.) vs. State of U.P. and others, (2006) 5 SCC 127,** in paragraphs 20, 21 and 22 has observed as under:

> "20. We, however, do not agree with the High Court that as by way of an interim order the award was directed to be implemented, the same should itself form the basis for dismissing the writ petition.
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> 21. The High Court exercised its discretion in not granting an interim relief in favour of the Appellant. In view of the refusal on the part of the High Court to grant an interim relief as was prayed for by the Appellant, the Appellant implemented the award pending the appeal which can only be subject to appeal, that would not mean that the High Court would not or should not go into the merit of the matter. In fact it is the duty of the High Court

to consider the appeal on merits. It is unfortunate that the writ petition filed in the year 1989 has been disposed of in 2004 but the Appellants cannot be blamed therefor. The Respondents might have continued in service for more than 14 years only because the High Court did not pass any interim order, but the same, in our opinion, should not have formed the basis for making the interim order absolute or for non-consideration of the merit of the matter.

22. In our opinion, the High Court did not adopt a correct approach in the matter."

12. The Apex Court in **Nagesh Datta Shetti & Ors. vs. State of Karnataka & ors., (2005) 10 SCC 383** also made similar observations. It is profitable to reproduce paragraphs 7 and 8 hereunder:

"7. As the factual scenario noted above goes to show specific challenge in the writ appeal was in respect of the direction given by learned Single Judge to grant occupancy rights to the respondents. That was the basic issue which was to be adjudicated by the Division Bench in the writ appeal. The basic issue, as noted above was whether the direction given by learned Single Judge could be maintained, when the matter was being remitted by learned Single Judge to the Tribunal for fresh adjudication. In a given case there can be limited remand and giving finality to an issue, may be permissible. In the present case the High Court had admitted the writ appeal to examine legality of such direction. Unfortunately, the Tribunal did not keep the proceedings pending though it was brought to its notice that the Writ Appeal had been admitted. Appellants have also contributed to the confusion to a great measure by not seeking stay of direction. In given cases the Court/Forum to which the matter is remitted can await decision in the appeal where the directions given are impugned. A copy of the order passed by the Tribunal pursuant to the direction given by learned Single Judge has been placed on record. It clearly shows that the Tribunal acted only on the basis of the direction given and on that ground alone granted occupancy rights.

8. The High Court was not justified in holding that the writ appeal had been rendered infructuous because of the subsequent decision of the Tribunal. Correctness of the order passed by learned Single Judge was being challenged in the writ appeal. Any decision taken by the Tribunal has to be per force subject to the decision in the writ appeal. Therefore, the Division Bench should have considered the matter on merits without concluding that the writ appeal had become infructuous."

13. The Apex Court in **Union of India and others vs. Narender Singh, (2005) 6 SCC 106,** also followed the same principle and held that by implementing an order, the challenge to the validity of the order is not wiped out and the order is not rendered redundant.

14. In a recent decision of the Apex Court in case **Union of India vs. Ram Kumar Thakur, 2008 AIR SCW 7638,** the Apex Court, while referring to its earlier decisions (supra), restated the same principle and held that mere implementation of the order cannot be a ground to dismiss the appeal or it cannot be said that the appeal has become infructuous. It is apt to reproduce paragraphs 2 to 7 as under:

> "2. Challenge in this appeal is to the judgment of a Division Bench of the Jammu and Kashmir High Court dismissing the appeal filed by the present appellants on the ground that the respondent had been reinstated in service pursuant to the judgment of the learned single Judge which was impugned in the writ appeal filed before the Division Bench. The High Court held that the appeal had therefore become infructuous.
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> 3. Learned counsel for the appellant submitted that the impugned order of the High Court has no legal basis. Merely because the impugned order before the High Court was implemented to avoid possible contempt proceedings that did not take away the right of the appellants to prefer an appeal and question correctness of the impugned order.
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> 4. Learned counsel for the respondent on the other hand supported the judgment.
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> 5. It has been noted by this Court that if even in cases where interim relief is not granted in favour of the applicant and the order is implemented that does not furnish a ground for not entertaining the appeal to be heard on merits. (See : Nagar Mahapalika v. State of U.P. [2006(5) SCC 127]. Similar view was also take in Nagesh Datta Shetti v. State of Karnataka [2005(10) SCC 383].
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> 6. In Union of India v. G.R. Prabhavalkar & Ors. [1973(4) SCC 183] it was observed at para 23 as follows:
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> > "23. Mr Singhvi, learned counsel, then referred us to the fact that after the judgment of the High Court the State Government has passed an order on March 19, 1971, the effect of which is to equate the Sales Tax Officers of the erstwhile Madhya Pradesh State with the Sales Tax Officers, Grade III of Bombay. This order, in our opinion, has been passed by the State Government only to comply with the directions given by the High Court. It was made during a period when the appeal against the judgment was pending in this Court. The fact that the State Government took steps to comply with the directions of the High Court cannot lead to the inference that the appeal by the Union of India has become infructuous."
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> Above position was also noted in Union of India v. Narender Singh [2005(6) SCC 106].
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> 7. Above being the position the impugned order of the High Court cannot be maintained and is set aside. The writ appeal shall be

heard by the High Court on merits about which we express no opinion. The appeal is allowed to the aforesaid extent. No costs."

15. Following the dictum of the Apex Court, this Court also in **CMP(M) No.1121 of 2014, titled State of H.P. & ors. Vs. Prem Lal,** laid down the same principle.

16. Having said so, the preliminary objection raised by the respondent fails and is rejected.

17. Coming to the second point raised by the learned Senior Counsel for the respondent that the interim direction i.e. stay order granted is adversely affecting the respondent since the actions which are to be drawn in a time bound manner would become time barred, we may observe that since the parties have not argued the cases on merits, it is not fair to return findings whether the stay is to be vacated or to be made absolute. However, it is made clear that in case any action becomes time barred in the interregnum, the period from the date of passing of the stay order shall be excluded, while computing the time limit.

18. Keeping in view the request made by the learned counsel for the respondent, we deem it proper to hear these writ petitions expeditiously.

19. List all the petitions for hearing on 18.11.2014.

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

Court on its own motion ...Petitioner.

VERSUS

The H.P. State Cooperative Bank Ltd. and others.

...Respondents.

CWPIL No.9 of 2014.
Reserved on: 16.09.2014
Pronounced on: 15th October, 2014

Income Tax Act, 1961- Section 194 A- Income Tax Authorities issued a circular to the banks to deduct the tax on the interest accruing on the compensation deposited with them- Held, that the compensation in lieu of death of person or bodily injury does not amount to income- Interest accrued on term deposit will also not amount to income and the circular was contrary to the mandate of granting compensation-Income Tax Authorities directed to refund the amount with interest at the rate of 12% from the date of deduction till payment, within six weeks.

(Para-14, 23)

Cases referred:

N.K.V. Bros. (P.) Ltd. vs. M. Karumai Ammal and others etc., AIR 1980, SC 1354

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

Savita vs. Bindar Singh & others, 2014 AIR SCW 2053

Ghaziabad Development Authority vs. Dr.N.K. Gupta, 2002 INDLAW NCDRC 189

Haryana Urban Development Authority vs. Dev Dutt Gandhi, (2005) 9 SCC 497

Commissioner of Income-Tax vs. Ghanshyam (HUF), [2009] 315 ITR 1(SC) 1

For the Petitioner: Mr.Vishal Mohan, Advocate, as Amicus Curiae.

For the Respondents: Mr.Ajay Mohan Goel, Advocate, for respondents No.1 to 3.

Mr.Vinay Kuthiala, Senior Advocate, with Ms.Vandana Kuthiala and Mr.Diwan Singh Negi, Advocates, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Justice Mansoor Ahmad Mir, C.J.

The Registrar (Judicial) of this Court had put up a note that Bank Authorities are making tax deductions on interest accrued on the term deposits i.e. fixed deposits made by the Registry in terms of the orders passed by the Court in Motor Accident Claims cases. The matter was referred to the Finance/Purchase Committee for examination. The Committee convened its meeting on 20th May, 2014 and was of the view that since the dispute involved is intricate and public interest is involved, therefore, it was recommended that the matter requires consideration on judicial side. The recommendation of the Committee was treated as Public Interest Litigation and suo motu proceedings were drawn.

2. Notices were issued to the respondents, who filed objections.

3. Respondents No.1 to 3, in their joint reply, pleaded that initially they were not deducting the tax on the said deposits, but the objections were raised by the concerned Authorities and that is why they started deducting the tax. Respondents No.1 to 3 have specifically averred in paragraphs 3 to 9 of their reply as to how they started making tax deductions.

4. Respondents No.4 and 5 also filed the reply and pleaded that in terms of the Circular No.8/2011 (F.No.275/30/2011-IT(B)], dated 14.10.2011, (Annexure-4, with the reply), issued by the Income Tax Authorities, the income tax is to be deducted on the interest periodically

accruing on the deposits made on the court orders to protect the interest of the litigants.

5. Precisely, the case of the respondents is that they are bound to deduct tax in terms of the circular, dated 14.10.2011, (Annexure-4).

6. We have heard the learned counsel for the parties.

7. The circular, dated 14.10.2011, issued by the Income-tax Authorities, is not in tune with the mandate of Sections 2(42) and 2(31), read with Section 6 of the Income Tax Act, 1961, (hereinafter referred to as the Act). The said circular also is not in accordance with the mandate of Section 194A of the Act.

8. Section 194A of the Act reads as under:

> **"Interest other than "Interest on securities".**
>
> **194A.** (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying[43] to a resident any income by way of interest[43] other than income [44][by way of interest on securities], shall, at the time of credit of such income to the account of the payee[45] or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :
>
> [**Provided** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (*a*) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax under this section.]"

9. Section 194A clearly provides that any person, not being an individual or a Hindu undivided family, responsible for paying to a "resident" any income by way of interest, other than income by way of interest on securities, shall deduct income tax on such income at the time of payment thereof in cash or by issue of a cheque or by any other mode.

10. Question is as to who can be said to be a "resident". The word "resident" has been defined in Section 2(42) of the Act. It is apt to reproduce Section 2(42) of the Act hereunder:

> **"2(42).** "resident" mans a person who is resident in India within the meaning of Section 6;"

11. Therefore, it is clear that "resident" means a person who is resident within the meaning of Section 6 of the Act.

12. Section 2(31) of the Act defines the word "person". It is apt to reproduce Section 2(31) of the Act hereunder:

> "person" includes—

(*i*) an individual,

(*ii*) a Hindu undivided family,

(*iii*) a company,

(*iv*) a firm,

(*v*) an association of persons[81] or a body of individuals[81], whether incorporated or not,

(*vi*) a local authority, and

(*vii*) every artificial juridical person, not falling within any of the preceding sub-clauses.

[*Explanation.*—For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains;]

13. While going through the said provisions of law, one comes to the inescapable conclusion that the mandate of the said provisions does not apply to the accident claim cases and the compensation awarded under the Motor Vehicles Act cannot be said to be taxable income. The compensation is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident, which is damage and not income.

14. Chapters X and XI of the Motor Vehicles Act, 1988 provides for grant of compensation to the victims of a vehicular accident. The Motor Vehicles Act has undergone a sea change and the purpose of granting compensation under the Motor Vehicles Act is to ameliorate the sufferings of the victims so that they may be saved from social evils and starvation, and that the victims get some sort of help as early as possible. It is just to save them from sufferings, agony and to rehabilitate them. We wonder how and under what provisions of law the Income Tax Authorities have treated the amount awarded or interest accrued on term deposits made in Motor Accident Claims cases as income. Therefore, the said Circular is against the concept and provisions referred to hereinabove and runs contrary to the mandate of granting compensation.

15. The Apex Court has gone to the extent of saying that the Claims Tribunals, in Motor Accident Claims cases, should award compensation without succumbing to the niceties of law and procedural wrangles and tangles.

16. The Apex Court in the cases titled ***N.K.V. Bros. (P.) Ltd. vs. M. Karumai Ammal and others etc***., ***AIR 1980, SC 1354,*** and **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** observed that the Courts, while awarding compensation

under the Motor Vehicles Act, should not succumb to niceties, technicalities and mystic maybes.

17. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

18. The ratio of the above said decision is to provide immediate relief to the victims of a vehicular accident, who have suffered damages, in order to save them from starvation and other social evils.

19. The damages are to be assessed while making guess work read with the fact as to what is the loss of dependency to the claimants/victims of a vehicular accident.

20. The Apex Court in **Ghaziabad Development Authority vs. Dr.N.K. Gupta, 2002 INDLAW NCDRC 189,** has held that damages paid for the death of a person cannot be equated with the income and tax cannot be deducted. It is apt to reproduce the observations made by the Apex Court hereunder:

> *"It would, therefore, appear to us that the provisions of the Land Acquisition Act where interest is payable under Sections 28 and 34 and tax is deducted at source under section 194A of the Income-tax Act would not apply in the present case where the GDA has been asked to pay interest on the amount refunded to the complainant because of its failure to construct the promises flat and to prive necessary facilities. The amounts which were paid to the GDA by the complainant were not paid by way of any deposit or the GDA had not borrowed that money. And, as a matter of fact, interest as defined in clause (28) of Section 2 of the Income Tax Act is not that interest as was directed to be paid to the complainant by the GDA. Interest to the complainant (here Dr. Gupta) has not been*

awarded on the basis of any deposit made by the complainant or the GDA being the borrower of any money of the complainant. Here interest payment is by way of damages. Merely describing the damages as by way of interest does not make them as interest under the Income-tax Act.

A similar question arose before the Income-tax Appellate Tribunal in the case of Delhi Development Authority v. ITO 1995 53 ITD 19 (Delhi), and the Appellate Tribunal held that the amounts credited in the accounts of the allottees were not in the nature of interest within the meaning of section 2(28A) of the Income-tax Act and the Appellate Tribunal quashed the orders of those authorities and directed that what is recovered by the DDA be refunded. The Appellate Tribunal also hoped that the DDA will be equally quick in paying back the amounts it recovered from the allottees. It appears to us that the Revenue authorities did not challenge this order of the Appellate Tribunal by making reference to the High Court under Section 256 of the Income-Tax Act. The Appellate Tribunal held that the amounts paid/credited to the allottees by the DDA under SFS (Self-Finance Scheme) did not fall under any category in section 2(28A) of the Income-tax Act, but represented measure for quantifying compensation for delay in construction and handling over possession of dwelling unit which was in the nature of non-taxable capital income. In coming to this conclusion the Appellate Tribunal relied on various judgments including that of the Supreme Court in the case of Dr. Shamlal Narula v. CIT 1964 Indiaw SC 263.

In our view, therefore, considering the definition of "interest" as contained in Section 2(28A) of the Income-tax Act, the provisions of section 194A were not applicable and the GDA was clearly wrong in deducting the tax deducted at source from the interest payable to the complainant. Accordingly, the order of the State Commission is upheld and this revision petition is dismissed."

21. The Apex Court in the decision in **Haryana Urban Development Authority vs. Dev Dutt Gandhi, (2005) 9 SCC 497,** while dealing with the land acquisition cases, held that compensation awarded in lieu of the acquired land or enhanced amount paid or interest thereon made cannot be termed as income and income tax cannot be deducted. It is apt to reproduce paragraphs 3, 8 and 9 hereunder:

> 3. Before this Court a large number of Appeals have been filed by the Haryana Urban Development Authority and/or the Ghaziabad Development Authority challenging Orders of the National Consumer Disputes Redressal Commission, granting to Complainants, interest at the rate of 18% per annum irrespective of the fact of each case. This Court has, in the case of Ghaziabad Development Authority v. Balbir Singh reported in (2004) 5 SCC 65, deprecated this practice. This Court has held that interest at

the rate of 18% cannot be granted in all cases irrespective of the facts of the case. This Court has held that the Consumer Forums could grant damages/compensation for mental agony/harassment where it finds misfeasance in public office. This Court has held that such compensation is a recompense for the loss or injury and it necessarily has to be based on a finding of loss or injury and must co-relate with the amount of loss or injury. This Court has held that the Forum or the Commission thus had to determine that there was deficiency in service and/or misfeasance in public office and that it has resulted in loss or injury. This Court has also laid down certain other guidelines which the Forum or the Commission has to follow in future cases.

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8. The National Commission disposed of the Revision filed by the Appellants with a one paragraph Order relying upon its own decision the case of Haryana Urban Development Authority v. Darsh Kumar.

9. We are informed that on 18th March, 1998 a sum of Rs. 2,26,470/- has been paid to the Respondent. As the Appellants were at fault in not developing the area for a number of years, the Commission was right in directing refund of amounts deposited. Normally, in case of refund of amount the Interest Act would have been applicable. However, as interest at the rate of 18% has already been paid on the principle laid down by this Court in the case of Ghaziabad Development Authority v. Balbir Singh (supra) no refund can be claimed. Counsel could not explain whether TDS had been deducted before making the payment of Rs. 2,26,470/-. As has been set out by the National Commission in its earlier Judgments and even by this Court, these are cases where amounts are being directed to be paid as compensation for mental harassment and agony and for failure of public duty. In such cases there is no question of deduction of TDS. If TDS has been deducted the Appellants shall, within two weeks from today, forward to the Respondent the amount of TDS deducted along with interest thereon at the rate of 12% from the date it was deducted till payment."

22. The Apex Court in another case titled **Commissioner of Income-Tax vs. Ghanshyam (HUF),** reported in **[2009] 315 ITR 1(SC) 1,** laid down similar preposition. It is apt to reproduce paragraphs 24, 25 and 27 hereunder:

"24. To sum up, interest is different from compensation. However, interest paid on the excess amount under Section 28 of the 1894 Act depends upon a claim by the person whose land is acquired whereas interest under Section 34 is for delay in making payment. This vital difference needs to be kept in mind in deciding this matter. Interest under Section 28 is part of the amount of

compensation whereas interest under Section 34 is only for delay in making payment after the compensation amount is determined. Interest under Section 28 is a part of enhanced value of the land which is not the case in the matter of payment of interest under Section 34.

25. It is clear from reading of Sections 23(1A), 23(2) as also Section 28 of the 1894 Act that additional benefits are available on the market value of the acquired lands under Section 23(1A) and 23(2) whereas Section 28 is available in respect of the entire compensation. It was held by the Constitution Bench of the Supreme Court in Sunder v. Union of India - (2001) 7 SCC 211, that "indeed the language of Section 28 does not even remotely refer to market value alone and in terms it talks of compensation or the sum equivalent thereto. Thus, interest awardable under Section 28, would include within its ambit both the market value and the statutory solatium. It would be thus evident that even the provisions of Section 28 authorise the grant of interest on solatium as well." Thus solatium means an integral part of compensation, interest would be payable on it. Section 34 postulates award of interest at 9% per annum from the date of taking possession only until it is paid or deposited. It is a mandatory provision. Basically Section 34 provides for payment of interest for delayed payment.

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27. In the case of Hindustan Housing (supra) certain lands belonging to the assessee-company, which was in the business of dealing in land and which maintained its account on mercantile system, were first requisitioned and then compulsorily acquired by the State Government. The Land Acquisition Officer awarded Rs.24,97,249/- as compensation. On appeal the Arbitrator made an award at Rs.30,10,873/- with interest at 5% from the date of acquisition. Thereupon, the State preferred an appeal to the High Court. Pending the appeal, the State Government deposited in the Court Rs.7,36,691/- being the additional amount payable under the award and the assessee was permitted to withdraw that additional amount on furnishing a security bond for refunding the amount in the event of the said Appeal being allowed. On receiving the amount, the assessee credited it in its suspense account on the same date. The question was : whether the additional amount of Rs.7,24,914/- could be taxed as the income on the ground that it became payable pursuant to the award of the Arbitrator. The Tribunal held that the amount did not accrue to the assessee as its income and was, therefore, not taxable in the assessment year 1956-57. The financial year in which the additional amount came to be withdrawn ended on 31.3.56. It was held by this Court that although award was made on 29.7.1955, enhancing the amount of compensation payable to the assessee, the entire amount was in dispute in the appeal filed by the State. Therefore, there was no

absolute right to receive the amount at that stage. It was held that if the Appeal was to be allowed in its entirety, the right to payment of enhanced compensation would have fallen altogether. Therefore, according to this Court, the extra amount of compensation of Rs.7,24,914/- was not income arising or accruing to the assessee during the previous year relevant to the assessment year 1956-57."

23. Having said so, the Circular, dated 14.10.2011, issued by the Income Tax Authorities, whereby deduction of income tax has been ordered on the award amount and interest accrued on the deposits made under the orders of the Court in Motor Accident Claims cases, is quashed and in case any such deduction has been made by respondents, they are directed to refund the same, with interest at the rate of 12% from the date of deduction till payment, within six weeks from today.

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

Mahinder Singh and another .....Petitioners.

Versus

Prem Chand and others .....Respondents.

CMPMO No.175 of 2014.
Date of decision: 15.10.2014.

Code of Civil Procedure, 1908- Order 8, Rule 1 – Trial Court struck off the defence of the defendant for not filing the written statement within a period of 90 days- Held, that the provisions of Order 8 Rule 1 providing the time period of 90 days is not mandatory- The delay can be condoned on the basis of sufficient cause- In the present case, mother of the petitioner had died and they must have been busy with the post death rituals and ceremonies which would lead to delay- Further held that the Court must be liberal in such matters as the litigant does not benefit by delayed filing of the written statement, rather, he runs a risk of his case being thrown out due to delay – Since the petitioner had sufficient reason for not filing the written statement in time, hence they are permitted to file written statement subject to payment of ₹ 2500/-.

(Para- 5 to 10)

For the Petitioners : Mr.Sanjay Dutt Vasudeva, Advocate.

For the Respondents : Mr.Surinder Saklani, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge, (Oral).

The petitioners have approached this Court under Article 227 of the Constitution of India for setting aside the order dated 02.05.2014 passed by the learned Civil Judge(Senior Division), Palampur, in Civil Suit No.10/14 titled Prem Chand versus Mahinder Singh and others, whereby the right to file written statement of the petitioners has been closed.

2. The respondent-plaintiff has filed a suit for declaration claiming declaration as set out in the suit with further consequential relief of permanent prohibitory injunction. Despite two opportunities, the petitioners did not file the written statement. Consequently, the right to file written statement was closed vide order dated 02.05.2014 which reads as follows:-

> *"Written statement not filed. Proforma defendants not served. Written statement on behalf of defendants not filed even today. Period of more than 90 days has been lapsed. Therefore, right to file written statement on behalf of defendants is struck off by the order of the court. Now case be listed for service of proforma defendants on taking steps for 7.7.2014. At this stage, counsel for plaintiff stated that one of the proforma defendant No.5 has expired. Steps be taken for bringing on record his LRs on the date fixed."*

3. This order has been challenged by the petitioners on the ground that the learned Court below did not take into consideration the fact that the defendants-petitioners could not file written statement on 02.05.2014 due to the fact that they had wrongly noted the date 03.05.2014 instead of 02.05.2014 and even otherwise on 02.05.2014 the written statement was already prepared and since it was not attested, therefore, the same could not be filed. It is also claimed that the counsel representing the petitioners had tried to contact them on telephone on 02.05.2014 but their phones were not reachable due to signal problem. Lastly, it is contended that on earlier occasions written statement could not be filed because of the fact that the petitioners remained busy and disturbed due to death of their mother, who died after prolong illness on 29.03.2014.

4. The petition is vehemently opposed by the respondent No.1 by claiming that sufficient opportunities have been granted to the petitioners to file written statement and it is only after the statutory period for filing the same had elapsed that the learned trial Court closed the right of the petitioners to file their written statement and, therefore, no exception could be taken to the order.

5. I have heard learned counsel for the parties and gone through the records of the case. At the outset, it may be observed that the time period of 90 days as provided in Rule 1 to Order 8 of the Code of

Civil Procedure is not mandatory and reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Salem Advocate Bar Association, Tamilnadu*** *versus* ***Union of India AIR 2005 SC 3353*** wherein it has been clearly held that the provisions including proviso to Order 8 Rule 1 of CPC are not mandatory but directory. It has also been held therein that delay can be condoned and written statement can be accepted even after the expiry of 90 days from the date of service of summons.

6. Viewed in the light of aforesaid exposition of law, it can conveniently be held that the mere fact that period of 90 days had elapsed from the date of issuance of summons, cannot be the sole ground on the basis of which right to file written statement can be closed.

7. It is not disputed that the mother of the petitioners had died on 29.03.2014 after prolong illness and it is, therefore, legitimate to assume that the petitioners thereafter must have been busy with the post death rituals and ceremonies and in these circumstances there was bound to be some delay in filing of the written statement. The petitioners otherwise do not stand to benefit from filing the written statement beyond time, rather, run a serious risk of not filing the same within the prescribed period which is apparent from the fact that the petitioners have now been driven to this Court only on account of delay in filing of the written statement.

8. The Court must have a justifiable and liberal approach in such matters unless of course the Court is of the view that the litigant is out to abuse the process of Court or has no right in law or is trying to delay the outcome of the suit. It has to be understood that a litigant does not stand to benefit by not filing the written statement or filing the written statement belatedly. Refusing to condone the delay and taking on record the written statement can result in meritorious matters being decided ex parte which may result in cause of justice being denied. Even otherwise, when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred as the other side cannot claim to have vested right in injustice being done because of non deliberate delay.

9. There is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of malafides. A litigant does not stand to benefit by resorting to delay, rather he runs a serious risk. It must be grasped that the Judiciary is respected not on account of its powers to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. The matter has to be approached with a justice oriented approach and, therefore, the mere fact that the trial Court had afforded two opportunities to the petitioners to file their written statement and that the written statement has been filed after a period of 90 days in itself cannot be a ground to close the right of the petitioners to file written statement.

10. In view of the above discussion, the order passed by the learned trial Court on 02.05.2014 is not sustainable in the eyes of law and is accordingly set aside. Resultantly, the present petition is allowed in the aforesaid terms. However, since the respondent has been driven to un-necessary and otherwise avoidable litigation, this shall be subject to a costs of Rs.2,500/-. Interim order dated 02.07.2014 passed in CMP No.9532 of 2014 is vacated.

11. The parties through their counsel are directed to appear before the learned trial Court on **31.10.2014** on which date the petitioners would file their written statement and also pay the costs. In the event of non-filing of the written statement or non-payment of costs, or both, the impugned order will automatically revive.

12. Pending application (s), if any, also stands disposed of.

Copy 'dasti'.

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

Nisha Devi ..Appellant.
Vs.
State of Himachal Pradesh & others ..Respondents

LPA No. 257 of 2010
Decided on : 15.10.2014

Constitution of India, 1950- Article 226- The dispute whether the degree of Parangat from Kendriya Hindi Shikshan Mandal, Agra is recognized by the State Government for employment or not, has already been determined by the Himachal Pradesh Administrative Tribunal, in the judgment rendered in O.A. No. 498 of 1998, titled as Ms. Nisha Devi versus State of Himachal Pradesh and others wherein it was held that the degree was recognized for the purpose of employment and the writ petitioner was found eligible- The judgment has not been questioned and has attained finality, therefore, the parties are bound by the judgment- order passed in writ petition is modified accordingly.

(Para-4 to 7)

For the Appellant : Mr. Dilip Sharma Senior Advocate Ms. Nishi Goel, 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.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is de-linked from LPA No. 84 of 2011.

2. Challenge in this appeal is to the judgment dated 6th August, 2010, passed by the learned Single Judge in CWP (T) No. 4595 of 2008, whereby the writ petition came to be dismissed and the writ respondents No. 1 & 2-State was directed to take necessary steps for terminating the services of writ respondent No. 3-appellant herein, hereinafter referred to as "impugned judgment".

3. The dispute in this Letters Patent Appeal is-whether the Degree of Parangat from Kendriya Hindi Shikshan Mandal, Agra is recognized with Himachal Pradesh Government and direction to terminate the service of writ respondent No. 3-appellant herein, is correctly made?

4. While addressing the arguments, the learned Counsel for the appellant argued that the issue has already been thrashed out by the Himachal Pradesh Administrative Tribunal, Camp at Dharamshala, in the judgment rendered in O.A. No. 498 of 1998, titled as Ms. Nisha Devi versus State of Himachal Pradesh and others, decided on 23.08.2007, (Annexure A-7), wherein it has been held that the said degree is recognized for the purpose of the employment and the writ petitioner was found eligible for appointment against the Post of Language Teacher and it was held that she was rightly appointed.

5. The said judgment has not been questioned by the State till today, has attained finality.

6. The writ petitioner has not questioned the impugned judgment, thus, has attained finality, so far as it relates her.

7. In view of the judgment, supra (Annexure A-7), the case of the appellant stands decided and the impugned judgments is bad to the extent questioned in this appeal and is set-aside.

8. The impugned judgment is modified, as indicated above. The appeal is disposed of.

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

Balvinder Singh Mahal .....Petitioner.
Versus
State of H.P. and others ..... Respondents.

CWP No.8425 of 2010-J.
Judgment reserved on :09.10.2014.
Date of decision: 16th October, 2014.

Constitution of India, 1950- Article 226 and 14 – Petitioner claimed that he is entitled to pay scale on the pattern of his counterparts in Punjab- State contended that the Fire Department is under the control of Municipal Committee and not under the control of Government in Punjab, therefore, the pay scales in two states could not be equated- Held, that the State of Himachal Pradesh is not bound to follow the rules and regulations, as are applicable to the employees of the State of Punjab and even if it had followed the same in the past, it is not bound to follow every change made under the rules or regulations- The petitioner had failed to mention the educational qualifications, working conditions, and other relevant factors to show that the nature of work of Fire Officers in two States was similar- Principle of equal pay for equal work cannot be applied without looking into the nature of work done by the persons working in different States.

(Para-8 to 10)

For the Petitioner : Mr.Neel Kamal Sood, Advocate.
For the Respondents : Ms.Meenakshi Sharma, Additional Advocate General with Ms.Parul Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner has approached this Court for grant of the following substantive reliefs:-

> **"I. To quash the order dated 27.11.2010 passed by Respondent No.1 rejecting the case of the petitioner regarding grant of revised pay scale on Punjab pattern and to direct the respondents, to grant the revised pay scale to the petitioner, on the Punjab patter or in the alternative Delhi pattern (where certain categories of Fire Officers do not exist in Punjab) right from his initial date of appointment i.e. January, 1980 (as Sub Fire Officer) and subsequently higher pay scale after his promotion as Station Fire Officer, w.e.f. 25.5.2005, strictly in**

accordance with the policy of the State Government in the matter of grant of pay scales to its employees on Punjab pattern/Delhi pattern, which practice and pattern is being followed by the State of Himachal Pradesh as per the past practice.

II. To direct the respondents to grant promotional avenues to the petitioner on the pattern of Home Guards Department as the respondents can not be allowed to discriminate between the two categories i.e. personnel working in the Fire Service Wing and those working in the Home Guards.

III. In view of relief at (i) & (ii) above to grant all consequential benefits flowing therefrom including arrears accruing thereto alongwith interest @ 18% per annum, from the due date till the date of actual payment."

2. The petitioner was appointed as Sub Fire Officer in the Directorate of Fire Services in January, 1980, and thereafter promoted as Station Fire Officer on 23.05.2005. The petitioner's case is that he is entitled to pay scale on the pattern of his counterparts in Punjab for which he has been repeatedly making representations from the year 1986. It is also claimed that his case along with similar situate persons was also recommended by the respondent No.2 to the respondent No.1 vide letter dated 01.07.2009, however, their cases were rejected without according any reasons vide letter dated 11.03.2010. This constrained the petitioner to file CWP No.4378/2010 wherein the petitioner sought relief of grant of revised pay scale. This petition was disposed of on 30.07.2010 with a direction to the respondent No.1 to consider the case of the petitioner on the basis of the averments made therein and also consider the representation submitted by the petitioner. The respondent No.1 after hearing the petitioner and also perusing all the documents annexed by him rejected his case vide order dated 27.11.2010.

3. It is this order which has been challenged by the petitioner before this Court on the ground that the respondent No.1 failed to take into consideration that there is no government department of fire services in Punjab and, therefore, there are no pay scales notified as such by the Government of Punjab since the fire services are under the control of Municipal Committees and the administrative control of such Committees in turn is under the Local Self Government. The pay scales of pay pattern applicable in Punjab Municipalities ought to have been adopted by the respondents since it is following the Punjab pattern in matters of grant of pay scales. It is also claimed that State Government has made departure from Punjab in the matters of grant of pay scales to the certain categories which are non-existent in Punjab State and the State Government has taken magnanimous/broader view with regard to grant of pay scales so as to give its employees incentives. It is further claimed that the petitioner is entitled to the grant of the pay scale on the basis of equal pay for equal work.

4. The respondents have filed their reply wherein preliminary objection has been taken to the effect that the petitioner does not have any right to claim the pay scale on the basis of the Punjab pattern because in Himachal Pradesh the Fire Services Organization is a Government department, whereas, in Punjab fire services officials are under the control of Municipal Committees and there is no Government department of fire services. Therefore, the petitioner has no legal right to file the petition.

5. On merits, it is submitted that the posts under the H.P. Fire Services Department have been equated with the posts either in H.P. Home Guards Department or in Punjab Police Department and have not been equated with the posts of fire services in Punjab as the fire services in Punjab are under the control of Municipalities. This position cannot be disturbed at this stage since it is liable to lead to new anomalies and inviting further demands from various sections of employees. It is also contended that the staffing structure of the Fire Services Department in H.P. is different from the staffing structure of the fire services personnel in Punjab Municipalities where there are no posts of Divisional Fire Officers and Chief Fire Officers. Similarly, a category of Assistant Divisional Fire Officers exists in Punjab, whereas, this is not existing in Himachal Pradesh. It is then claimed that there are more promotional avenues to the Fire Services Officers of H.P., who can go up to the level of Chief/Divisional Fire Officers which are not available to the counterparts in Punjab. The State of Himachal Pradesh has its own staffing structure, relevant to its requirements, for the employees and officers of the department of Fire Services.

6. I have heard the learned counsel for the parties and gone through the records of the case. At the outset, it may be observed that the State of Himachal Pradesh is not bound to follow the rules and regulations as are applicable to the employees of the State of Punjab or any other State and if it has adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other States. This was so held by the Hon'ble Supreme Court in **State of Himachal Pradesh** versus **P.D.Attri and others (1999) 3 SCC 217** in the following terms:-

> "5. The case of the respondents is not based on any Constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab & Haryana High Court and their pay-scales from the same date. They do not allege any violation of any Constitutional provision or any other provision of law. They say it is so because of "accepted policy and common practice" which, according to them, are undisputed. We do not think we can import such vague principles while interpreting the provisions of law. India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the employees of the other State or if it had adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other State. The

question then arises before us is whether the State of Himachal Pradesh has to follow every change brought in the States of Punjab & Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab & Haryana. The answer has to be in negative. No argument is needed for that as anyone having basic knowledge of the Constitution would not argue otherwise, True, the State as per "policy and practice' has been adopting the same pay-scales for the employees of the High court as sanctioned from time to time for the employees of the Punjab & Haryana High Court and it may even now follow to grant pay-scales but is certainly not bound to follow. No law commands it to do so.

6. The State of Punjab was reorganised into States of Punjab, Haryana and Himachal Pradesh. Himachal Pradesh, to begin with, was a Union Territory and was given the status of full statehood in 1970. Since employees of the composite States of Punjab were taken in various Departments of the State of Himachal Pradesh in order to safeguard the seniority, pay-scales etc., the State of Himachal Pradesh followed the Punjab pattern of pay-scales. After attaining the status of full statehood, High court of Himachal Pradesh formulated its own rules and regulations for its employees. It adopted the pattern of Punjab & Haryana High Court rules of their employees. When Punjab & Haryana High court gave effect to certain portion of its Rules from 25-9-1985 by notification dated 23-1-1986 as a result of which redesignation of the posts of Senior Translators and Junior Translators were equated to the posts in the Punjab Civil Secretariat, in the Himachal Pradesh High court similar effect was given to in its rules for its employees. When the Punjab & Haryana High court gave effect to those rules from 23-1-1975, the State Government did not agree to the recommendations of the chief justice of the Himachal Pradesh High Court to follow the same suit. It is true that till now, the Himachal Pradesh High Court has been following the rules applicable to the employees of the Punjab & Haryana High Court and it may go on following those rules as may be amended by the Punjab & Haryana High Court from time to time, but certainly it is not bound to so follow. No law commands the State government to follow the rules applicable to the employees of the Punjab & Haryana High Court to the employees of the Himachal Pradesh High Court. That being the position, it is not necessary for us to examine different qualifications for appointment to the posts of Senior Translators and Junior Translators that may exist between the Punjab & Haryana High Court and the Himachal Pradesh High Court and also as to the mode of their recruitment/placement in the service. Moreover, any change in the pay-scale following Punjab & Haryana High Court can set in motion chain reaction for other employees which may give rise to multiplicity of litigation among various categories of employees. Rules of each High court have to be examined

> independently. There cannot be any such law that Himachal Pradesh High Court has to suo motu follow the same rules as applicable to the employees working in the Punjab & Haryana High Court."

7. In view of the exposition of law in **P.D. Attri's case** (supra), it has to be seen as to whether the petitioner has been able to establish violation of any constitutional or any other legal provision when he has laid claim based upon parity with the posts with similarly situate persons in the State of Punjab and claiming pay scales granted in the said State.

8. The petitioner nowhere in the petition has made even a whisper regarding the nature of the work done by him so as to compare it with his counterparts in State of Punjab. Further, he has not even mentioned the educational qualifications, the working conditions and other relevant factors so as to make it possible for this Court to come to a conclusion with regard to similarity in the nature of work performed by the petitioner vis-a-vis his counterparts in the adjoining State of Punjab. The petitioner has simply relied upon the judgment of the Hon'ble Supreme Court in **Union of India** versus **Dineshan K.K. (2008) 1 SCC 586, State of Kerala** versus **B.Renjith Kumar and others (2008) 12 SCC 219** and **Hukam Chand Gupta** versus **Director General, Indian Council of Agricultural Research and others (2012) 12 SCC 666.**

9. No doubt, the aforesaid cases deal with the doctrine of equal pay for equal work, but the same is not an abstract doctrine capable of being enforced in a Court of law. However, this principle has no mathematical application in every case and a number of factors have to be considered before applying this principle. This principle requires consideration of various dimensions of a given job and normally the applicability of this principle must be left to be evaluated and determined by an expert body and the Court should not interfere till it is satisfied that the necessary material on the basis whereof the claim is made is available on record with necessary proof and that there is equal work of equal quality and all other relevant factors are fulfilled.

10. Without looking into nature of work done by the persons working in different States in departments belonging to different employers, one cannot jump to a conclusion that all these persons were doing similar type of work or shouldering the same kind of responsibility. This has been so held in a recent judgment of the Hon'ble Supreme Court in **State of Himachal Pradesh and another** versus **Tilak Raj, Civil Appeal No.9124 of 2014 arising out of SLP (C) No.404 of 2011** wherein the Hon'ble Supreme Court held as under:-

> "It is clear that the respondents had prayed for pay scale which was being given to persons holding a promotional post by contending that the nature of work was similar. It is pertinent to note that pay scale of Laboratory Attendants in different departments are different and the qualifications of the respondents are also different. As Laboratory Attendants, the respondents were in the pay scale of

Rs.750-1350(revised) whereas upon getting promotion to the post of Laboratory Assistant, they would be getting pay scale of Rs.950-1800(revised). It is, thus, clear that the posts of Laboratory Attendant and Laboratory Assistant are different and therefore, the respondents could not have been paid pay scale which was being paid to the persons belonging to a higher cadre. It is also clear that disputed question of facts were involved in the petitions because according to the respondents, who were petitioners before the High Court, nature of work done by them was similar to that of the work of other Laboratory Attendants or Laboratory Assistants.

Without looking at the nature of work done by persons working in different cadres in different departments, one cannot jump to a conclusion that all these persons were doing similar type of work simply because in a civil suit, one particular person had succeeded after adducing evidence. There is nothing on record to show that the High Court had examined the nature of work done by the respondents and other persons who were getting higher pay scale.

The High Court had also not considered the fact that qualifications required for appointment to both the posts were different. In our opinion, the High Court should not have entertained all these petitions where disputed questions of fact were required to be examined. Without examining relevant evidence regarding exact nature of work, working conditions and other relevant factors, it is not possible to come to a conclusion with regard to similarity in the nature of work done by persons belonging to different cadres and normally such exercise should not be carried out by the High Court under its writ jurisdiction.

It is settled law that the work of fixing pay scale is left to an expert body like Pay Commission or other similar body, as held by this Court in several cases, including the case of S.C.Chandra v. State of Jharkhand (2007) 8 SCC 279. Moreover, qualifications, experience, etc. are also required to be examined before fixing pay scales. Such an exercise was not carried out in this case by the High Court.…"

11. The petitioner has not demonstrated on record any material on the basis of which the doctrine of equal pay for equal work can be applied to the case of the petitioner. As already observed earlier, the principle of equal pay for equal work would depend upon many factors like nature of work done, volume of work, quality of work, qualitative difference as regards reliability and responsibility of work even in cases where the functions may be the same but the responsibilities are different, this principle is not attracted.

12. Tested on the touchstone of the aforenoted broad guidelines and taking into account the exposition of law in **Tilak Raj's case** (supra), it can conveniently be concluded that the petitioner has failed to establish on record his entitlement to the pay scale as being paid to his counterparts in Punjab and the petitioner is not otherwise entitled to claim

the same merely on the basis of Punjab pattern in view of judgment in **P.D.Attri's case** (supra).

13. The net result of aforesaid discussion is that there is no merit in this petition and the same is dismissed along with pending application(s), if any, leaving the parties to bear their own costs.

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

State of H.P. ....Appellant.
Vs.
Hema Devi wife of Sh. Dila Ram. ....Respondent.

Cr. Appeal No.425 of 2008.
Order reserved on: 26.8.2014
Date of Decision: October 16 ,2014.

Code of Criminal Procedure, 1973- Section 391 **–**The case of the prosecution is based on the circumstantial evidence- The deceased was found in the kitchen- The house was found closed from all the sides- No evidence was led by the prosecution to prove as to who was present at the time of the death- Held, that additional evidence is necessary to establish who was present at the time of death to dispose of the case effectively.

(Para-10, 11)

For the appellant: Mr. B.S.Parmar & Mr. Ashok Chaudhary, Addl. Advocate General with Mr.Vikram Thakur & Mr.Puneet Rajta Dy. Advocate General.

For the respondent: Mr.G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Presiding Officer Fast Track Court Mandi HP in Sessions Trial No. 1 of 2007 titled State of HP Vs. Hema Devi decided on 27.3.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 18.4.2006 at about 5.30 PM at village Shilli-Dogari accused Hema Devi strangulated deceased Hima Devi @ Phithi wife of Dila Ram with a plastic rope and committed her murder intentionally. It is further alleged by prosecution that on dated 18.4.2006 a telephonic message was received from Dila Ram Vice President that a quarrel picked up between his two wives Hima Devi @ Phithi deceased and Hema Devi accused at

village Shilli-Dogari in the residential house of accused. It is further alleged by prosecution that rapat No.21 was recorded in daily diary Ext PW12/A. It is further alleged by prosecution that after recording rapat in daily diary ASI Prem Lal along with HHC Mohan Singh and HC Ranjeet Singh proceeded to spot. It is further alleged by prosecution that after reaching at the spot at about 5.30 PM statement of PW1 Narvada Devi Ext PW1/A under Section 154 Cr PC was recorded and same was sent to police station Gohar through constable Dev Raj for registration of case. It is further alleged by prosecution that on the basis of statement recorded under Section 154 Cr PC Ext PW1/A FIR No. 50 of 2006 Ext PW13/B was registered. It is further alleged by prosecution that PW18 ASI Prem Lal took photographs of deceased Hima Devi @ Phithi through photographer Sh Gian Chand. It is further alleged by prosecution that photographs took at the spot are Ext PW11/A to Ext PW11/14 and its negatives are Ext PW11/15 to Ext PW11/28. It is further alleged by prosecution that ASI Prem Lal inspected the dead body of deceased Hima Devi @ Phithi and found ligature marks around the neck of deceased Hima Devi @ Phithi. It is further alleged by prosecution that after taking photographs of deceased Hima Devi @ Phithi ASI Prem Lal filled up form 23-35(1)(A) and form 25-35 (1) (B) which are Ext PW18/A to Ext PW18/B. It is further alleged by prosecution that thereafter PW18 ASI Prem Lal wrote an application Ext PW10/A to Medical Officer Zonal Hospital Mandi for conducting post mortem of deceased Hima Devi @ Phithi and obtained post mortem report Ext PW10/B. It is further alleged by prosecution that two pieces of rope Ext P1 and Ext P2 were took into possession vide memo Ext PW2/A which was handed over to police by PW2 Dila Ram in the presence of witnesses Narvada Devi and Uttam Singh. It is further alleged by prosecution that weapon of offence Ext P1 and Ext P2 were sent to Zonal Hospital Mandi through HC Muni Lal. It is further alleged by prosecution that site plan Ext PW18/C was prepared. It is further alleged by prosecution that disclosure statement Ext PW3/A was given by accused Hema Devi in the presence of Narvada Devi and Ajay Kumar. It is further alleged by prosecution that site plan Ext PW18/J was prepared. It is further alleged by prosecution that one piece of wood stained with blood was taken into possession from the room of accused. It is further alleged by prosecution that tatima Ext PW4/A and jamabandi Ext PW4/B of the place of incident also got prepared from Patwari Halqua. It is further alleged by prosecution that two pieces of ropes Ext P1 and Ext P2 and a packet containing blood stained wooden piece Ext P3 were deposited with MHC along with viscera of deceased Hima Devi @ Phithi. It is further alleged by prosecution that on dated 19.4.2006 at about 11.45 AM statement of PW1 Narvada Devi under Section 154 Cr PC was recorded. It is further alleged by prosecution that on dated 20.4.2006 PW13 HC Inder Singh sent viscera of deceased Hima Devi @ Phithi and one parcel sealed with seal impression 'ZH' to Forensic Science Laboratory Junga through HHC Madan Singh vide road certificate No.11/2006. It is further alleged by prosecution that after analysis of viscera and other related case property, reports of FSL Junga Ext PY and Ext PZ were received. Accused did not plead guilty and

claimed trial. Charge was framed against the accused under Section 302 IPC on dated 10.1.2007.

3. The prosecution examined as many as eighteen witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Smt Narvada Devi
PW2	Sh Dila Ram
PW3	Smt Narvada Devi
PW4	Sh Ajay Kumar
PW5	Smt Dolma Devi
PW6	Sh Uttam Singh
PW7	Sh Kamal Singh
PW8	Sh Narain Singh
PW9	Sh Hem Raj
PW10	Dr Hemant Kapoor
PW11	Sh Gian Chand
PW12	Sh Mahinder Singh
PW13	Sh Inder Dev
PW14	Sh Mohan Singh
PW15	Sh Muni Lal
PW16	Sh Dabe Ram
PW17	Sh Amin Chand
PW18	Sh Prem Lal

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

Sr.No.	Description:
Ext PW1/A	State of Narvada Devi U/S 154 Cr.PC
Ext PW2/A	Recovery memo

Ext P1&P2	Ropes
Ext PW2/B	Recovery report
Ext PW2/C	Fard Sapurdari
Ext PW3/A	Disclosure statement
Ext PW3/B	Demarcation report
Ext P3	Cigarette packet containing blood
Ext PW3/C	Recovery memo
Ext PW4/A	Tatima
Ext PW4/B	Copy of jamabandi
Ext PW10/A	Application
Ext PW10/B	Post mortem report
Ext PW11/1 to Ext PW11/14	Photographs
Ext PW11/15 to Ext PW11/28	Negative photographs
Ext PW12/A	Copy of rapat No.21
Ext PW13/A	Endorsement
Ext PW13/B	FIR
Ext PW18/A to Ext PW18/B	Inquest reports
Ext PW18/C & Ext PW18/J	Spot maps
Ext PX	Copy of rapat No.29
Ext PY and Ext PZ	Reports of Chemical examiner.

5. Statement of accused was also recorded under Section 313 Cr.PC Accused did not examine any defence witness. Learned trial Court acquitted the accused qua charge under Section 302 IPC.

6. Feeling aggrieved against the judgment passed by learned Trial Court appellant State of HP filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the appellant State of HP and learned Advocate appearing on behalf of respondent and also gone through the entire record carefully.

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

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Smt Narvada Devi has stated that she knows accused Hema Devi present in Court who is her elder mother in relation. She has stated that her father Dila Ram had two wives namely Hema Devi accused who is first wife and deceased Hima Devi @ Phithi was his second wife. She has stated that deceased Hima Devi @ Phithi was the second wife of Dila Ram. She has stated that accused Hema Devi has three children who are all married and they live in village Jhrenthi. She has stated that deceased Hima Devi @ Phithi had no issue. She has stated that she was adopted by deceased Hima Devi @ Phithi as her daughter. She has stated that she married to Hem Raj and she lives with him at village Tungadhar. She has stated that accused Hema Devi used to reside at village Shilli-Dogari and deceased Hima Devi @ Phithi used to reside with her parents at village Tungadhar along with her husband Dila Ram. She has stated that on dated 18.4.2006 she visited Tungadhar in the morning in her parental house and thereafter she went back to her matrimonial house as her father-in-law was ill. She has stated that at about 10 AM her mother deceased Hima Devi @ Phithi told her that she would go to Shilli-Dogari to leave oxen in the residential house of accused. She has stated that thereafter her father had gone to graze his sheep in his orchard. She has stated that she reached at her parental house at about 2 PM and her father Dila Ram also reached at that time at Tungadhar. She has stated that she inquired from her father Dila Ram about her mother and he told her that deceased had gone to Shilli-Dogari in the residential house of accused to leave oxen. She has stated that thereafter she along with her father went to Shilli-Dogari in search her mother and when they reached near Shilli-Dogari she called her mother but she did not receive any response. She has stated that thereafter she along with her father came back at village Tungadhar. She has stated that thereafter her father rang up her younger brother Kamal Dev and inquired from him about deceased Hima Devi @ Phithi whether deceased had reached. She has stated that her brother Kamal Dev replied that deceased had not reached. She has stated that at about 6.30 PM Uttam Singh, Jaswant Singh and Kamal Dev came to her house and Uttam Singh told that he met accused Hema Devi in village Jhrenthi path. She has stated that Uttam Singh told her that accused Hema Devi informed him that deceased and accused picked up a quarrel and accused does not know whether deceased Hima Devi was alive or dead. She has stated that thereafter she and her father Dila Ram, Jaswant Singh and Kamal

Dev and other villagers went to village Shilli-Dogari. She has stated that villagers told her to return back to her house as she was pregnant. She has stated that thereafter dead body of deceased was brought to Tungadhar. She has stated that she did not see dead body of deceased because she was pregnant and as per custom pregnant woman is not supposed to see the dead body. She has stated that thereafter her father informed police about the incident. She has stated that she suspected that her mother was killed by accused Hema Devi. She has stated that police also visited and her statement Ext PW1/A under Section 154 Cr PC was recorded. She has stated that there was some dispute regarding land between the deceased and accused. She has admitted that accused Hema Devi is living with her son. She has stated that Dila Ram was retired Kanungo from revenue department. She has denied suggestion that her father Dila Ram had intimated his son Kamal Dev on telephone to return back to his house as deceased Hima Devi had committed suicide at village Shilli-Dogari. She denied suggestion that deceased used to pick up quarrel with Dila Ram. She denied suggestion that deceased tried to kill Dila Ram with the blow of 'Drat' (Sharp edged weapon) in the month of March 2006. She denied suggestion that deceased was bent upon to kill Dila Ram. She has admitted that she inherited the property of deceased on the basis of registered will. She has stated that she has cordial relation with Dila Ram. She has stated that Dila Ram brought the dead body of deceased Hima Devi from village Shilli-Dogari. She denied suggestion that Dila Ram has kept one Smt Bhuvneshwari Devi as his third wife. She has denied suggestion that she and Dila Ram had strained relations with the accused.

9.1 PW2 Dila Ram has stated that deceased Hima Devi @ Phithi and accused Hema Devi are his wives. He has stated that deceased has no issue and accused has three children who are all married. He has stated that his second wife deceased used to reside at her parental house at Tungadhar. He has stated that he used to reside at village Tungadhar as well as with accused. He has stated that PW1 Narvada Devi is adopted daughter of deceased Hima Devi @ Phithi . He has stated that on dated 18.4.2006 he was at village Tungadhar with deceased and accused Hema Devi was at village Shilli-Dogari. He has stated that deceased had gone to village Shilli-Dogari at 11 AM to leave two oxen with accused. He has stated that he had gone to graze sheep in his orchard at Tungadhar. He has stated that his adopted daughter Narvada Devi reached at home at about 2 PM. He has stated that Narvada Devi inquired about deceased mother and he told that deceased had gone to village Shilli-Dogari to return oxen of accused. He has stated that thereafter he along with his daughter Narvada went to village Shilli-Dogari. He has stated that at Shilli-Dogari Narvada called her mother by name but no response was given by deceased. He has stated that he thought that both deceased and accused would have gone to village Jhrenthi. He has stated that at about 6 PM he inquired from his son Kamal Singh and asked from him as to whether deceased Hima Devi @ Phithi was available or not. He has stated that thereafter he along with Narvada came back at village Tungadhar. He has stated that at about 6.30 PM Uttam Singh, Kamal

Singh and Jaswant Singh reached at his home and Uttam Singh told him that he met accused Hema Devi on the Jhrenthi path. He has stated that all three persons told him that accused and deceased had a quarrel with each other. He has stated that accused Hema Devi told that she does not know about whereabouts of deceased Hima Devi @ Phithi whether she was alive or dead. He has stated that thereafter he along with Uttam Singh and his son visited village Shilli-Dogari and some villagers were also accompanied with him. He has stated that when they reached village Shilli-Dogari they found that dead body of deceased was lying down near the door of kitchen and neck of the deceased was tied with a plastic rope. He has stated that he was under the impression that deceased was alive and in order to save the deceased he removed the plastic rope from her neck. He has stated that after removing the plastic rope from neck of deceased he saw that there was ligature marks around the neck and there was blood clot out side the right ear of deceased Hima Devi @ Phithi. He has stated that thereafter dead body was brought to village Tungadhar. He has stated that he informed the police and thereafter the police visited his house. He has stated that police recorded the statement of Narvada Devi, Uttam Singh, Jaswant Singh and Kamal Singh. He has stated that he handed over plastic rope to Police which was took into possession vide memo Ext PW2/A in the presence of witness Uttam Singh. He has stated that post mortem of deceased was conducted at Zonal Hospital Mandi. He has stated that during post mortem the ornaments of deceased were handed over to him vide memo Ext PW2/B and dead body of deceased was also handed over to him vide memo Ext PW2/C. He has stated that police also obtained photographs of deceased Hima Devi @ Phithi. He has stated that he solemnized marriage with deceased Hima Devi @ Phithi in the year 1975-76 and entries to this effect were recorded in the panchayat record. He has denied suggestion that deceased was not his legally wedded wife. He has stated that deceased has adopted PW1 Narvada as her daughter. He denied suggestion that deceased used to quarrel with him. He denied suggestion that deceased used to threat PW1 Narvada Devi to disinherit her. He denied suggestion that in the month of March 2006 deceased had tried to kill him with blow of 'Darat' (Sharp edged weapon). He denied suggestion that he stopped to provide the maintenance to accused Hema Devi and her children. He denied suggestion that he has no cordial relations with accused Hema Devi.

9.2 PW3 Narvada Devi has stated that accused is known to her. She has stated that Dila Ram is also known to her. She has stated that she was associated by police in the investigation. She has stated that on dated 18.4.2006 Dila Ram telephonically informed her that his wives had picked up quarrel and told her to come his house on which she visited at village Tungadhar. She has stated that police was also present in the house of Dila Ram and dead body was also lying in the verandah of Dila Ram. She has stated that at the instance of police she removed the clothes of the dead body of deceased Hima Devi @ Phithi and she saw injuries on the person of deceased. She has stated that there was one injury on the back of right ear and one injury on the forehead and blood

clot was also present on the ear. She has stated that left leg of the deceased was blackened. She has stated that she inspected the dead body on dated 19.4.2006 in the morning hour around 5.30 AM. She has stated that accused had disclosed the place of incident where accused picked up a quarrel with deceased Hima Devi @ Phithi. She has stated that deceased was strangulated with the help of a plastic rope. She has stated that accused had given disclosure statement in the presence of Dolma Devi and Ajay Kumar. She has stated that plastic rope Ext P1 and P2 were took into possession by police and blood stained lying on the floor was also took into possession. She has stated that police prepared Ext PW3/A, Ext PW3/B and Ext PW3/C at about 1 PM at village Shilli-Dogari. She has stated that accused had not made any disclosure statement to the police. She has stated that Deputy Superintendent of Police told her that accused had made extra judicial confession and she signed Ext PW3/A, Ext PW3/B and Ext PW3/C in a good faith.

9.3. PW4 Ajay Kumar has stated that he was posted as Patwari in circle Tungadhar since 2005. He has stated that on dated 19.4.2006 he was associated by police in the investigation. He has stated that during investigation he issued tatima Ext PW4/A and jamabandi Ext PW4/B. He has stated that police took blood stained piece of wood vide memo Ext PW3/C and bears his signature. He has stated that on dated 19.4.2006 accused Hema Devi had not given any statement before him. He was declared hostile. He has admitted that memo Ext PW3/A bears his signature. He has admitted that Narvada Devi and Dolma Devi have also appended their signatures and accused Hema Devi also appended her thumb impression on Ext PW3/B. He has stated that document Ext PW3/A and Ext PW3/B were prepared by police in his presence as he was busy in preparing tatima and jamabandi. He has stated that he signed Ext PW3/A and Ext PW3/B in good faith at the instance of police officials. He has stated that accused had not put her thumb impression over Ext PW3/A and Ext PW3/B in his presence. He has stated that accused had not given any disclosure statement in his presence.

9.4 PW5 Dolma Devi has stated that deceased Hima Devi was married to Dila Ram. She has stated that on dated 19.4.2006 she along with president Narvada Devi and sons of the deceased went with accused to Shilli-Dogari and accused has given disclosure statement that a quarrel took place between the accused and deceased in a kitchen room. She has stated that accused told her that when deceased fell on the floor thereafter accused strangulated the deceased with rope to kill her. She has stated that accused told that thereafter accused left village Shilli-Dogari leaving the deceased in kitchen at village Shilli-Dogari. She has stated that she along with President Narvada Devi put her signature and accused put her thumb impression on Ext PW3/B.

9.5 PW6 Uttam Singh has stated that Dila Ram is his elder brother. He has stated that deceased used to live with her parents at village Tungadhar and his brother was also living with deceased at village Tungadhar. He has stated that on dated 17.4.2006 the accused Hema Devi was at home as she was sowing maize crop. He has stated that prior

to 17.4.2006 accused used to graze the cattle in the forest at Shilli-Dogari. He has stated that on dated 15.4.2006 deceased took oxen from village Shilli-Dogari to village Tungadhar. He has stated he could not say at whose permission deceased took the oxen from village Shilli-Dogari to village Tungadhar. He has stated that he did not know when deceased returned oxen at village Shilli-Dogari. He has stated that on dated 18.4.2006 Kamal Singh received a telephonic message from his brother Dila Ram that deceased had gone to village Shilli-Dogari to return oxen but deceased did not come back after returning oxen. He has stated that thereafter he along with Kamal Singh and Jaswant went to village Tungadhar and on the way to village Tungadhar they did not meet the accused. He has stated that his brother Dila Ram had handed over two rope Ext P1 and Ext P2 which were took into possession by police vide Ext PW2/A. He has denied suggestion that on dated 18.4.2006 accused was at village Shilli-Dogari. He denied suggestion that when deceased went to village Shilli-Dogari to return the oxen to accused there quarrel took place between accused and deceased. He denied suggestion that in the process of scuffle deceased fell down on the floor and thereafter accused strangulated the deceased with the help of plastic rope. He denied suggestion that on dated 17.4.2006 and 18.4.2006 the accused was not showing maize crop. He denied suggestion that in order to save the accused he deposed falsely. He has admitted that Dila Ram asked him to accompany to village Shilli-Dogari to bring the deceased from village Shilli-Dogari at village Tungadhar. He has admitted that when they reached at village Shilli-Dogari they saw rope Ext P1 and Ext P2 was encircled around the neck of deceased and left portion of the rope was under the door of the kitchen. He has stated that rope Ext P1 and Ext P2 was single rope and the rope was cut into two pieces by his brother Dila Ram. He has stated that there were no knots applied in the neck of deceased and plastic rope was simply encircled at three places around the neck. He has admitted that deceased also used to pick up quarrel with her husband Dila Ram. He has stated that in the month of March 2006 deceased hit her husband Dila Ram with a blow of 'Darat' (Sharp edged weapon) but due to woolen coat Dila Ram did not receive any injury.

9.6 PW7 Kamal Singh has stated that he is elder son of Dila Ram and accused Hema Devi**.** He has stated that deceased was the second wife of his father Dila Ram . He has stated that deceased Hima Devi was living at village Tungadhar with her parents. He has stated that his mother used to resides in village Jhrenthi. He has stated that accused used to graze cattle at village Shilli-Dogari. He has stated that on dated 16.4.2006 deceased took two oxen from accused to Tungadhar and on dated 18.4.2006 the deceased brought back the oxen to village Shilli-Dogari. He has stated that he does not know to whom deceased handed over the oxen. Self stated that oxen were kept in the cow shed situated at village Shilli Dogari. He has stated that on dated 18.4.2006 his father Dila Ram rang him on his mobile and told that deceased had gone to village Shilli-Dogari to return back ox but deceased did not come back from village Shilli-Dogari and asked him to come to village

Tungadhar. He has stated that while he was going to village Tungadhar the accused did not meet him on the way and did not disclose anything to him. He has denied suggestion that his mother Hema Devi resides at village Shilli-Dogari. He denied suggestion that there was a dispute regarding land between the deceased and accused. He has admitted that rope Ext P1 and Ext P2 was single piece which was encircled around the neck of the deceased and left out portion was pressed under closed door of the kitchen situated at Shilli-Dogari. He has admitted that one portion of the rope was underneath the door and the other portion of the rope was around the neck of the deceased and was stretched strongly in the kitchen situated at Shilli -Dogari. He has admitted that his father is not providing any maintenance to accused Hema Devi.

9.7 PW8 Narain Singh has stated that he was Secretary of Radha Swami Satsang at Kuthah during the year 2006. He has stated that member of Radha Swawmi Satsang requested Dila Ram to sell one biswa of land for the purpose of widening the existing path leading towards Satsang land. He has stated that Dila Ram told him that he would consult with his brothers and co-sharers of land but the same could not be executed due to the fact that when the head of Satsang visited at Kuthah for inspection of the spot Dila Ram was not present. He has denied suggestion that he was not Secretary of Radha Swami Satsang. He denied suggestion that he did not meet Dila Ram at any point of time.

9.8 PW9 Hem Raj has stated that during the year 2006 he was associated in the investigation of the case. He has stated that on dated 19.4.2006 the ornaments i.e. one nose stud, two ear rings and two ear stud of gold and three bangles of brass of deceased Hima Devi @ Phithi were handed over to Dila Ram by the doctor Zonal Hospital Mandi vide memo Ext PW2/B in the presence of Shiv Lal. He has stated that dead body of the deceased was also handed over to Dila Ram vide memo Ext PW2/C. He has stated that he conducted the post mortem.

9.9 PW10 Dr Hemant Kapoor has stated that he was posted as Medical Officer in Zonal Hospital Mandi HP since 1998. He has stated that on dated 19.4.2006 the police has moved an application Ext PW10/A for conducting post mortem of deceased Hima Devi @ Phithi. He has stated that he and Dr. K.S.Malhotra conducted post mortem on dated 19.4.2006 at 2 PM. He has stated that dead body was brought to Zonal Hospital Mandi by police and on conducting post mortem examination doctor observed (1) That there was patch of defuse irregular echymosis 1x1/2 inch over left cheek colour was bluish and there was evidence of bleeding from right ear. (2) There was burst blister exposing denuded area involving right big, second and third toe along with lower 2 cm of dorsum of foot. (Ante mortem burns) with presence of mud. (3) There was three ligature marks around the neck. He has stated that deceased had died due to combined asphyxia and cerebral anoxia. He has stated that he preserved the viscera and sent for chemical analysis. He has stated that on analysis of samples no trace of any poison or alcohol was found. He has stated that deceased Hima Devi @ Phithi died

due to cumulative effect of asphyxia and strangulation. He has stated that he issued post mortem report Ext PW10/B which bears his signature. He has stated that plastic rope Ext P1 and Ext P2 could cause ligature marks over the neck of the deceased. He has stated that injury of the deceased was found simple in nature and the ligature mark around the neck of deceased caused ultimate death of deceased. He has stated that bleeding noticed at the time of post mortem was caused by rupture of blood vessels due to sudden rise of pressure. He has admitted that injury found on the cheek of the deceased could be caused by fall at the time of strangulation. He has stated that strangulation is of three types (1) Suicidal (2) Homicidal (3) Accidental. He has admitted that rope Ext P1 and Ext P2 was made of plastic. He has admitted that he did not complete post graduation or specialization in forensic medicine.

9.10 PW11 Gian Chand has stated that he is performing the work of photographer in Aman Studio since 2000. He has stated that on dated 19.4.2006 he took photographs of deceased Hima Devi at village Tungadhar at the instance of police. He has stated that he also took photographs of the place of incident at village Shilli-Dogari. He has stated that he has seen photographs Ext PW11/1 to Ext PW11/14 and its negatives Ext PW11/15 to Ext PW11/28 which were took into possession by him and the same were handed over to the police. He has stated that he took first photograph of the dead body on dated 19.4.2006 at about 8.30 AM and handed over the photographs and negatives to PW9 Hem Ram on dated 4.5.2006. He has denied suggestion that he did not take photographs.

9.11 PW12 Mahinder Singh has stated that he was posted as Constable in Police Post Jhrenthi on dated 18.4.2006. He has stated that at about 11.25 PM a telephonic message from vice president Gram Panchayat Tungadhar was received and rapat No.21 was recorded in roznamcha by him. He has stated that original rapat roznamcha Ext PW12/A was brought by him.

9.12 PW13 Inder Dev has stated that he was posted as MHC in Police Station Gohar on dated 19.4.2006. He has stated that on dated 19.4.2006 at about 11.45 AM LHC Dev Raj handed over to him statement under Section 154 Cr PC Ext PW1/A and thereafter he made endorsement Ext PW13/A and recorded FIR Ext PW13/B in police station Gohar. He has stated that case property was deposited with him by ASI Prem Lal on dated 19.4.2006. He has stated that on dated 20.4.2006 viscera of deceased and one more parcel sealed with seal impression 'ZH' were deposited with him by HHC Mohan Singh. He has stated that on dated 21.4.2006 he sent viscera along with three sealed parcels to FSL Junga through HHC Mohan Singh vide RC No.11/2006 and he handed over the same in FSL Junga and obtained receipt. He has stated that he sent case file to the spot from police station at about 12.15 PM. He has denied suggestion that rukka Ext PW1/A and FIR Ext PW13/B were falsely prepared at police station Gohar.

9.13 PW14 Mohan Singh has stated that he handed over viscera and one parcel sealed with seal impression 'ZH' to MHC Inder Dev Police Station Gohar which were given to him by doctor. He has stated that he deposited case property with FSL Junga on dated 22.4.2006 which were handed over to him by MHC Inder Dev on dated 21.4.2006 vide RC No.11/2006 and obtained receipt from FSL Junga and handed over the same to MHC Gohar.

9.14 PW15 Muni Lal has stated that during the year 2006 he was posted as Investigating Officer in Police Post Janjhali. He has stated that on receiving information vide rapat No.21 Ext PW12/A he along with HHC Mohan Singh and HHC Ranjeet Singh visited the spot at Tungadhar and found dead body of deceased Hima Devi in the court yard of Dila Ram. He has stated that they kept dead body of deceased Hima Devi on guard till arrival of ASI Prem Lal Police Station Gohar. He has stated that ASI Prem Lal reached at the spot at about 3 AM on dated 19.4.2006. He has stated that ASI Prem Lal handed over to him an application Ext PW10/A. He has stated that after conducting post mortem Dr. K.S Malhotra and Dr Hemant Kapoor handed over to him ear ring, nose pin and ear stud which were took into possession vide memo Ext PW2/B and the same were handed over to Dila Ram. He has stated that dead body was handed over by him to Dila Ram vide memo Ext PW2/C. He has stated that he recorded statements of Dr. Hemant Kapoor, Dila Ram, Hem Raj and Shiv Dayal under Section 161 Cr PC as per their versions. He has stated that they reached at the spot at 12 PM in the night. He has denied suggestion that no telephone message was received by him. He denied suggestion that false report has been recorded.

9.15 PW16 Dabe Ram has stated that he remained posted as Station House Officer Police Station Gohar in the year 2006. He has stated that on dated 18.4.2006 a telephonic message was received from HC Muni Lal Police Post Janjehli that Dila Ram vice President gram panchayat Tungadhar has informed police post Janjehli that a quarrel picked up between his two wives at village Shilli-Dogari and consequently deceased Hima Devi @ Phithi died in suspicious circumstances. He has stated that thereafter rapat No.29 was recorded and ASI Prem Lal and LHC Dev Raj were sent for investigation of case. He has stated that on completion of investigation he prepared challan which bears his signature. He denied suggestion that no telephone message was received by him from police post Janjehli. He denied suggestion that rapat mark 'X' is forged.

9.16 PW17 Amin Chand has stated that he remained posted in police post Janjehli as Incharge in the year 2006. He has stated that on dated 25.5.2006 he recorded statements of Dila Ram, Narain Singh and Molak Ram as per their version. He has stated that he handed over case file to Inspector Dabe Ram for preparing challan.

9.17 PW18 Prem Lal has stated that he remained posted as ASI at police station Gohar in the year 2006-2007. He has stated that on dated 18.4.2006 a telephonic message was received from police post

Janjehli to the effect that rapat No. 29 was recorded. He has stated that he along with LHC Dev Raj left for the spot in a government vehicle and reached at village Tungadhar where he recorded the statement of Narvada Devi under Section 154 Cr PC Ext PW1/A. He has stated that same was sent to police station Gohar for registration of FIR through Constable Dev Raj and FIR No. 50/2006 Ext PW13/B was recorded. He has stated that he inspected the dead body of deceased Hima Devi @ Phithi and found ligature marks around the neck. He has stated that photographs of deceased Hima Devi were took by photographer Gian Chand at Tungadhar and photographs of the place of incident at village Shilli-Dogari were also taken. He has stated that photographs Ext PW11/1 to Ext PW11/14 are the same. He has stated that dead body of deceased Hima Devi and forms were handed over to HC Muni Lal for conducting post mortem of deceased. He has stated that weapon of offence i.e. two pieces of plastic rope Ext P1 and Ext P2 were presented before him by Dila Ram and same were took into possession. He has stated that he prepared site plan of village Shilli-Dogari Ext PW18/C. He has stated that he recorded statements of Uttam Singh Ext PW18/D, Dila Ram Ext PW18/E, Narvada Devi Ext PW18/F and Ajay Kumar Ext PW18/G. He has stated that he also recorded statements of Gian Chand, MHC Inder Dev, HHC Mohan Singh, Jaswant Singh, Kamal Singh and Dolma Devi as per their version. He has stated that accused was arrested on dated 19.4.2006 and disclosure statement Ext PW3/A was recorded in the presence of Narvada Devi and Ajay Kumar. He has stated that site plan was prepared and one piece of wood stained with blood was took into possession from the room of accused Hema Devi vide memo Ext PW3/C. He has stated that he saw wooden piece Ext P3. He has stated that when he reached at village Tungadhar he found that dead body of deceased Hima Devi was kept in the courtyard. He denied suggestion that accused did not make any disclosure statement. He denied suggestion that he prepared map Ext PW18/C in police station. He denied suggestion that he filed false case against the accused in connivance with Narvada Devi. He has stated that he sent dead body for post mortem through HC Muni Lal. He denied suggestion that photographs were not taken at his instance.

Additional evidence under Section 391 Code of Criminal Procedure 1973 is necessary in the ends of justice.

10. Submission of learned Additional Advocate General that additional evidence under Section 391 of the Code of Criminal Procedure 1973 is essential in the present case in order to dispose of the present appeal properly and effectively and in the ends of justice is accepted for the reason hereinafter mentioned. It is the case of the prosecution that on dated 18.4.2006 at village Shilli-Dogari accused Hema Devi strangulated deceased Hima Devi @ Phithi with the help of plastic rope and committed murder. It is also proved on record that present case is based upon circumstantial evidence and is not based upon any eye witness. It is also proved on record that dead body of deceased Hima Devi @ Phithi was found in the kitchen of accused Hema Devi situated at

place Shilli-Dogari as per site plan Ext PW18/C. It is also proved on record that blood clot and dead body of deceased Hima Devi @ Phithi was found in the kitchen of accused Hema Devi at place 'D' shown in the site plan Ext PW18/C. It is also proved on record that there was only one door measuring 3 feet in height and 33 inches in breadth in the residential house of accused at village Shilli-Dogari in which the dead body of deceased Hima Devi was found shown in site plan Ext PW18/C. It is also proved on record that the residential house of accused situated at Shilli-Dogari shown in site plan Ext PW18/C where the dead body of deceased Hima Devi was found was closed from all side and entrance to the house shown in site plant Ext PW18/C was only through the door. The prosecution did not adduce any evidence on record in order to prove that who was present in the residential house of accused Hema Devi situated at village Shilli-Dogari on dated 18.4.2006 when incident of strangulation of deceased took place. Additional evidence in the present case is necessary in the ends of justice in order to ascertain as to who was present in the residential house of accused Hema Devi on dated 18.4.2006 at Shilli-Dogari shown in site plan Ext PW18/C which was closed from all side wherein the entrance to the residential house was only through the door. As per medical evidence placed on record the death of the deceased was caused due to strangulation and it is also proved on record that plastic rope through which this strangulation was committed was found in the residential house of accused Hema Devi situated at Shilli-Dogari shown in site plan Ext PW18/C and human blood clot was also found in the residential house of accused Hema Devi as per site plan Ext PW18/C placed on record. Court has carefully perused site plan Ext PW18/C placed on record qua village Shilli-Dogari where the dead body of deceased Hima Devi was initially found in the residential house of accused Hema Devi. One wood stained with blood Ext P3 was also found in residential house of accused situated at Shilli-Dogari shown in site plan Ext PW18/C. It is well settled law that Section 391 of the Code of Criminal Procedure 1973 is an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court. See AIR 1959 Allahabad 129 titled State Vs. Jai Prakash. It is well settled law that Section 391 Cr PC is analogous to Order 41 Rule 27 CPC and enables the appellate Court to take additional evidence in the ends of justice. See AIR 1933 Calcutta 364 titled Amar Chand Vs. Emperor. Also See AIR 1928 Bombay 241 titled Bansilal Gangaram Vani Vs. Emperor. The object of Section 391 Cr PC is to see that justice should be done inter se the parties and object of Section 391 Cr PC is the prevention that guilty person should not be escaped through careless or ignorant investigation. Additional evidence is necessary in the present case in the ends of justice and for proper adjudication of the present appeal. In the present case it is not the case of the prosecution that dead body of the deceased was found in open place which was approachable to the general public. On the contrary it is the case of the prosecution that dead body was found in the residential house of accused Hema Devi situated in village Shilli-Dogari which was approachable to accused or her family members. Additional evidence qua fact that who was present in the residential house of accused Hema Devi

at Shilli-Dogari on dated 18.4.2006 at the time of strangulation of deceased with plastic rope is essential in the present case in order to dispose of the present appeal properly and effectively. It was held in case reported in AIR 1965 SC 1887 titled Rejeshwer Prasad Misra Vs. State of West Bengal and another that appellate Court has power to take additional evidence in the ends of justice. Also See AIR 1963 SC 316 titled Abinash Chandra Bose Vs. Bimal Krishan Sen and another.

11. Submission of learned Advocate appearing on behalf of the respondent that additional evidence is not essential in the present case is rejected being devoid of any force for the reason hereinafter mentioned. As per site plan Ext PW18/C it is proved on record that dead body of deceased Hima Devi was found in the residential house of accused Hema Devi on dated 18.4.2006 at about 5.30 PM. We are of the opinion that in the ends of justice and in order to dispose of the present appeal properly and effectively additional evidence is essential in the present case in order to ascertain as to who was present in the residential house of accused Hema Devi which was closed from all side on dated 18.4.2006 at 5.30 PM where dead body of Hima Devi @ Phithi was found by way of strangulation through plastic rope at place Shilli-Dogari.

12. In view of the above stated facts we direct learned Sessions Judge Mandi to take additional evidence under Section 391 of the Code of Criminal Procedure in the present case qua factum that who was present in the residential house of accused Hema Devi situated in place Shilli-Dogari shown in site plan Ext PW18/C on dated 18.4.2006 at 5.30 PM when death of Hima Devi @ Phithi took place by way of strangulation. We further direct that accused or her Advocate shall have the right to be present when the additional evidence would be recorded by learned Sessions Judge in the present case. We further direct that additional evidence would be recorded by learned Sessions Judge Mandi subject to provision of Chapter XXIII of the Code of Criminal Procedure 1973 as an inquiry. Learned Sessions Judge Mandi will submit additional evidence along with his report to the Registrar Judicial of Hon'ble High Court of HP within one month after receipt of file. Original file of learned trial Court be transmitted to learned Sessions Judge Mandi alongwith certified copy of order forthwith. After receipt of additional evidence along with report from learned Sessions Judge Mandi, learned Registrar Judicial will list the case for further hearing. A certified copy of site plan Ext PW18/C will be sent to learned Sessions Judge Mandi for guidance along with certified copy of order.

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

Rama Nand Rathore son of
Shri Shoba Ram Rathore ....Petitioner
Versus
State of H.P. ....Respondent

CWP No. 1670 of 2013
Order Reserved on 10th October,2014
Date of Order 16th October, 2014

Constitution of India, 1950- Article 226- The department had issued seniority list of Excise and Taxation Officers in accordance with the judgment of Hon'ble Supreme Court of India in case titled ***Ajit Singh vs. State of Punjab, AIR 1999 SC 3471*** -pay and pension of the petitioner was fixed on notional basis- the department contended that the petitioner had not worked against the post of Assistant Excise & Taxation Officer and he was rightly granted notional promotion- Held, that the petitioner was legally entitled for promotion w.e.f. 17.08.1999- Promotion is fundamental right of the employee under Article 16 (1) of the Constitution of India- An employee is entitled to be promoted if not disqualified as per the Annual Confidential Reports or due to pendency of disciplinary proceedings- The petitioner could not be penalized for the fault of the department- The respondent is directed to promote the petitioner w.e.f. 17.8.1999 from the date when he was granted notional promotion and to release the monetary benefits to the petitioners.

(Para-5 to 7)

For the Petitioner: Mr. P.P. Chauhan, Advocate.
For the Respondent: 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 filed under Section 226 of the Constitution of India. It is pleaded that respondent department issued final seniority list of Excise and Taxation Officers (Class-1 Gazetted) of the Excise and Taxation department as it stood on dated 20.10.1995. It is pleaded that it was not in consonance with judgment of Hon'ble Supreme Court reported in AIR 1999 SC 3471 titled Ajit Singh vs. State of Punjab. It is further pleaded that thereafter petitioner filed OA No. 405 of 2001 (CWP (T) No. 2580 of 2008) titled as Rama Nand Rathore vs. State of H.P. and others and order of Hon'ble High Court was sent to department for implementation. It is further pleaded that final seniority

list was circulated by respondent department for giving petitioner rightful place. It is also pleaded that petitioner was promoted as Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999 by giving notional benefits. It is further pleaded that pay of petitioner was fixed by respondent department on notional basis. It is further pleaded that pension of the petitioner was fixed on the basis of notional promotion. Petitioner sought relief to quash Annexure P6 wherein notional promotion granted w.e.f. 17.8.1999. Petitioner also sought relief for monetary benefits w.e.f. 17.8.1999.

2. Per contra, reply filed on behalf of the respondent pleaded therein that petitioner was promoted as Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999 on notional basis. It is pleaded that petitioner superannuated from service on dated 30.4.2001. It is pleaded that petitioner did not actually work against the post of Assistant Excise and Taxation Commissioner and he was rightly granted notional promotion w.e.f. 17.8.1999. It is further pleaded that pay of the petitioner was fixed on notional basis vide order dated 31.8.2012. It is pleaded that action of the respondent is legal and sustainable in the eyes of law. It is further pleaded that all benefits have been released to the petitioner as per law. It is also pleaded that seniority list of the petitioner was maintained strictly in accordance with law and all benefits were given to the petitioner as permissible under law. Prayer for dismissal of writ petition sought.

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

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

1. Whether word “notional” mentioned in notification No. EXN-B(14)-15/2001 dated 9.8.2012 issued by Principal Secretary (E&T) to the Government of H.P. is contrary to law, as alleged?

2. Whether petitioner is entitled for all monetary benefits for the post of Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999 with retrospective effect?

Findings on Point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that order of Principal Secretary i.e. notification No. EXN-B(14)-15/2001 dated 9.8.2012 qua the promotion of petitioner on notional basis w.e.f. 17.8.1999 is illegal and contrary to law is accepted for the reasons mentioned hereinafter. It is proved on record that respondent promoted the petitioner w.e.f. 17.8.1999 to the post of Assistant Excise and Taxation Commissioner (Class-1 Gazetted) w.e.f. 17.8.1999 on notional basis in the pay scale of Rs. 7880-11660 per month. It is also proved on record that petitioner filed CWP (T) No. 2580 of 2008 titled Rama Nand Rathore vs. State of H.P. and others which was decided on dated 8.7.2011. It is also proved on record that Hon’ble High

Court of H.P. allowed the writ petition filed by Rama Nand Rathore and directed the respondent department to issue final seniority list by taking into account the decision rendered by the Constitution Bench of the Apex Court reported in AIR 1999 SC 3471 titled Ajit Singh vs. State of Punjab. It is also proved on record that in view of directions of Hon'ble High Court of H.P. the seniority of petitioner was fixed rightly w.e.f. 17.8.1999. It is proved on record that petitioner was legally entitled for promotion to the post of Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999. It is well settled law that promotion is fundamental right of the employee as per Article 16(1) of Constitution of India. It is well settled law that promotional right is attached with seniority of employee as guaranteed under Article 16(1) of Constitution of India unless employee is not disqualified for promotion as per Annual Confidential Reports. It is well settled law that promotion can be denied to the employee if there is some disciplinary proceeding pending against the employee. There is no evidence on record in order to prove that disciplinary proceedings were pending against the petitioner at the time of his promotion. It is also well settled law that no employee should be penalized without any fault. It is also well settled law that if employer did not promote the employee in accordance with law at stipulated period then employee should not be suffered for inaction of employer. Petitioner was promoted to the post of Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999 on the recommendation of review DPC meeting held on dated 24.7.2012. It is held that notional promotion will not give any monetary benefits to the petitioner It is further held that if monetary benefits are not given to the petitioner then purpose of filing CWP (T) No. 2580 of 2008 titled Rama Nand Rathore vs. State of H.P. would be futile. Hence it is held that the word "notional promotion" mentioned in notification No. EXN-B(14)-15/2001 dated 9.8.2012 issued by Principal Secretary (E&T) to the Government of H.P. is illegal and same is ordered to be deleted from notification No. EXN-B(14)-15/2001 dated 9.8.2012. In view of above stated facts point No.1 is decided in affirmative in favour of the petitioner.

Findings on Point No.2

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is also entitled for all consequential monetary benefits w.e.f. 17.8.1999 to the post of Assistant Excise and Taxation Commissioner is accepted for the reasons hereinafter mentioned. It is held that petitioner was promoted to the post of Assistant Excise and Taxation Commissioner (Class-1 Gazetted) w.e.f. 17.8.1999 and it is also held that there were no disciplinary proceedings pending against the petitioner when his promotion was due and it is held that promotion is fundamental right of an employee as per Article 16(1) of Constitution of India. It is held that petitioner will be legally entitled for all monetary benefits of promotion for the post of Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999.

7. Submission of learned Assistant Advocate General appearing on behalf of the respondent that petitioner did not work on the

post of Assistant Excise and Taxation Commissioner and he is not legally entitled for any monetary benefit on the concept of no work no pay is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that promotion of petitioner was withheld due to fault of employer only and it is further held that promotion of petitioner was not withheld due to fault of petitioner. It is well settled law that no person should be penalized for the action which he has not committed. It is further held that petitioner/employee cannot be penalized for inaction of employer qua his fundamental rights mentioned in Article 16(1) of Constitution of India. In view of above stated facts point No. 2 is decided in favour of the petitioner.

8. In view of above findings, it is held that (1) Word "notional" mentioned in notification No. EXN-B(14)-15/2001 dated 9.8.2012 issued by Principal Secretary (E&T) to the Government of H.P. is illegal and same is ordered to be deleted. (2) It is held that petitioner will be legally entitled for all consequential monetary benefits for the post of Assistant Excise and Taxation Commissioner w.e.f. 17.8.1999 till his retirement date i.e. 30.4.2001 in accordance with law and thereafter will also be entitled for all pensionary benefits in accordance with law. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Ms. Sushma alias Sunita Devi .....Appellant.

Versus

Shri Vivek Rai .....Respondent.

FAO (HMA) No. 229 of 2014

Date of decision: 16th October, 2014

Hindu Marriage Act, 1955- Section 2(2) **-** The District Judge passed a decree of divorce in favour of the petitioner and the respondent- However, the parties were members of Scheduled Tribes within the meaning of Section 2(2) of the Act- Held, that the judgment passed by the District Judge was void, ab initio and nullity as the provisions of Hindu Marriage Act are not applicable to members of the Scheduled Tribes.

(Para-16 to 21)

Cases referred:

Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another, (2005) 7 SCC 791

Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340

For the Appellant : Mr.Neeraj Gupta, Advocate.
For the Respondent : Mr.Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered**:**

Tarlok Singh Chauhan, Judge.

The appellant has challenged the order passed by learned District Judge, Kullu, dated 21.12.2013 in H.M.P.No.15 of 2011 whereby a decree of divorce was passed in favour of the petitioner and against the respondent under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act').

2. Shri Neeraj Gupta, learned counsel for the appellant has raised preliminary submission that the parties are the members of Scheduled Tribe and in terms of Section 2(2) of the Act, the provisions of Hindu Marriage Act are not applicable to the parties having been specifically excluded and, therefore, the learned Court below had no jurisdiction to entertain much less decide the lis.

3. This Court vide its order dated 22.8.2014 directed the parties to file affidavits as to whether they belong to scheduled tribe or not, within the meaning of Clause 25 of Article 366 of the Constitution of India. Pursuant to such directions, both the parties have filed the affidavits and it is abundantly clear from the perusal thereof that both the parties are members of Scheduled Tribes within the meaning of Clause 25 of Article 366 of the Constitution of India as notified by the Constitution (Schedule Tribe) Order, 1950 as amended by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 63 of 1956, 108 of 1956, 18 of 1987 and 15 of 1990.

Sub Section 2 of Section 2 of the Act reads thus:

> "(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

The aforesaid sub Section starts with the non-obstante clause and, therefore, has overriding effect overall the provisions of the Statute and it cannot be disputed that the judgment therefore rendered by the learned District Judge, Kullu is coram non-judice.

4. The learned counsel for the respondent has though made a faint attempt to canvass that no objection regarding jurisdiction was ever raised by the appellant before the learned Courts below and, therefore, the appellant is estopped from raising such a plea in these proceedings. I am afraid that such a plea cannot be accepted for more than one reason. Firstly, the Court cannot be conferred jurisdiction by consent of parties and in case there is inherent lack of jurisdiction, then the order

passed by such court is void, ab initio and is a nullity and decision amounts to nothing.

5. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in **Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another (2005) 7 SCC 791** which reads as follows:

> "29. Ms. Malhotra, then contended that Section 21 of the Code, requires that the objection to the jurisdiction must be taken by the party at the earliest possible opportunity and in any case where the issues are settled at or before settlement of such issues. In the instant case, the suit was filed by the plaintiff in 1988 and written statement was filed by the defendants in 1989 wherein jurisdiction of the court was 'admitted'. On the basis of the pleadings of the parties, issues were framed by the court in February, 1997. In view of the admission of jurisdiction of court, no issue as to jurisdiction of the court was framed. It was only in 1998 that an application for amendment of written statement was filed raising a plea as to absence of jurisdiction of the court. Both the courts were wholly wrong in allowing the amendment and in ignoring Section 21 of the Code. Our attention in this connection was invited by the learned counsel to Hira Lal v. Kali Nath, (1962) 2 SCR 747 and Bahrein Petroleum Co. v. Pappu, 1966 (1) SCR 461.
>
> 30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.
>
> 31. In Halsbury's Laws of England, (4th edn.), Reissue, Vol. 10; para 317; it is stated;
>
> > 317. Consent and waiver.- Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the

> acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

32. In Bahrein Petroleum Co., this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that 'where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.' A decree passed by a court having no jurisdiction is non-est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice.

33. In Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340, this Court declared;

> "It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction _ strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties." (emphasis supplied)

37. In the instant case, Delhi Court has no jurisdiction since the property is not situate within the jurisdiction of that court. The trial court was, therefore, right in passing an order returning the plaint to the plaintiff for presentation to the proper court. Hence, even though the plaintiff is right in submitting that the defendants had agreed to the jurisdiction of Delhi Court and in the original written statement, they had

admitted that Delhi Court had jurisdiction and even after the amendment in the written statement, the paragraph relating to jurisdiction had remained as it was, i.e. Delhi Court had jurisdiction, it cannot take away the right of the defendants to challenge the jurisdiction of the court nor it can confer jurisdiction on Delhi Court, which it did not possess. Since the suit was for specific performance of agreement and possession of immovable property situated outside the jurisdiction of Delhi Court, the trial court was right in holding that it had no jurisdiction."

6. In view of the aforesaid exposition of law coupled with the provisions of the Act, it can be safely concluded that the petition filed by the respondent for dissolution of marriage by way of decree of divorce under the provisions of Hindu Marriage Act, 1955 was not maintainable and the decree so passed was therefore a nullity since the Act was not applicable to either of the parties who admittedly were members of a scheduled tribe within the meaning of Clause 25 of Article 366 of the Constitution of India. Such decree being a nullity cannot withstand judicial scrutiny and accordingly is set aside. Resultantly, the appeal is allowed and the impugned judgment passed by the learned District Judge, Kullu in HMP No.15 of 2011 is set aside leaving the parties to bear their own costs. Pending applications, if any, shall stand disposed of.

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

Smt. Asha and others ..... Applicants

Vs.

Suresh Kumar and others ..... Respondents

CMP(M)No.774 of 2014 in Civil Revision No. .

Date of decision: 16.10.2014.

Indian Limitation Act, 1963- Section 5- The applicant had sought condonation of delay of 121 days delay in filing the revision petition on the ground that the case was being pursued by Sh. Naresh Kumar, who had died on 30.11.2012 and after his death the matter was being pursued by Sh. Rajinder Kumar, who met with a road accident at Solan in January 2014- Held, that the applicant had relied upon the certificates bearing dates 5.2.2013 and 16.3.2013, which clearly shows that a false case was set up by the applicants, therefore, they are not entitled for the condonation of delay. (Para-5 to 7)

Cases referred:

Parju Ram vs. Bhag Singh, CMP(M) No. 834 of 2014, decided on 9.10.2014

Dalip Singh vs. State of Uttar Pradesh and others, (2010) 2 SCC 114

Hari Narain v. Badri Das, AIR 1963 SC 1558

Hotel and others v. State of Andhra Pradesh and others etc., AIR 1983 SC 1015

G. Narayanaswamy Reddy and others v. Govt. of Karnataka and another, AIR 1991 SC 1726

S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, JT (1993) 6 SC 331

Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449

R. v. Kensington Income Tax Commissioners, (1917) 1 KB 486

A.V. Papayya Sastry and others v. Government of A.P. and others, AIR 2007 SC 1546

Sunil Poddar & Ors. v. Union Bank of India, (2008) 2 SCC 326 : (2008 AIR SCW 556)

K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481 : (2008 AIR SCW 6654)

G. Jayshree and others v. Bhagwandas S. Patel and others (2009) 3 SCC 141 : (2009 AIR SCW 1311)

For the applicants :	Mr. K.D.Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.
For the respondents:	Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The applicants have sought condonation of 121 days delay in filing of revision petition on the ground that they had preferred a revision petition on 28.5.2014 against the judgement of the appellate court dated 22.10.2013. Earlier the case was being pursued by Sh. Naresh Kumar, who died on 30.11.2012 and after his death the matter was being pursued by Sh. Rajinder Kumar, who met with a road accident at Solan in January 2014 and was hospitalized in Zonal Hospital, Solan and later at his home. He inquired from his counsel Sh. Rajiv Garg about the hearing of the appeal and was informed that the same had been dismissed. He accordingly, applied for copy of the judgement through another counsel on 25.2.2014, which was taken by Sh. Sudhir Thakur, Advocate on 4.3.2014. However, the copy of the judgement was not received by the petitioners. It is then alleged that the house and business premises were earlier with Naresh Kumar and now petitioners No. 1 to 5 are occupying the same and petitioners No. 6 to 8 who are real brothers of Naresh Kumar could not pursue the matter as the petitioners Asha Devi and Ajay Kumar subsequently got copy of judgement from Sh. Sudhir Thakur, Advocate, but because of ill health of

Asha Devi the revision against the order of Rent Controller, Solan dated 23.6.2012 affirmed in appeal on 22.10.2013 could not be preferred earlier.

2. It is also averred that petitioners No. 1 to 5 are residing in the premises in dispute and also carrying on business. It is also averred that Asha Devi has not been keeping well and for the said reason the copy of the judgement which had been given to her could not be brought to the notice of other petitioners, thereby preventing the filing of revision petition within the prescribed period of limitation. As soon as the factum of the case having been decided against the petitioners came to the notice of Ajay Kumar, he collected the copy of judgement under revision and after taking legal advice preferred the present revision petition.

3. The respondents filed reply to this application, wherein it was claimed that contents of the petition were an afterthought and lame excuses were being made to cover up the negligence with a sole view to create a false ground for condoning the delay in filing the revision petition. It was averred that the stand taken by the petitioners was falsified from the fact that all the four brothers, who were respondents in the eviction petition, not only reside at Solan, but also carrying on business. Therefore, it is not permissible for the tenants-petitioners to allege that it was only Naresh Kumar, who alone was pursuing the matter. The factum of death of Naresh Kumar is not disputed, but it is emphatically denied that Rajinder Kumar allegedly met with a road accident in January 2014, since no medical records had been annexed with the application in support of such contention. It is also claimed that ground taken by the petitioners that after the death of Naresh Kumar, the matter was being pursued by Rajinder Kumar, could not be accepted as the appeal before the learned appellate court was filed on behalf of all the four brothers and there was no explanation why the other two brothers could not pursue the matter when it was within their knowledge. It is then claimed that falsity of the claim of the tenants-petitioners is apparent from the fact when one of the petitioners alleged to have contacted his counsel for obtaining the copy then where was the necessity of engaging another counsel especially when the matter stood finally disposed of. It was also denied that Asha Devi was not keeping good health. Lastly, it was alleged that the allegations made by Ajay Kumar are false and nothing more than cooked up bull story.

4. In rejoinder to reply, the petitioners claimed that after the death of Naresh Kumar, Sh. Rajinder Kumar had been pursuing the matter, but he met with a road accident in Solan in January 2014. It was also submitted that Asha Devi and Ajay Kumar got copy of the judgement, but because of ill health of Asha Devi, the matter could not be pursued, while on the other hand, Sh. Ajay Kumar was busy with the treatment of his mother Asha Devi and therefore, he too could not file the appeal.

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

5. The petitioners in support of their contention that Rajinder Kumar who had been pursuing the case met with a road accident in January 2014 have annexed certificate Annexure A-1. Now in case this certificate is seen minutely it shows that the same bears the date 5.2.2013, while another certificate has also been annexed which is dated 16.3.2013, on which dates admittedly the proceedings were pending adjudication before the learned District Judge, who decided the same on 22.10.2013. The averments made by the applicants in this application coupled with the documents particularly Annexure A-1 shows that entirely a false claim has been set up by the applicants. Once the claim of the petitioners is found to be false, the same is sufficient to deny relief to them.

6. In **CMP(M) No. 834 of 2014 titled Parju Ram** vs. **Bhag Singh, decided on 9.10.2014** while dealing with the similar case regarding condonation of delay in filing of the appeal wherein like in the present case the applicant had resorted to falsehood in the application, this court held as follows:-

> **"5. At the out set it may be observed that applicant is guilty of *suppressio veri suggestio falsi* because the applicant has not stated the truth and when confronted with the truth in rejoinder to the reply has invented stories which he expects this court to believe. It is settled law that a party who seeks to avail the jurisdiction of the court must come to the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. A person whose case is based on falsehood has no right to approach the court and he can be thrown out at any stage of the litigation. The applicant cannot be permitted to abuse the process of the court. Save and except age by his side, the applicant on account of the falsity of his claim has nothing to fall back upon. But even age in this case can be of no help or assistance to the applicant as this would not only be a bad precedent but would also amount to granting premium to dishonesty. It cannot be denied that grant of relief apart from law on the subject is also governed by principles of "justice, equity and good conscience" and it is the duty of the court of equity to prevent legal fraud and the Court is expected to do justice by promoting honesty and good faith as far as it lies within its power. Therefore, it is all the more incumbent for the party seeking relief and equity that he must come to the court with clean hands."**

7. This court is not oblivious to the fact that in matters of delay an extremely liberal and justice oriented approach has to be adopted but then can any indulgence be shown in favour of a party who has not approached the court with clean hands. It cannot be disputed that applicants have sought to abuse the process of law by resorting to falsehood and misrepresentation, which are required to be viewed very seriously by this court. The position of law has been succinctly dealt with

by the Hon'ble Supreme Court in **Dalip Singh** vs. **State of Uttar Pradesh and others (2010) 2 SCC 114** in the following terms:-

> **"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the Courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the Court proceedings.**
>
> **2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order, to meet the challenge posed by this new creed of litigants, the Courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.**
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> 3. In Hari Narain v. Badri Das AIR 1963 SC 1558, this Court adverted to the aforesaid rule and revoked the leave granted to the appellant by making the following observations:
>
> > **"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue and misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterizes as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."**

4. In Welcome Hotel and others v. State of Andhra Pradesh and others etc., AIR 1983 SC 1015 the Court held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

5. In G. Narayanaswamy Reddy and others v. Govt. of Karnataka and another, AIR 1991 SC 1726, the Court denied relief to the appellant who had concealed the fact that the award was not made by the Land Acquisition Officer within the time specified in Section 11-A of the Land Acquisition Act because of the stay order passed by the High Court. While dismissing the special leave petition, the Court observed :

> "**2.....Curiously enough, there is no reference in the Special Leave Petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the Special Leave Petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the Special Leave Petitions.**"

6. In S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, JT (1993) 6 SC 331, the Court held that where a preliminary decree was obtained by withholding an important document from the Court, the party concerned deserves to be thrown out at any stage of the litigation.

7. In Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449, it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a Court of law, but is also a Court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, LJ. in R. v. Kensington Income Tax Commissioners, (1917) 1 KB 486, and observed:

> "**In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such**

jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ Courts would become impossible."

8. In A.V. Papayya Sastry and others v. Government of A.P. and others, AIR 2007 SC 1546 the Court held that Article 136 does not confer a right of appeal on any party. It confers discretion on this Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular Court of Appeal or a Court of Error. This Court only intervenes where justice, equity and good conscience require such intervention.

9. In Sunil Poddar & Ors. v. Union Bank of India, (2008) 2 SCC 326 : (2008 AIR SCW 556), the Court held that while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. **If the appellant has not come forward with clean hands, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court, will non-suit him on the ground of contumacious conduct.**

10. In K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481 : (2008 AIR SCW 6654), the Court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in G. Jayshree and others v. Bhagwandas S. Patel and others (2009) 3 SCC 141 : (2009 AIR SCW 1311)."

8. That apart it would be seen that there are as many as eight petitioners in this case and that too all of them are residents of Solan bazar where the trial and appellate court are situate and yet none of them cared to collect the certified copy of judgement, which was available at a stone-throw. This only establishes lethargy, negligence, intentional inaction on the part of the applicants in pursuing the petition, which inaction on the part of the applicants by no stretch of imagination can be termed to be a good ground for condoning the delay in filing the petition beyond the prescribed period of limitation. The petitioners were required to establish that they were not negligent or guilty of "inaction" and had exercised "due diligence" but despite this, the delay had occurred and having failed to do so, no indulgence can be shown in their favour.

9. For all the reasons aforesaid, there is no cause much-less sufficient cause disclosed by the applicants, which prevented them from filing the revision petition within the prescribed period of limitation. Further, since the applicants have resorted to falsehood and abuse the process of court by deceiving it, this application is dismissed and consequently even the revision petition is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

FAOs (MVA) No. 252,253 & 254 of 2007
Date of decision: 17.10.2014.

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1. <u>FAO No. 252 of 2007.</u>

Bhagwan Datt .....Appellant.
Versus
Narender Kumar and another ...Respondents.

2. <u>FAO No. 253 of 2007.</u>

Mahinder Kumar .....Appellant.
Versus
Narender Kumar and another ...Respondents.

3. <u>FAO No. 254 of 2007.</u>

Raj Kumar .....Appellant.
Versus
Narender Kumar and another ...Respondents.

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal had absolved the Insurance Company of its liability on the ground that the insured had committed willful breach of terms and conditions of the policy- Held, that the record showed that the insured had in fact committed breach of terms and conditions of the policy and insurance company was rightly absolved of its liability. (Para-7 & 8)

For the appellant(s): Mr. Debinder Ghosh, Advocate.
For the respondent(s): Mr.V.S. Chauhan, Advocate, for respondent No. 1.
Ms. Devyani Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

These three appeals are disposed of by this common judgment, having been filed by the claimant(s)-injured for enhancement of the compensation, against three different set of judgments and awards of the same date, arising out of the same accident, awarding the same amount of compensation, in favour of the injured-claimants and against respondent No. 1 Narender Kumar, for short "the impugned awards".

2. It appears from the record that three claimants, namely Bhagwan Datt, Mohinder Kumar and Raj Kumar filed claim petitions before the Tribunal for grant of compensation on account of injuries sustained by them in an accident caused by the driver of truck bearing registration No. HP-15-3352 near village Sari Talrota by driving the said vehicle rashly and negligently. All the three claimants claimed compensation to the tune of Rs.2 lacs each, in the claim petitions, as per the break-ups given in their claim petitions.

3. The owner and insured have resisted and contested the clam petitions.

4. Following common issues came to be framed by the Tribunal in all the three claim petitions.

(i) Whether the petitioner has sustained injuries on account of rash/negligent driving of the vehicle by its driver (since deceased) ? OPP.

(ii) If issue No.1 is proved in affirmative, to what amount of compensation the petitioner is entitled to an from whom? OPP

(iii) Whether the driver of the vehicle did not possess a valid and effective driving licence and respondent No. 1 was fully aware of it, if so its effect? OPR-2.

(iv) Whether the vehicle did not have valid registration certificate, fitness certificate, route permit and other documents? OPR-2

(v) Whether the driver of the vehicle had violated the standard Insurance Policy conditions? OPR-2

(vi) Whether the petition is bad for non-joinder of necessary parties? OPR-2

(vii) Whether the petitioner was a gratuitous passenger? OPR-2

(viii) Relief.

5. The Tribunal, after scanning the evidence on records,- awarded compensation to the tune of Rs.10,000/- each with costs in favour of the claimants and against respondent No. 1 Narender Kumar owner of vehicle.

6. The owner and insurer have not questioned the impugned award(s) on any ground, thus, has attained finality so far the same relates to them. The claimants have questioned the impugned award(s) on two grounds, i.e., the impugned award is inadequate and the award(s) was to be satisfied by the insurer.

7. I wonder how the claimant(s) can make such a prayer that the impugned award(s) should be satisfied by the insurer and not by the insured. However, I deem it proper not to discuss this issue.

8. I have examined the evidence on record. I am of the considered view that the Tribunal has rightly held that the insured has committed willful breach and is liable to pay compensation in all the three petitions.

9. The injured/claimants have not examined any expert and have not led any evidence to the effect that to what amount of compensation they are entitled to. They have not produced on record the disability certificate(s) which could have held them entitled to Rs.25,000/-, on no fault liability. The Tribunal, after making guess work held the claimants entitled to Rs.10,000/- each with costs which is a just and appropriate compensation.

10. Having said so, all the three appeals are dismissed alongwith pending applications, if any.

11. Send down the records forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Bhawani Singh & another ...Appellants.
Versus
Dhan Dev & others ...Respondents.

FAO No. 344 of 2010
Decided on: 17.10.2014

Motor Vehicle Act, 1988- Section 149- The respondents contended that the vehicle was being driven by "B"- "B" also admitted in the reply filed by him that he was driving the vehicle- Motor Accident Claims

Tribunal held that FIR was lodged against one "M" and report was also lodged under Section 173 (2) Cr.P.C.- Held, that Sub Divisional Judicial Magistrate had held that the State had failed to prove that "M" was driving the vehicle, consequently, "M" was acquitted- therefore, the version of the respondents that "B" was driving the vehicle is to be accepted as correct- "B" had a valid driving licence to drive the vehicle, therefore, the insurance company is liable to pay the amount.

(Para-8 to 11)

For the appellants: Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondent No. 1.
Ms. Seema Sood, Advocate, for respondent No. 2.
Ms. Ambika Kotwal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 17th June, 2010, made by the Motor Accident Claims Tribunal (I), Mandi, (hereinafter referred to as "the Tribunal") in Claim Petition No. 28 of 2008, titled as Dhan Dev versus Bhawani Singh & others, whereby compensation to the tune of Rs. 86,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and against the appellants-respondents No. 1 and 2 in the claim petition (hereinafter referred to as "the impugned award").

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

3. The appellants have questioned the impugned award on the ground that the Tribunal has fallen in error in saddling them with liability and discharging the insurer.

4. The claimant-injured, namely Shri Dhan Dev, became victim of the motor vehicular accident which was caused by the driver of a private car, bearing registration No. HP-34 A-7167, on 8th December, 2007, at Bali Chowki, while driving the offending vehicle rashly and negligently, hit the claimant-injured, in which he sustained injuries.

5. One of the questions to be determined in this appeal is – whether the offending vehicle was being driven by Shri Mangharu or by Shri Bir Singh?

6. Respondents have resisted the claim petition on the grounds taken in the respective memo of objections. Respondents No. 12 and 4 have filed separate replies to the claim petition stating therein that it was Shri Bir Singh (respondent No. 4 in the claim petition), who was

driving the offending vehicle at the time of accident. It is apt to reproduce relevant portion of the reply filed by respondent No. 4 herein:

> *"..... It is however submitted that respondent No. 4 was driving vehicle no. HP-34A-7167 and respondent no. 1 & 2 were sitting on back seat of the vehicle on 8-12-2007. It is further submitted that respondent no. 4 was not driving the vehicle rashly and negligently and no accident has taken place due to rash and negligent driving of respondent no. 4 neither the petitioner has sustained any injuries in motor vehicle accident."*

Thus, it is admission on the part of Shri Bir Singh that he was driving the offending vehicle at the relevant point of time.

7. The Tribunal has held that FIR was lodged against Shri Mangharu and report under Section 173 (2) of the Code of Criminal Procedure (hereinafter referred to as "the CrPC") was presented against him, thus, it can be presumed that he was driving the offending vehicle at the time of accident. It is apt to reproduce para 19 of the impugned award herein:

> *"19. FIR was lodged against respondent No. 2. It is also in the evidence that a police challan was presented against him only. The FIR must have been lodged immediately i.e. when there was no chance of manipulation. It can be presumed that the investigation was properly done and on such proper investigation, it must have been found that it was respondent No. 2 who was driving the vehicle that is why police presented challan against him."*

8. Learned counsel for the appellants produced in this Court, in terms of the mandate of Order 41 Rule 27 of the Code of Civil Procedure (hereinafter referred to as "the CPC"), the judgment, dated 21st June, 2010, made by the Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi (hereinafter referred to as "the Magistrate") in Police Challan No. 105-I/2008 / 1-II/2008, titled as The State of Himachal Pradesh versus Manghru Ram, wherein it has been held that accused, namely Shri Manghru Ram, had taken the defence that he was not driving the offending vehicle, which was being driven by Shri Bir Singh. It is apt to reproduce para 10 of the judgment herein:

> *"10. Defence of the accused was that of simplicitor denial. Accused in his statement u/s 313 Cr.P.C. stated that on the said date vehicle was being driven by Vir Singh and defence evidence led by the accused was also on similar grounds. Further, defence taken by the accused was that complainant on his own fell into the drain causing injuries to himself. It was further brought before the court that the vehicle*

had missing problem because of which it was not possible to drive it in high speed."

9. The Magistrate, after scanning the evidence, held that case of the State is shrouded in doubts and it is not proved as to who had driven the offending vehicle. It is also apt to reproduce paras 13 and 15 of the said judgment herein:

"13. Thus, first doubt arises in the mind of the court is whether Manghru Ram was driving the vehicle or Vir Singh was driving the vehicle. PW-4 complainant in his cross examination states that 4-5 persons were sitting inside the vehicle. He further states that two persons were sitting on the front side and three persons were sitting in the back seat. He further stated that at the time of accident he did not recognize who was driving the vehicle. Thus, from the statement of the complainant we can safely assume that he had not seen the driver of the vehicle. PW-6 also in his cross examination stated that though he had seen Alto being driven, but he did not see who was driving the vehicle. He further stated that he came to know the name of the driver when police asked the accused. Thus, this eye witness also cannot state the fact who was driving the vehicle. PW-7 in his cross examination has stated that 1-2 persons were sitting inside the vehicle. This is a contradiction with the statement of the injured who stated that five persons were sitting in the vehicle. PW-7 further states that he does not remember that how many persons were sitting on the back seat of the vehicle, whereas complainant states that three persons were sitting in the back seat of the vehicle. This witness further states that he does not remember that what colour cloth were worn by the accused on the date of accident. Only this witness has denied the suggestion that he did not see who was driving the vehicle and stated that accused was driving the vehicle. But, this witness is the owner of Cloth Shop Smrat Sale. This witness stated that at the time of accident he was sitting outside his shop on a chair. Whereas complainant as PW-4 has stated in his cross examination that he was talking to PW-7 who was inside his shop. These two facts are contradictory raising a doubt that whether PW-7 Bhoop Singh was inside the shop or outside the shop. Further, the fact that PW-7 is stating that only 1-2 persons were sitting inside the vehicle, whereas injured is stating that 4-5 persons were sitting inside the vehicle, shows that Bhoop Singh might have not seen the accident or is only guessing the fact that accused was driving the vehicle. Further, PW-7 states that he was sitting

outside his shop for 15-20 minutes before the accident and Dhan Dev was standing there for 15-20 minutes. Further he stated that complainant Dhan Dev never talked to him for the said 15-20 minutes. Whereas PW-4 in his cross examination has stated that at the time of accident he was talking to PW-7. These facts in combination shows that present of PW-7 is being deliberately shown at the spot of accident. Further, PW-4 complainant, in his examination in chief has stated that accused has revealed his name to him on being asked by him. Whereas in his cross examination he states that 3-4 persons had come to him asking for forgiveness and name of the accused i.e. Manghru Ram was revealed to him by the police officials and no body else. The said fact in combination with statement of the witness discussed above as well as DW-1 shows that there is a doubt qua the identity of the driver of vehicle No. HP34A-7167.

14. .....

15. Thus, as discussed above there is a doubt qua the identity of the driver and also a doubt has arisen in the mind of the court qua the fact that whether vehicle can be driven in speed or not. Though, I.O. as PW-8 in his examination in chief has corroborated the version of the prosecution, but there is nothing in his examination in chief or cross examination which could remove the aforesaid doubt. In fact in his cross examination first I.O. states that he cannot say whether can had come missing problem or not, but further admits the fact that as per mechanical report has has missing problem. This fact brings before the court that I.O. never investigated the case taking into mind the mechanical aspect that car was incapable of being driven in speed. Hence, point No. 1 is decided against the prosecution and in favour of the accused."

10. Keeping in view the admission on the part of Bir Singh-respondent No. 4 in the claim petition read with the judgment made by the Magistrate, reproduced hereinabove, the presumption drawn by the Tribunal in para 19 of the impugned award loses its efficacy.

11. Having said so, one comes to an inescapable conclusion that, prima facie, it was Bir Singh who was driving the offending vehicle at the relevant point of time.

12. Now, the question is – whether he was having valid and effective driving licence to drive the offending vehicle at the time of accident?

13. The photo copy of the driving licence of Bir Singh is on the record of the claim petition at page No. 137, Ext. RA, perusal of which do disclose that Bir Singh was competent to drive light motor vehicle, i.e. offending car, which is not in dispute. Thus, the owner-insured has not committed any willful breach.

14. I have also perused the insurance policy, Ex. RX, in terms of which risk is covered, which is also not disputed.

15. Viewed thus, the impugned award needs to be modified and the insurer-National Insurance Company has to satisfy the award, is, accordingly, saddled with liability.

16. The insurer-National Insurance Company is directed to deposit the awarded amount with interest before the Registry within six weeks, which shall be released to the claimant-injured after proper verification. After deposition of the awarded amount by the insurer-National Insurance Company, the amount deposited by the appellants be released to them with interest through payee's account cheque.

17. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

18. Send down the records after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

National Insurance Company Ltd. .....Appellant
Versus
Ram Lal and others ...Respondents

FAO (MVA) No. 251 of 2007
Date of decision: 17th October, 2014.

Motor Vehicle Act, 1988- Section 149**-** The driver was competent to drive the LMV/ HTV- He was driving a truck- Held, that the driver was competent to drive the truck in terms of driving license- further, the Insurance company had not proved that insured had committed willful breach of the insurance policy, therefore, insurer is liable to indemnify the insured. (Para-9 & 10)

Cases referred:

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

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

For the appellant: Mr. Ashwani K.Sharma, Advocate.

For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No. 1.
Mr. M.L. Sharma, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

The appellant has assailed the judgment and award dated 28.12.2005, made by the Motor Accident Claims Tribunal, -II Hamirpur in MAC Petition No. 65 of 2003/22 of 2005, titled Ram Lal versus National Insurance Company Ltd. and others, whereby the claim petition filed by the claimant came be granted and compensation to the tune of Rs.5,15,000/- alongwith interest @ 6% came to be awarded in favour of the claimant and against the driver and owner with command to the appellant-insurer to satisfy the award, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

BRIEF FACTS.

2. Ram Lal-respondent No. 1 herein invoked the jurisdiction of the Motor Accident Claims Tribunal for the grant of compensation to the tune of Rs.12 lacs, as per the break-ups given in the claim petition. It is averred that on 22.7.2003, he was sitting in a rain shelter on the side of the road at Kuthera on Hamirpur Sujanpur road. At about 1 p.m. respondent No.3 Sanjeev Kumar came from Sujanpur side driving Truck bearing registration No. HP-11-0717, owned by respondent No. 2 Ramesh Kumar, in a rash and negligent manner and struck his truck against the rain shelter as a result of which it had fallen down. The claimant had sustained multiple injuries because of this accident and his six teeth were broken. He had also suffered two fractures in his left leg which was broken from thigh as well as near the ankle and subsequently his foot was amputated. He has become permanent disabled and he was not in a position to walk and is always dependent on others and that he has a large family to support.

3. The respondents contested and resisted the claim petition.

4. The following issues came to be framed by the Tribunal.

(i) Whether the petitioner received injuries on his person while sitting in a rain shelter when a truck bearing no.HP-11-0717 on 22.7.2003 struck against the rain shelter due to rash and negligent driving by respondent No.3 at village Kuthera? OPP.

(ii) If issue no. 1 is proved, whether the petitioner is entitled for compensation, if so, to what amount and from whom? OPP

(iii) Whether respondent no.3, the driver of the truck involved in the accident was not holding effective and valid driving licence, if so, to what effect?OPR-1.

(iv) Relief.

5. The claimant has examined seven witnesses in support of his case and placed on record documents, i.e., copy of FIR, Ext. PW1/A, M.L.C. of claimant Ext. PW2/A, medical certificate, Ext. PW3/A, travel receipts and medical receipts Mark-A-1 to A-49 and OPD slip Ext. PW7/A.

6. The insurer/appellant has not examined any witness. Only driver stepped into the witness-box and produced the documents, i.e., driving licence of Sanjeev Kumar, Ext. RW1/A, registration certificate, copy of insurance, copy of national permit and list of reliance Ext. R-1 to R-4 respectively.

7. The Tribunal, after scanning the evidence on the record, held the insurer liable to pay the compensation. The driver, owner and claimant have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

8. The insurer has questioned the impugned award on the grounds that the driver was not competent to drive heavy goods motor vehicle thus was not having a valid and effective driving licence and the amount awarded is excessive.

9. I have perused the record. The driving licence is on the file, exhibited as Ext.RW1/A which do disclose that the driver was competent to drive "light motor vehicle" and also "heavy transport vehicle". Thus, the driver was competent to drive the said vehicle and it cannot lie in the mouth of the insurer-appellant that the driver was not having a valid and effective driving licence. Even otherwise, the insurer has not proved that the driver was not competent to drive the offending vehicle and insured has committed any willful breach in terms of Section 149 (2) of the Motor Vehicle Act read with the insurance contract. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd.** versus **Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or

> disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.
>
> (iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.
>
> (v).....
>
> (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section149 (2) of the Act."

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

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

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

11. The second argument that the compensation awarded is excessive is devoid of any force, for the following reasons.

12. The injured, a young man has lost all the charm of his life. The said accident has shattered his physical frame and has become permanent disabled rather burden on his family. He has lost all the amenities of his life. He is entitled to compensation more than what he was awarded by the Tribunal, but he has not questioned the impugned award.

13. Having said so, the appeal is dismissed and the impugned award is upheld. Send down the record forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ

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

FAO No.129 of 2007
Date of decision: 17.10.2014

Motor Vehicle Act, 1988- Section 166- The Driver had not produced the driving license, but had only produced the certificate from Drivers

Training Institute, Murthal, regarding undergoing training- RW1 deposed that Drivers Training Institute, Murthal, had no authority to issue the driving licence and no Licence was issued by the Institute- Held that in the absence of driving licence, the insurer is not liable to pay the amount- However, insurer is to satisfy the claim with the right of recovery from the owner . (Para-9 to 14)

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. J.R. Thakur, Advocate, for respondents No.1 to 4.

Nemo for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 31st January, 2007, passed by the Motor Accident Claims Tribunal-II Fast Track Court, Hamirpur (for short, "the Tribunal") in MAC Petition No.54 of 2004/RBT 26/05, titled Kanta Devi & others vs. Puneet Sharma & another, whereby compensation to the tune of Rs.6,08,900/- alongwith interest at the rate of 6% per annum came to be awarded in favour of the claimants and against the insurer with a command to the insurer-appellant to satisfy the award (for short the "impugned award").

2. **Brief facts**

The claimants have invoked the jurisdiction of the Tribunal by the medium of claim petition in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the M.V. Act") for grant of compensation to the tune of Rs.12 lacs as per the break-ups given in the claim petition on the ground that deceased Kewal Krishan became the victim of a vehicular accident, which was caused by the driver-cum-owner, namely, Arjan Singh while driving truck bearing registration No.HR-46-A-6606 rashly and negligently on 18th February, 2004 at about 6.00 p.m. near Sandhoia on National Highway at Dashmesh Hotel, District Bhilwara (Rajasthan). The deceased sustained injuries and succumbed to the same. The deceased was an employee of 7th Mile Stone Bhatia Complex Giani Border Ghaziabad (UP) and was earning Rs.6,000/- per month plus Rs.100/- as daily expenses. The claimants have sought compensation on the ground that they were dependents upon the deceased and lost source of dependency.

3. The owner has not appeared before the Tribunal and was set ex-parte. The insurer-appellant contested the claim petition by filing objections.

4. The following issues came to be framed in the claim petition on 8.8.2005:-

"1. Whether Shri Kewal Krishan had died on account of rash and negligent driving of respondent No.1 of vehicle No. HR-46-A6606? OPP.

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

3. Whether the claim petition is not maintainable against the respondents? OPR.2.

4. Whether respondent No.1 had not been in possession of a valid and effective driving license at the time of accident, if so with what effect? OPR-2.

5. Whether the petitioners are estopped from filing the petition, by their act and conduct? OPR.2.

6. Whether the claim petition is bad for non-joinder and mis-joinder of necessary parties? OPR.2.

7. Relief."

5. The claimants have examined the witnesses and proved the averments contained in the claim petition. The insurer has examined RW-1 Yog Raj, Clerk, Dealing Hand in the office of General Manager, Drivers Training Institute, Murthal, District Sonepat (Haryana).

6. The Tribunal, after examining the pleadings and scanning the evidence, oral as well as documentary, held that the claimants have proved all the issues and the insurer has failed to prove that the owner has committed any willful breach and saddled the insurer with the liability.

7. The claimants and the owner have not questioned the impugned award on any count, has attained finality so far it relates to them.

8. The insurer has questioned the impugned award on the ground that the owner-cum-driver was not having valid and effective driving licence to drive the offending vehicle at the time of accident.

9. In view of the above, issues No.1, 3, 5 and 6 are not in dispute and the findings returned on these issues are upheld.

10. The only dispute is with regard to issue No. 4 and issue No.2 to the effect whether the amount of compensation is to be recovered from the insurer. The driver-cum-owner has not contested the claim petition. The only evidence led before the Tribunal was the statement of RW-1 Yog Raj, in which he has specifically stated that the Training Institute was not having the power and authority to issue the driving licence and no licence was issued by the said institute. However, stated that certificate (Ext.RW-1/A) is correct to the extent that the driver was under training in the said institute from 22nd February 1999 to 24th February, 1999.

11. No driving licence is on the file. The only document on the file is a photo copy of certificate (Ext.RW-1/A), which appears to have been issued by the said institute.

12. Having said so, the driver was not having driving licence and the owner has committed the willful breach.

13. The claimants, being the third party, cannot be made to suffer. Thus, the insurer has to satisfy the claim of the third party with a right of recovery.

14. Accordingly, the impugned award is modified and the insurer is saddled with the liability to satisfy the entire award with right of recovery and is at liberty to lay a motion before the Tribunal for effecting recovery.

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

16. The impugned award is modified, as indicated above, and the appeal is disposed of alongwith all the pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

NHPC ...Appellant.
Vs.
Smt. Sharda Devi & others ...Respondents.

FAO No. 77 of 2010
Decided on: 17.10.2014

Motor Vehicle Act, 1988- Section 149- The deceased was travelling in the vehicle for distribution of meals to the CISF Personnel deployed at Nakroda Barrier Sub Post at Bairra Dam out post- The vehicle met with an accident while returning from the post- Held, that the deceased was in active duty and was travelling with the goods in the vehicle, therefore, he cannot be called to be a gratuitous passenger. (Para-16 to 21)

Cases referred:

National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550,

National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)

National Insurance Co. Ltd. v. Maghi Ram, 2010 ACJ 2096 (HP)

National Insurance Co. Ltd. v. Urmila, 2008 ACJ 1381 (P&H)

For the appellant: Mr. Vijay Arora, Advocate.

For the respondents: Mr. Adarsh K. Vashisth, Advocate, for respondents No. 1 to 3.

Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appellant has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act (hereinafter referred to as "the MV Act") for setting aside the judgment and award, dated 5th December, 2009, made by the Motor Accident Claims Tribunal (II), Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in MACT No. 49-J/2006, titled as Smt. Sharda Devi & others versus NHPC & another, whereby compensation to the tune of Rs. 8,47,736/- with interest @ 6% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the appellant-owner-insured came to be saddled with liability (hereinafter referred to as "the impugned award").

2. Precisely, the case of the appellant is that deceased-Lajpat Rai was employed as Constable in the Central Industrial Security Force (hereinafter referred to as "CISF), was on active duty with the truck, bearing registration No. HP-44-0795, on 30th October, 2004, for distributing the meals to CISF personnel, who were deployed at Nakroda Barrier Sub Post at Bairra Dam out post.

3. In order to determine the issue, it is necessary to mention herein the facts of the case briefly.

Brief facts:

4. The claimants filed a claim petition before the Tribunal for grant of compensation to the tune of Rs. 20,50,000/- as per the break-ups given in the claim petition on the ground that the deceased-Lajpat Rai was on active duty with the offending vehicle, i.e. truck bearing registration No. HP-44-0795 on 30th October, 2004, for distribution of meals to the CISF Personnel deployed at Nakroda Barrier Sub Post at Bairra Dam out post. The said truck, while coming back to Bairra Dam, met with an accident, in which the deceased lost his life. The claimants have averred that the deceased was the only bread earner of the family, thus, have lost their source of dependency.

5. The claim petition was resisted by the respondents, i.e. NHPC and the insurer on the grounds taken in the respective memo of objections.

6. The following issues came to be framed by the Tribunal on 30th April, 2007:

> *"1. Whether the petitioners being legal heirs of the deceased are entitled to claim compensation from the*

respondents? If so to what amount and from whom? OPP

2. Whether the petition is not maintainable in the present form? OPR-1

3. Whether the petition is bad for non-joinder of necessary parties? If so its effect? OPR-2

4. Whether the driver of the offending vehicle was not holding a valid and effective driving licence? If so its effect? OPR-2

5. Whether the deceased was a gratuitous passenger in the offending vehicle and because of that reason the petitioners are not entitled to get compensation for the death of deceased as alleged? OPR-2

6. Relief."

7. The claimants have examined HC Charan Singh as PW-1, Shri Tormel Singh as PW-2, Dr. Abhinab Rana as PW-3 and one of the claimants, i.e. Smt. Sharda Devi, has herself stepped into the witness box as PW-4. NHPC has examined only one witness, namely Shri H.K. Sharma, as RW-1. The insurer has not examined any witness in support of its case.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved issue No. 1 and decided the same in their favour. Issues No. 2, 3 and 4 have been decided against the respondents and in favour of the claimants.

9. The insurer had to discharge the onus to prove issue No. 5. The Tribunal, after scanning the evidence, held that the deceased was travelling as a gratuitous passenger in the offending vehicle, discharged the insurer from its liability and directed the appellant-NHPC to satisfy the award.

10. The findings returned on issues No. 1 to 4 are not in dispute. The only dispute is – whether the deceased was travelling in the offending vehicle as a gratuitous passenger or otherwise?

11. The claimants have specifically pleaded in paras 10 and 25 of the claim petition that the deceased was on active duty in the offending vehicle for distribution of meals to the CISF Personnel. The appellant-NHPC has not denied the said fact.

12. The insurer-respondent No. 2 in the claim petition in para 3 of the preliminary objections has averred that the deceased was a gratuitous passenger. It has not specifically but evasively denied the averments contained in paras 10 and 25 of the claim petition.

13. In terms of the mandate of Order VIII of the Code of Civil Procedure (hereinafter referred to as "the CPC"), if a pleading is not

denied specifically or no reply is filed, it is deemed to have been admitted.

14. The claimants have examined Shri Tormel Singh, Deputy Superintendent of CISF, as PW-2, who has stated that the deceased was on active duty at the time of accident for distributing meals to CISF Personnel.

15. Viewed thus, the deceased was travelling in the offending vehicle not as a gratuitous passenger, but was on active duty. Having said so, the Tribunal has fallen in error in holding that the deceased was a gratuitous passenger, which is not the fact.

16. Learned Senior Counsel for the insurer argued that the vehicle met with the accident on its return journey and the deceased was a gratuitous passenger at that time. The argument is misconceived and is devoid of any force for the following reasons:

17. It is admitted case that the deceased was travelling in the offending vehicle as a Constable for distributing meals, which they had taken to Nakrod Barrier Sub Post of Bairra Dam out post, met with the accident, cannot be said to be a gratuitous passenger.

18. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

19. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

> *"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in* ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)****wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is*

not to be proved and, therefore, this decision does not help the appellant.

9. Learned counsel for the appellant had also relied upon the decision in ***National Insurance Co. Ltd. v. Maghi Ram****, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*

10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in ***National Insurance Co. Ltd. v. Urmila****,* ***2008 ACJ 1381 (P&H)****, wherein it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*

11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."

20. Applying the test to the instant case, one comes to an inescapable conclusion that the deceased was not travelling in the offending vehicle as a gratuitous passenger.

21. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007** being the lead case, titled as **National Insurance Company Limited versus Smt. Teji Devi &**

others, decided on 22nd August, 2014 and **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on **26th September, 2014.**

22. RW-1, namely Shri H.K. Sharma, has proved that the driver of the offending vehicle, namely Shri Dalel Singh, was having the valid and effective driving licence to drive the same. Thus, the owner has not committed any willful breach.

23. Having said so, the Tribunal has wrongly saddled the appellant-owner-NHPC with liability and discharged the insurer.

24. The factum of insurance is not in dispute. Thus, the insurer has to satisfy the impugned award, is accordingly saddled with liability.

25. The insurer is directed to deposit the awarded amount with interest before the Registry within six weeks. On deposition of the same, the Registry is directed to release the same in favour of the claimants strictly as per the terms and conditions contained in the impugned award on proper identification. Registry is also directed that the amount deposited by the appellant be thereafter released in favour of the appellant with interest through payee's account cheque.

26. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

27. Send down the records after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, CJ.

Oriental Insurance Company Ltd. ...Appellant

VERSUS

Dinesh Sharma and others. ...Respondents.

FAO No.90 of 2007
Decided on: October 17, 2014.

Motor Vehicle Act, 1988- Section 149- Insurance company contended that the risk was not covered on the date of accident, as the cheque issued by the insured was dishonoured due to insufficiency of funds- Held, that it was for the insurer to inform the insured that the cheque was dishonoured and to cancel the policy - in case an accident takes place in between, the insurer has to satisfy the liability.

(Para-14)

Cases referred:

New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082

Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948

United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657

Oriental Insurance Co.Ltd. vs. Dharam Chand & Ors., 2010(4) T.A.C. 15 (S.C.)

For the Appellant: Mr.Deepak Bhasin, Advocate.
For the Respondents: Mr.B.S. Kanwar, Advocate, for respondent No.1.
Mr.B.R. Sharma, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (oral):

Subject matter of this appeal is the award, dated 11th January, 2007, passed by Motor Accident Claims Tribunal, Shimla, H.P., (hereinafter referred to as the Tribunal), in Claim Petition No.17-S/2 of 2003, titled Dinesh Sharma vs. Surjeet Singh and others, whereby compensation to the tune of Rs.4,92,600/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant (respondent No.1 herein) and the insurer/appellant was directed to satisfy the same, (for short, the impugned award).

2. The insurer/appellant has questioned the impugned award mainly on the ground that on the date of accident, the insurance risk was not covered and no insurance policy was subsisting on the said date, and the Tribunal has fallen in error in saddling the appellant with the liability. The other ground urged is that the accident was the outcome of contributory negligence and the owner and the driver of the Jeep, involved in the accident, were liable to be saddled with the liability.

3. The owner/insured and the driver have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them.

4. The question is – Whether the insurer/appellant has been wrongly saddled with the liability?

5. In order to determine the said issue, it is necessary to give flash back of the case, the womb of which has given birth to the present appeal.

6. Claimant Dinesh Sharma (respondent No.1 herein) filed a Claim Petition before the Tribunal for grant of compensation to the tune of Rs.8.00 lacs, as per the break-ups given in the Claim Petition, on the ground that on 27th September, 2001, at about 9.00 p.m., while he was going from Shogi to Khawara Chowki in Jeep No.HPR-32, where his Karyana shop was situated, when he reached near the Petrol Pump

Shogi, the said Jeep was hit by truck bearing registration No.HP-12-8759, being driven by the driver, namely, Raj Kumar rashly and negligently, as a result of which he sustained injuries.

7. The driver and the owner of the offending truck resisted the Claim Petition on the ground that the claimant had driven the Jeep rashly and negligently and that the accident was not the outcome of rash and negligent driving of the truck driver.

8. During the pendency of the Claim Petition, it appears that the insurer/appellant had filed an application under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure for arraying one Kailash Chand, son of Shri Parash Ram as respondent, being the owner of the Jeep, was rejected by the Tribunal. Neither the insurer nor the owner and the driver of the offending truck have questioned the said order, has attained finality.

9. On the pleadings of the parties, the following issues came to be settled:

1. Whether the petitioner has suffered injuries because of the rash and negligent driving of truck No.HP-12-8759, by respondent Raj Kumar? OPP
2. In case Issue No.1 is proved in affirmative, to what amount the petitioner is entitled? OPP
3. Whether the petition in the present form is not maintainable? OPR-3
4. Whether the petition is bad for non-joinder and mis-joinder of necessary parties? OPR
5. Whether the petitioner is estopped to file the petition by his acts and conduct? OPR
6. Whether the vehicle in question was being driven by an unauthorized person who was not having valid and effective driving licence at the time of the accident? OPR
7. Whether the vehicle in question was being plied in violation of the terms and conditions of the insurance policy? OPR
8. Relief.

10. In order to prove his case, the claimant examined PW-1 Sudesh Thakur, PW-2 Puran Chand, PW-3 V.S. Panwar, PW-4 Sunita Seth, PW-5 H.C. Mohan Lal, PW-6 Ram Lal, PW-7 Rajinder Kumar, PW-8 Dr. P. Sharma and the claimant himself stepped into the witness box as PW-9. The owner and the driver of the offending truck examined two witnesses, namely, Raj Kumar (driver himself) and S.I. Prem Singh as RW-2/1 and RW-2, respectively.

11. The insurer opted not to lead any evidence. Thus, the evidence led by the claimant remained un-rebutted, as far as insurer is concerned. At the cost of repetition, it may be stated that the owner and

the diver have not questioned the impugned award. Thus, the findings recorded by the Tribunal on issues No.1, 3, 4, 5, 6 and 7 are upheld.

12. The argument of the learned counsel for the appellant/insurer that the accident was caused by the claimant while driving the Jeep is devoid of any force and far fetched for the reason that it has not led any evidence to prove the said fact and the owner and the driver of the offending truck accepted the impugned award. Moreover, no such ground was taken by the insurer in the reply filed before the Tribunal. Accordingly, the argument is turned down.

13. During the pendency of the appeal, the insurer/appellant has filed an application under Order 41 Rule 27 read with Section 151 CPC, (CMP No.247 of 2007), to prove the fact that the cheque issued by the insured towards the payment of premium was bounced and, thus, the insurer was not liable. This ground has not been taken by the insurer before the Tribunal nor such evidence was led. The application appears to have been filed just to delay the disposal of the case, which is against the concept of granting compensation.

14. It was for the insurer to inform the owner of the offending truck that the cheque had bounced and in case the accident takes place in between, the insurer had to satisfy the liability.

15. In terms of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") read with the provisions of Sections 147 to 149 of the MV Act, the insurer has to intimate the insured about the bouncing of the cheque, which has not been done in the present case, and if intimation is not given and during that period, the accident happens, it is the insurer, who is liable.

16. The Apex Court in the case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of*

Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."

17. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :

> *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*

We, therefore, agree with the opinion of the High Court.

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.

18. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made and conveyed and if the accident occurs till the cancellation is made, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

19. Having said so, the application is dismissed.

20. The learned counsel for the appellant/insurer further argued that at the time of the accident, the insurance policy was not subsisting. The insurance policy has been proved on record as Ext.RW-2/B, which does disclose that the vehicle was duly insured with the same Company. The date of issue of the insurance policy has been mentioned as 27.9.2001 at 1.00 p.m. and as per column 4, it was to expire on 27th September, 2002. However, in column 3 of the policy document, effective date and time of commencement of insurance is recorded as 28th September, 2001 at 10.00 a.m.

21. The question is whether the insurer is liable from 27th September, 2001 at 1.00 p.m. or from 28th September, at 10.00 a.m. The answer to the same is that the insurer is liable from 27th September, 2001 for the reason that the previous insurance policy was also issued by the same Company and that was subsisting during the night of 27th September, 2001. The owner has taken all steps to deposit the premium and obtain cover note on 27th September, 2001 at 1.00 p.m. and the accident had taken place on 27th September, 2001 at 9.00 p.m. Thus, the insurance policy is valid.

22. The Apex Court in case **titled as Oriental Insurance Co.Ltd. vs. Dharam Chand & Ors.,** reported in **2010(4) T.A.C. 15 (S.C.),** held that the insurance cover was valid from the date & time of deposit of the insurance premium. It is apt to reproduce paragraph 2 of the said decision hereunder:

> *"2. In this case, the premium cheque for the insurance policy was received by the appellant, the Insurance Company, on 7th May, 1998 at 4.00 pm and a cover note was issued at the same time. In columns 3 & 4 of the cover note, however, it was stated that the insurance would commence from 8th May, 1998 and expire on 7th May, 1999."*

23. Applying the ratio of the judgment (supra) to the present case, the risk was covered and the insurer is liable.

24. Having said so, the findings recorded by the Tribunal are upheld and the appeal is dismissed.

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

Ravinder Singh alias Laddi and others .....Petitioners.

Versus

State of H.P. and another ..... Respondents.

Cr.MMO No.198 of 2014.
Date of decision: 17.10.2014.

Code of Criminal Procedure, 1973- Section 482– An FIR was registered against the accused for the offences punishable under Sections 341, 323, 325, 504, 147, 149 IPC- Parties entered into a compromise- Held, that the continuation of criminal proceedings would amount to abuse of process of law- The offences are of personal nature and quashing the proceedings would bring out peace and amity between two sides.

(Para-8)

Cases referred:

Narinder Singh & Ors. vs. State of Punjab & Anr., JT 2014 (4) SC 573

Gian Singh vs. State of Punjab and another, (2012) 10 SCC 303

Dimpey Gujral, W/o Vivek Gujral and others vs. Union Territory through Administrator, UT, Chandigarh and others, (2013) 11 SCC 497

For the Petitioners : Mr.N.K.Thakur, Senior Advocate with Mr.Rahul Verma, Advocate.

For the Respondents : Mr.Virender Kumar Verma and Ms.Meenakshi Sharma, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondent No.1.

Mr.Dheeraj K.Vashisht, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

The petitioners have approached this Court for quashing of FIR No.75/2012, registered at Police Station, Barsar, District Hamirpur, on 11.06.2012 under Sections 341, 323, 325, 504, 147, 149 IPC and also the consequential criminal proceedings in Case No.45-II/2013, titled State of Himachal Pradesh versus Ravinder Singh and others, pending before the Court of learned Judicial Magistrate Ist Class, Barsar, District Hamirpur.

2. The petitioners are students of 'Sai Ram Educational Trust' and pursuing their studies in different fields. The complainant is also a student of the same Institution, who on 11.06.2012 at around 9.30 p.m. along with his friends Amit and Atul was coming back to his quarter after getting certain papers photostat, then petitioners came there and obstructed his path and after some verbal duel petitioners started giving fist blows to him, as a result of which, he sustained injuries on his face, chest and back. On this allegation, the aforesaid FIR came to be registered and after investigation final report was prepared which finally culminated into filing of the challan before the competent Court. Now, it is alleged that due to persuasion of the elder persons and as a gesture of goodwill and to maintain cordial relations, the parties have settled the dispute/differences.

3. The parties have also entered into a written compromise in which they have undertaken to live peacefully with each other and compromise has been effected without any pressure, coercion, greed etc. Copy of the compromise deed has been annexed as Annexure P-1 with this petition.

4. Today, the petitioners are present in the Court, who have been identified as such by their counsel Mr. Rahul Verma, Advocate. The respondent No.2 is also present in person and has been identified by his counsel Mr.Dheeraj K.Vashisht, Advocate. The parties have admitted that they have compromised the matter interse themselves and respondent No.2 has stated that he does not want to pursue the matter any further as he has entered into a compromise Annexure P-1 with the petitioners.

5. The moot question is whether the Court in such like cases can quash the proceedings. The law on this subject has been summed up in a recent judgment of the Hon'ble Supreme Court in ***Narinder Singh & Ors.*** V. ***State of Punjab & Anr. JT 2014 (4) SC 573,*** wherein it was held as under:

"(I) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is t to be exercised sparingly and with caution.

(II) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

(III) Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the of offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

(IV) On the other, those criminal cases having overwhelmingly and pre--dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

(V) While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

(VI) Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is

inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

(VII) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

6. It would be seen that prior to **Narinder Singh's case** (supra), a three Hon'ble Judges Bench had considered the relevant scope of Section 482 and 320 Cr.P.C. in ***Gian Singh*** *versus* ***State of Punjab and another (2012) 10 SCC 303*** wherein it was held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.P.C. while exercising inherent power of quashment under Section 482 Cr.P.C., the Court must have due regard to the nature and gravity of the crime and its social impact. It warned the Courts, the High Court for

quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. which principles have been reported and reaffirmed in **Narinder Singh's case** (supra).

7. Now the further question remains whether this Court can quash proceedings where the petitioners have been charged under Sections 341, 323, 325, 504, 147, 149 IPC. This question need not detained this Court no longer in view of the judgment of the Hon'ble Supreme Court in ***Dimpey Gujral, W/o Vivek Gujral and others*** *versus* ***Union Territory through Administrator, UT, Chandigarh and others (2013) 11 SCC 497*** wherein the Hon'ble Supreme Court seized of a case seeking quashment of FIR and its consequential proceedings wherein the accused like in the present case had been charged under Sections 147, 148, 149, 323, 307, 452 and 506 IPC and the Hon'ble Supreme Court after relying upon the judgment of **Gian Singh's case** (supra) held as follows:-

> *"7. In certain decisions of this court in view of the settlement arrived at by the parties, this court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.*
>
> *The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp.342-43, para 61)*
>
> > *"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences*

under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No.163 dated 26/10/2006 registered under Section 147, 148,149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3,Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial court are hereby quashed."

8. On the basis of the aforesaid exposition of law, this Court is of the opinion that this is a case where the continuation of the criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of personal nature and quashing the proceedings would bring out peace and amity between two sides.

9. In these circumstances, FIR No.75/2012, registered at Police Station, Barsar, District Hamirpur, on 11.06.2012 under Sections 341, 323, 325, 504, 147, 149 IPC and also the consequential criminal proceedings in Case No.45-II/2013, titled State of Himachal Pradesh versus Ravinder Singh and others, pending before the Court of learned Judicial Magistrate Ist Class, Barsar, District Hamirpur, are hereby quashed.

10. The petition is disposed of in the aforesaid terms, so also the pending application, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Smt. Samantra Devi & others ...Appellants.
Versus
Sanjeev Kumar & others ...Respondents.

FAO No. 71 of 2007
Decided on: 17.10.2014

Motor Vehicle Act, 1988- Section 166- Minor sisters of the deceased are dependent upon him and are entitled for maintenance- Further, held that both the scooterists were rash and negligent and accident was due to their contributory negligence- 50% of the amount was ordered to be deducted on this account.

(Para-13 to 17)

Cases referred:

Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another, AIR 1987 Supreme Court 1690

Gian Singh and others versus Ram Krishan Kohli and others, AIR 2002 Jammu and Kashmir 82

Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc., 2014 AIR SCW 1051

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellants: Ms. Archana Dutt, Advocate.
For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. J.S. Bagga, Advocate, for respondent No. 3.
Nemo for respondents No. 2 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the award, dated 21st December, 2006, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 19/03 RBT 29/05/03, titled as Samantra Devi & others versus Sanjeev Kumar & others, whereby compensation to the tune of Rs. 2,75,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization alongwith costs came to be awarded in favour of the claimants and against respondent No. 3-insurer of scooter bearing registration No. HP-20A-4899 (hereinafter referred to as "the impugned award").

Brief facts:

2. Deceased-Pardeep Kumar, who was butcher by profession, became victim of a motor vehicular accident on 16th March, 2003, when he was travelling on scooter, bearing registration No. HP-52-0833, at about 9.30 p.m., near Village Behdala, was hit by another scooter, bearing registration No. HP-20A-4899, driven by one Shri Raju, being owned by Shri Sanjeev Kumar, sustained injuries and succumbed to the injuries. Both the scooterists died in the said accident.

3. The claimants-appellants filed claim petition for grant of compensation to the tune of Rs.10,00,000/- as per the break-ups given in the claim petition.

4. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

5. On the pleadings of the parties, following issues were framed by the Tribunal on 2nd May, 2006:

> *"1. Whether deceased Pardeep Kumar had died on account of rash and negligent driving of scooter No. HP-20A-4899 being driven by Sh. Raju at the relevant date and time as alleged? ...OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, how much and from whom? ...OPP*
>
> *3. Whether the petition is not maintainable as alleged? ...OPR-1&2*
>
> *4. Whether the claim petition is incomplete, vague and does not disclose any cause of action, as alleged, if so its effect? ...OPR-3*

5. *Whether the driver of scooter No. HP-20A-4899 was not holding effective driving licence as alleged, if so, its effect? ...OPR-3*

6. *Whether the vehicle in question was being driven against the terms and conditions of the policy as alleged? ...OPR-3*

7. *Whether the claim petition is bad for misjoinder of parties, as alleged? ...OPR-4*

8. *Relief."*

6. The claimants have examined HC Paramjit Singh as PW-1, Dr. Satinder Chauhan as PW-2, Shri Mangal Singh as PW-4 and one of the claimant, Smt. Sumantra Devi, herself stepped into the witness box as PW-3. The claimants have filed copies of the FIR as Ext. PW-1/A and post mortem report as Ext. PW-2/A in support of their case. The respondents have not examined any witness. However, Shri Ram Kumar and Shri Sanjeev Kumar, owners of both the scooters, have stepped into the witness box as RW-1 and RW-2, respectively.

7. The insurer has not led any evidence, thus the evidence has remained unrebutted so far the same relates to it.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that both the scooterists were rash and negligent and the accident was outcome of their contributory negligence. Further, after making assessment, held that the claimants-appellants have lost source of dependency to the tune of Rs. 4,80,000/-, but as the accident was outcome of contributory negligence, the liability of insurance was fixed at 50%, i.e. Rs.2,40,000/-. After granting compensation under various heads, the claimants-appellants were held entitled to the total compensation to the tune of Rs.2,75,000/- and respondent No. 3-insurer was saddled with liability.

9. The respondents, i.e. owners-insured and the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

10. The claimants-appellants have questioned the impugned award on the ground that the accident was outcome of rash and negligent driving of scooter, bearing registration No. HP-20A-4899, thus, the claimants-appellants were entitled to entire compensation, as assessed by the Tribunal under the head 'loss of source of dependency' and respondent No. 3-insurer was to be saddled with the entire liability.

11. Another ground of attack is that the Tribunal has also fallen in error in not granting compensation in favour of the minor sisters of the deceased, i.e. claimants No. 2 to 4, i.e. Pami, Reena and Rinki, minor daughters of late Shri Bhajan Lal, who were dependent upon the

deceased as he was the sole bread earner of the family being the eldest male in the family as they had already lost their father, Shri Bhajan Lal.

12. I have perused the pleadings, gone through the evidence, oral as well as documentary, and also perused the impugned award. The Tribunal has fallen in error, while passing the impugned award, for the following reasons:

13. The Tribunal has lost sight of the fact that the claimants No. 2 to 4, i.e. the minor sisters of the deceased, were dependent upon the deceased, which has not been disputed by any of the parties.

14. The Apex Court in a case titled as **Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another,** reported in **AIR 1987 Supreme Court 1690,** held that brother of a deceased is also a legal representative, provided he is dependent.

15. The same view has been taken by a Division Bench of the Jammu and Kashmir High Court in a case titled as **Gian Singh and others versus Ram Krishan Kohli and others,** reported in **AIR 2002 Jammu and Kashmir 82,** while holding that sisters and brothers of a person, who dies in accident, are entitled to maintain petition under Section 166 of the MV Act if they are legal representatives of the deceased.

16. The Apex Court in a latest case titled as **Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc.,** reported in **2014 AIR SCW 1051,** has taken note of various judgments and held that brothers, sisters, brothers' children and some times, the foster children are entitled to maintain claim petition, provided they are dependent. It is apt to reproduce paras 10, 11, 15 and 16 of the judgment herein:

> *"10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue.*
>
> *11. Learned counsel for the Insurance Company tried to persuade us that since the term `legal*

representative' has not been defined under the Act, the provision of Section 1-A of the Fatal Accidents Act, 1855, should be taken as guiding principle and the claim should be confined only for the benefit of wife, husband, parent and child, if any, of the person whose death has been caused by the accident. In this context, he cited judgment of this Court in the case of Gujarat State Road Transport Corporation, Ahmedabad vs. Raman Bhai Prabhatbhai & Anr., AIR 1987 SC 1690. In that case, covered by the Motor Vehicles Act of 1939, the claimant was a brother of a deceased killed in a motor vehicle accident. The Court rejected the contention of the appellant that since the term `legal representative' is not defined under the Motor Vehicles Act, the right of filing the claim should be controlled by the provisions of Fatal Accident Act. It was specifically held that Motor Vehicles Act creates new and enlarged right for filing an application for compensation and such right cannot be hedged in by the limitations on an action under the Fatal Accidents Act. Paragraph 11 of the report reflects the correct philosophy which should guide the courts interpreting legal provisions of beneficial legislations providing for compensation to those who had suffered loss.

> *"11. We feel that the view taken by the Gujarat High Court is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society. Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Sections 110-A to 110-F of the Act. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in Section 110-B of the Act and to specify the person or persons to whom compensation shall be paid. The determination of the compensation payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers' children*

and some times foster children live together and they are dependent upon the bread-winner of the family and if the bread-winner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in Megjibhai Khimji Vira v. Chaturbhai Taljabhai, (AIR 1977 Guj.195) and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

12. .....

13. .....

14. .....

15. On coming to know about the High Court judgment the appellants filed a review petition in which they gave all the relevant facts including the constitution of the society appellant no.1 in support of their claim that a `Brother' of the Society renounced his relations with the natural family and all his earnings and belongings including insurance claims belonged to the society. These facts could not have been ignored by the High Court but even after noticing such facts the review petition was rejected.

16. A perusal of the judgment and order of the Tribunal discloses that although issue no.1 was not pressed and hence decided in favour of the claimants/appellants, while considering the quantum of compensation for the claimants the Tribunal adopted a very cautious approach and framed a question for itself as to what should be the criterion for assessing compensation in such case where the deceased was a Roman Catholic and joined the church services after denouncing his family, and as such having no actual dependents or earning? For answering this issue the Tribunal relied not only upon judgments of American and English Courts but also upon Indian judgments for coming to the conclusion that even a religious order or organization may suffer considerable loss due to death

> *of a voluntary worker. The Tribunal also went on to decide who should be entitled for compensation as legal representative of the deceased and for that purpose it relied upon the Full Bench judgment of Patna High Court reported in AIR 1987 Pat. 239, which held that the term `legal representative' is wide enough to include even "intermeddlers" with the estate of a deceased. The Tribunal also referred to some Indian judgments in which it was held that successors to the trusteeship and trust property are legal representatives within the meaning of Section 2(11) of the Code of Civil Procedure."*

17. Viewed thus, any legal representative, who is dependent on deceased, can file a claim petition for grant of compensation being the dependent. Thus, it is held that the claimants No. 2 to 4 were also entitled to compensation.

18. The Tribunal has assessed the income of the deceased at ` 5,000/- per month and has deducted one third towards his personal expenses, which is not in accordance with the principle of granting compensation read with the ratio laid down by the Apex Court in **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** in terms of which one fourth was to be deducted towards the personal expenses.

19. While making guess work and after going through the pleadings, it can be safely held that the deceased was earning Rs. 5,000/- per month; after deducting one fourth towards his personal expenses, the appellants-claimants have lost source of dependency to the tune of Rs.3,800/- per month. Admittedly, the age of the deceased was 22 years at the relevant point of time. The Tribunal has applied the multiplier of '12'. As per the Schedule appended with the Motor Vehicles Acts, 1988 (hereinafter referred to as "the MV Act") read with the ratio laid down by the Apex Court in **Sarla Verma's case (supra)** upheld by the larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' was applicable. Thus, it is also held that multiplier of '15' is applicable.

20. The FIR stands proved, perusal of which do disclose that the accident was outcome of contributory negligence of both the scooterists. There is also other evidence on the file which can be made basis for holding that the accident was outcome of contributory negligence. Thus, the Tribunal has rightly held that the accident was outcome of the contributory negligence and has rightly fixed the liability of the insurance at 50%.

21. Having said so, it is held that the appellants-claimants have lost their source of dependency to the tune of Rs. 3,800/- x 12 = Rs. 4,56,000/- x 15 = Rs.6,84,000/-. As the liability of insurance has rightly been fixed at 50% by the Tribunal, the appellants-claimants are held entitled to compensation to the tune of Rs.3,42,000/- under the head 'loss of source of dependency'. The appellants-claimants are also held entitled to Rs. 15,000/- under the head 'loss of love and affection', Rs. 10,000/- under the head 'loss of estate' and Rs.10,000/- under the head 'funeral expenses'. Hence, the appellants-claimants are entitled to total compensation to the tune of Rs. 3,77,000/- (Rs.3,42,000/- + Rs. 15,000/- + Rs. 10,000/- + Rs.10,000/-) with interest @ 7.5% per annum.

22. Respondent No. 3 is directed to deposit the enhanced amount of compensation before this Registry within eight weeks. The total amount of compensation be released in favour of the claimants in equal shares through payee's account cheque.

23. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

24. Send down the records after placing copy of the judgment on Tribunal's file.

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BEFORE *HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.*

FAO (MVA) No. 33 & 55 of 2010
Decided on : 17.10.2014

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1. FAO No. 33 of 2010

The United India Insurance Company Ltd. .....Appellant
Versus
Shri Madan Lal & others ...Respondents

2. FAO No. 55 of 2010

Shri Madan Lal ...Appellant
Versus
Rakesh Kumar & others ...Respondents

Motor Vehicle Act, 1988- Section 149- The Driver had a valid driving license to drive the LMV- He was driving the Mahindra Pickup, gross weight of which is 2523 kilograms- Held, that the driver had a valid driving licence to drive the vehicle and endorsement of PSV was not required- Further it was not proved that the accident had taken place due to the reason that the driver was competent to drive one kind of vehicle and he was found driving different kind of vehicle- insurance

company directed to pay the compensation.

(Para-24 to 25)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW)

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832

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

FAO No. 33 of 2010

For the appellant : Mr. J.S. Bagga, Advocate.

For the respondents: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate, for respondent No. 1.
Mr. Sunil Mohan Goel, Advocate, for respondent No. 2.
Mr. Neeraj Gupta, Advocate, for respondent No. 3.

FAO No. 55 of 2010

For the appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For the respondents: Mr. Sunil Mohan Goel, Advocate, for respondent No. 1.
Mr. Neeraj Gupta, Advocate, for respondent No. 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Award dated 25th November, 2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P., in M.A.C. Petition No. 81-S/2 of 2005/04, titled as Shri Madan Lal versus Shri Rakesh Kumar & others, has given birth to both these appeals, for short, "the impugned award".

Brief Facts:

2. Claimant Madan Lal filed claim petition before the Tribunal, for grant of compensation to the tune of Rs. 5,22,000/-, on the ground that his father Mast Ram became victim of the motor vehicular

accident, which was caused by driver, namely Rakesh Kumar, while driving vehicle-Mahindra Pick Up bearing registration No. HP-09A-0197, rashly and negligently, on 23rd December, 2002, at about 2.40 p.m., near Hotel 'Asia The Dawn'; Shimla, sustained injuries and succumbed to the injuries; FIR No. 300/2002 was registered in Police Station Boileauganj, Shimla and the deceased was earning Rs. 5,000/- per month.

3. Initially, the driver appeared before the Tribunal, but later on, he failed to do so. Accordingly, he was set ex-parte. The owner also did not appear before the Tribunal and was set ex-parte.

4. The claim petition was resisted only by the insurer on the grounds taken in its memo of objection.

5. Following issues came to be framed by the Tribunal on 04.07.2008:-

"1. Whether Sh. Mast Ram died due to the rash and negligent driving of vehicle No. HP-09-0197 by respondent/driver Sh. Rakesh Kumar? …OPP

2. If issue No. 1 is proved in the affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? ..OP Parties

3. Whether the petition is not maintainable? …OPR-3

4. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy. If so, its effect? …OPR-3

5. Whether Sh. Rakesh Kumar was not holding and possessing a valid and effective driving licence to drive the vehicle as alleged? If so, its effect? …OPR-3

6. Whether the petition is collusive as alleged, If so, its effect? ..OPR-3

7. Relief."

6. The claimants examined Dr. Piyush Kapila (PW-1), Smt. Nirmala Devi (PW-2), Constable Badri Dutt (PW-3) and Shri Amar Singh (PW-5). The claimant also appeared in the witness box as PW-4. The insurer has examined Smt. Shashi Saini (RW-1), Shri Shamsher Singh (RW-2) and Smt. Sheela Shyam (RW-3).

7. The Tribunal, after examining the pleadings and scanning the evidence on record, held that the claimant has lost source of dependency, the deceased was 58 years of age at the time of accident and was earning Rs.4,000/-, per month and awarded compensation to the tune of Rs.2,03,000/- in favour of the claimant and directed the insurer to satisfy the award.

8. The claimant has questioned the impugned award on the ground that the Tribunal has wrongly applied the multiplier of '7' and deducted 50% towards his personal expenses, which is without any legal sanctity.

9. In terms of the Schedule appended to Motor Vehicles Act, 1988 and the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW)**, the multiplier of '7' came to be rightly applied.

10. I wonder, how the Tribunal has deducted 50% towards the personal expenses of the deceased. 1/3rd deduction was to be made towards his personal expenses in view of the ratio laid down by the Apex Court in ***Sarla Verma's*** and ***Reshma Kumari,s*** cases, *supra*. Thus, the claimant is held entitled to the tune of Rs.3300/- per month under the head "loss of dependency", which comes to Rs. 3300 x 12 = Rs.39,600 x 7 = Rs.2,77,200/-.

11. Having said so, the claimant is held entitled to the tune of Rs.2,77,200/-, under the head "loss of dependency", Rs.25,000/- under the head "loss of love and affection" and Rs.10,000/- under the head "conventional charges", total compensation amounting to Rs. 3,12,200/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization.

12. The insurer has questioned the impugned award on the ground that the driver was not having valid and effective driving licence at the time of accident.

13. Admittedly, the driver was driving Mahindra Pick Up, the gross weight of which is 2523 kilograms, as per the Insurance Policy, Ext. RW 1/A, is a light motor vehicle.

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

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

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

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

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

"3. Necessity for driving licence. *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

18. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read

with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

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

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

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

21. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor*

vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.....*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

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

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-*

trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

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

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

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

short), a light goods carriage would come within the purview thereof.

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

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

9. .....

10. .....

11. .....

12. .....

13. .....

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

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

15. .....

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

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

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

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

26. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** held that it has to be pleaded and proved that the driver was having licence to drive one kind of vehicle, was found driving another kind of vehicle and that was the cause of accident. If no

such plea is taken, that cannot be ground for discharging the insurer. It is apt to reproduce para 84 of the judgment herein:

> "84. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 *of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motorcycles without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are `goods carriage', `heavy-goods vehicle', `heavy passenger motor-vehicle', `invalid carriage', `light motor-vehicle', `maxi-cab', `motorcycle', `omnibus', `private service vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for `motorcycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for `light motor vehicle' is found to be driving a `maxi-cab', `motor-cab' or `omnibus' for which he has no licence. In each case on evidence led before the tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.*
>
> *Emphasis added."*

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

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> (iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by *the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences*

available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

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

(v).....

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

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

"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that

the driver has a licence *and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.*

10. .....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

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

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence *possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

30. Admittedly, the driver was having driving licence to drive 'light motor vehicle'. This Court has held in so many cases, FAO No. 306 of 2012, titled as Prem Singh & others versus Dev Raj & others, decided

on 18.07.2014, being one of them, that the driver who was having licence to drive "light motor vehicle", requires no "PSV" endorsement.

31. Having glance of the above discussions, I am of the considered view that the insurer-United India Insurance Company has failed to prove that the insured has committed any willful breach and that the driver was not having valid and effective driving licence. Accordingly, FAO No. 55 of 2010 merits to be granted and FAO No. 33 of 2010 merits to be dismissed.

32. Viewed thus, FAO No. 55 of 2010 is allowed by providing that the claimant is entitled to compensation to the tune of Rs. 3,12,200/-with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization and FAO No. 33 of 2010 is dismissed. The impugned award, as indicated above, is modified.

33. The insurer is directed to deposit the enhanced amount before the Registry within six weeks from today.

34. The Registry to release the amount already deposited and, on deposit, release the enhanced amount, strictly as per the terms and conditions contained in the impugned award, in favour of the claimant, through payee's account cheque.

35. Send down the records after placing copy of the judgment on each of the files.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ.

Sh. Vipan Kumar .....Appellant
Versus
Smt. Devki Devi & others ...Respondents

FAO (MVA) No. 470 of 2009
Decided on : 17.10.2014

Motor Vehicle Act, 1988- Section 149- General Power of Attorney of the owner had deposed that the driving licence of the driver was examined and steps were taken to determine whether the driver was competent to drive the vehicle or not- Held, that the owner had not committed any willful breach of terms and conditions of the policy- and the insurance company is liable to indemnify the insured.

(Para-14 to 18)

Cases referred:

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

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

For the appellant : Mr. Onkar Jairath, Advocate.
For the respondents: Mr. Pawan Gautam Advocate, for respondents No. 1 & 2 (since deceased).
Respondent No. 3 ex-parte.
Mr. Praneet Gupta, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The insured-owner has called in question award dated 21st August, 2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, District Una, H.P., (hereinafter referred to as 'the Tribunal') in M.A.C. Petition No. 9/2004 RBT 25/05/04, titled as Devki Devi & another versus Vipan Kumar & others, whereby compensation to the tune of Rs.3,30,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 & 2, herein, for short, 'the impugned award'.

2. The insured-owner has questioned the impugned award on the ground that he has committed no willful breach, as he had employed the driver, after taking all precautions. Thus, the Tribunal has fallen in error in granting right of recovery to the insurer-respondent No. 4, herein.

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

4. The only question to be determined in this appeal is- whether the Tribunal has rightly granted right of recovery to the insurer-respondent No. 4, herein. The answer is in negative for the following reasons:-

5. The claimants had filed claim petition before the Tribunal for grant of compensation to tune of Rs.8,00,000/-, as per the break-ups given in the claim petition.

6. The owner and the driver, i.e. Vipan Kumar and Ranjeet Singh, resisted the claim petition on the grounds taken in their memo of objections. According to them, the driver was having a valid driving licence at the time of accident and the vehicle was duly insured with the insurer-Insurance Company.

7. The insurer has also resisted the claim petition on the ground that the owner has committed willful breach by engaging a driver, who was not having a valid driving licence.

8. Following issues came to be framed by the Tribunal:-

"1. Whether deceased Dharam Pal had died because of rash and negligent driving of truck No. HP-20A-3465 by

respondent No. 2 Ranjit Singh on 19.9.2003 at about 8 a.m., at village Galog, Tehsil and District Solan, as alleged? …OPP

2. If issue No. 1 is proved in the affirmative, whether the petitioners are entitled to compensation, if so, how much and from whom? …OPP

3. Whether the claim petition is incomplete, vogue and does not disclose any cause of action as alleged, if so its effect? …OPR-3.

4. Whether the driver of offending vehicle was not holding any valid and effective driving licence at the time of accident in question as alleged, if so, its effect? ..OPR-3

5. Whether the vehicle in question was not having valid route permit and fitness certificate, as alleged, if so, its effect? …OPR-3

6. Whether the petition is bad for non-joinder of necessary parties, as alleged? …OPR-3

7. Whether the deceased was a gratuitous passenger in the vehicle in question at the time of accident as alleged, if so, its effect? ….OPR-3

8. Relief. "

9. The claimants examined Head Constable Sunil Kumar, (PW-1), Smt. Urmila Nadda (PW-2) and Shri Pritam Kumar (PW-4). One of the claimants, namely, Smt. Devki Devi also appeared in the witness box as PW-2. The insurer examined officers of the Licensing Authority, i.e. RW-1 Sampuran Singh and RW-3 Smt. Amarjit Kaur. The owner examined his Attorney Holder Shri Ram Pal as RW-2.

10. There is no dispute regarding issues No. 1 to 3 & 5 to 7. Accordingly, the findings returned by the Tribunal on these issues are upheld.

11. The dispute is qua issue No. 4 to the extent-from whom the compensation amount is to be recovered?

12. The insurer-Insurance Company has examined its witnesses, i.e. RW-1 Sampuran Singh and RW-3 Smt. Amarjit Kaur, who have stated that the driving licence was renewed in the name of driver Ranjeet Singh and stands exhibited as RW-2/B.

13. RW-2 Ram Pal, the General Power of Attorney of the owner, has deposed that they had examined the driving licence of Ranjeet Singh, had taken all steps to ensure whether he was competent for driving and whether he was having a valid licence and after making satisfaction, on all counts, engaged Ranjeet Singh as driver.

Unfortunately, the Tribunal has not discussed this fact. Thus, the impugned award suffers from infirmity and is illegal one.

14. While going through para-7 of the reply filed by the owner and the driver, one comes to an inescapable conclusion that the owner and his attorney holder had taken all steps, which they were supposed to do, while engaging a driver.

15. The insurer has not led any evidence to the effect that the owner has committed any willful breach in terms of the mandate of Section 149 of the Motor Vehicles Act, 1988.

16. It was for the insurer to plead and prove that the driver was not competent to drive the offending vehicle. Even otherwise, had the insurer discharged the onus, it had further to prove that the owner has committed willful breach, as held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

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

found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of available the Act."

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

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

18. This Court has also delivered so many judgments on the same principle.

19. Learned Counsel for the insurer has argued that Ram Pal was attorney holder of the owner, therefore, his statement cannot be taken into consideration.

20. The argument of the learned Counsel is devoid of any force for the reason that Tribunals have to decide a claim

petition summarily as early as possible and procedural wrangle and tangles and mystic maybees have no role to play. It is also the duty of the Tribunals to provide relief to the claimants in order to save them from social evils i.e. destitution and other evils, who are rendered hapless and helpless because of the accident.

21. However, I have gone through the General Power of Attorney, Ext. RW-2/A, at page 119 of the claim petition, which do disclose that attorney holder Shri Ram Pal was authorized for doing all acts and duties on behalf of the owner, which as per the law he is supposed to do.

22. Having said so, the Tribunal has fallen in error in granting right of recovery to the insurer-Insurance Company. Accordingly, it is held that the insurer has to indemnify.

23. At this stage, Mr. Pawan Gautam, Advocate stated that the claimants have passed away during the pendency of the appeal and the amount stands deposited in favour of the claimants. It is for the legal representatives/legal heirs of the claimants to seek appropriate remedy.

24. Having said so, the impugned award is modified, as indicated above. The appeal is disposed of.

25. Send down the records after placing copy of the judgment on record.

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

R.D.Sharma S/o late Sh. Hem Raj Sharma ...Applicant.
Versus
State of H.P. .....Non-applicant.

Cr.MP(M) No. 1151 of 2014.
Order reserved on: 15.10.2014.
Date of Order: October 18 ,2014

Code of Criminal Procedure, 1973 - Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 316, 498A, 325 read with Section 34 IPC- Held, that at the time of granting bail the Court should consider the nature of seriousness of offence, nature of evidence, circumstances peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and larger interests of the public and State- The object of granting bail is not punitive- Bail is rule and committal to jail is an

exception- The petitioner was kept in column No. 12 of the challan, therefore, it would be expedient to release him on bail-Bail granted.

(Para-6)

Cases referred:

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702

HDFC Bank Ltd. Vs. J.J.Mannan, AIR 2010 S.C. 618

Parvinderjit Singh and another Vs. State (U.T.Chandigarh) and another, AIR 2009 SC 502

For the applicant: Mr.Rajesh Mandhotra, Advocate.
For Respondent. Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No.70 of 2014 dated 16.5.2014 registered under Sections 316, 498A, 325 read with Section 34 IPC at Police Station Barmana District Bilaspur HP.

2. It is pleaded that applicant has no connection with alleged offence. It is further pleaded that complainant did not come to hospital of the applicant for her medical treatment. It is further pleaded that applicant has no criminal back ground. It is further pleaded that applicant will join investigation of the case. Prayer for acceptance of bail application sought.

3. Per contra police report filed. There is recital in police report that FIR No. 70 of 2014 dated 16.5.2014 registered under Sections 316, 498A and 325 read with Section 34 IPC at Police Station Barmana District Bilaspur HP. There is further recital in police report that on dated 9.5.2014 husband and mother-in-law of the complainant have beaten Smt.Priyanka Kapoor wife of Sh Shushil Kumar resident of village Ghagus Police Station Barmana District Bilaspur HP with legs and fist blows and caused death of her non-born child aged about three months. There is further recital in police report that as per USG report fetus of the complainant was already dead. There is further recital in police report that complainant Smt Priyanka Kapoor remained admitted in Regional Hospital Bilaspur w.e.f 12.5.2014 to 14.5.2014. There is further recital in police report that site plan was prepared and statement of the witness recorded. There is further recital in police report that sex determination test of fetus was also conducted from Leelawati Hospital Ghumarwin in which applicant Dr R.D.Sharma was working. There is further recital in police report that letter was also written to Chief

Medical Officer Bilaspur vide letter No. 5411/5A and 6045/5 for taking necessary action against the concerned Medical Officer. There is further recital in police report that complainant has stated in her statement recorded under Section 164 Cr PC that her husband and her mother-in-law have conducted ultra sound of complainant Smt Priyanka Kapoor. There is further recital in police report that as per complaint of Chief Medical Officer Bilaspur separate FIR No. 206 of 2014 dated 4.10.2014 was registered against applicant Dr R.D.Sharma under Section 23 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994. There is further recital in police report that applicant was kept in column No.12 of the challan but after filing of the challan learned Chief Judicial Magistrate Bilaspur took cognizance of the offence.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused entire records carefully.

5. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Fact whether applicant is innocent or not cannot be decided at this stage. The same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by the Court will be binding upon the applicant and on this ground applicant be released on bail is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered such as (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration. Also see AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh. It was held in case reported in 2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation that the object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In view of the fact that applicant was kept in column No.12 of the challan by the investigating agency, Court is of the opinion that it is expedient in the ends of justice to release the applicant on anticipatory bail. Court is of the opinion that if the applicant is released on anticipatory bail at this

stage then interest of the State and general public will not be adversely effected.

7. Submission of learned Addl. Advocate General appearing on behalf of the non-applicant that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness is rejected for the reason hereinafter mentioned. It is held that condition will be imposed in the bail order that applicant will not induce and threat the prosecution witness. It is held that if the applicant flouts the conditions of the bail order then prosecution is at liberty to file application for cancellation of bail against the applicant in accordance with law. It was held in case reported in AIR 2010 S.C. 618 titled HDFC Bank Ltd. Vs. J.J.Mannan that the object of Section 438 Cr PC is that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. It was held in case reported in AIR 2009 SC 502 titled Parvinderjit Singh and another Vs. State (U.T.Chandigarh) and another that an order under Section 438 Cr PC is a device to secure the individual liberty and it is neither a passport for the commission of crime nor a shield against any kinds of accusations. It was held in case reported in 1997 3 Crimes 112 titled Sennasi and another Vs. State that grant of bail under Section 438 Cr PC by the High Court or the Court of Session is depended on the merits of the case.

8. In view of the above stated facts anticipatory bail application filed by the applicant is allowed and in the event of arrest, applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of Arresting Officer. (i) That applicant will attend proceedings of learned trial Court regularly till conclusion of the trial (ii) That applicant will join investigation of case as and when called for by the Investigating Officer in accordance with law. (iii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That applicant will not leave India without prior permission of the Court. (v) That applicant will not commit any similar offence qua which the applicant is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. Anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is disposed of. All pending application(s) if any are also disposed of.

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

Ram Pyari wife of Shri Balak Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1152 of 2014
Order Reserved on 15th October, 2014
Date of Order 18th October, 2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the accused for commission of offences punishable under Sections 302, 326-A, 307, 325, 504, 452, 506 read with Section 34 IPC- Held that the applicant being female is entitled to special privilege- Investigation is complete and presence of accused is not required- therefore, bail application is allowed and the applicant is released on bail.

(Para-6)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702

For the Applicant: Mr. N.S. Chandel, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Pushpender Singh Jaswal, Deputy Advocate General and Mr.J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 64 of 2014 dated 8.5.2014 registered under Sections 302, 326-A, 307, 325, 504, 452, 506 read with Section 34 IPC in Police Station Barmana District Bilaspur (H.P.).

2. It is pleaded that applicant is innocent and has been falsely implicated in present case. It is pleaded that there is no direct or indirect evidence against the applicant and investigation of the case is complete. It is further pleaded that detention of applicant in judicial custody would not advance the cause of justice. It is pleaded that any condition imposed by Court will be binding upon the applicant. It is further pleaded that deceased had set herself on fire and prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report, FIR No. 64 of 2014 dated 8.5.2014 registered under Section 302, 326-A, 307, 325, 504, 452, 506 read with Section 34 IPC in Police Station Barmana District Bilaspur against the applicant. There is recital in police report that statement of Smt. Anjana Kumari wife of Shri Kamal Kumar resident of village Saloon Tehsil Sadar District Bilaspur aged 27 years was recorded which was attested by Shashi Pal Sharma Executive Magistrate posted as DRO Bilaspur. There is recital in police report that deceased was teacher in school at Barmana and between 8 to 8.45 AM deceased was preparing herself to go to school. There is recital in police report that deceased and her husband used to reside separately and mother-in-law of deceased namely Ram Pyari, father-in-law namely Balak Ram and brother-in-law of deceased namely Vijay Kumar came from upper portion of house and abused both of them i.e. deceased and her husband and told to withdraw the case otherwise they would be killed. There is further recital in police report that father-in-law of deceased threw kerosene gallon upon the deceased and thereafter lit the fire with match box. There is further recital in police report that thereafter husband of deceased extinguished the fire and all three accused fled away from the place of incident. There is recital in police report that thereafter deceased became unconscious. There is further recital in police report that 90% burnt body of deceased was detected due to fire. There is recital in police report that site plan was prepared and burnt pieces of clothes were took into possession vide seizure memo and all accused persons were arrested. There is further recital in police report that co-accused Balak Ram had retired from police department. There is further recital in police report that deceased was referred to IGMC for further medical treatment where she died on dated 24.5.2014. There is recital in police report that post mortem of deceased was conducted and as per post mortem deceased died as a result of septicemic shock i.e. 72% Wilson classification dermoepidermal. There is further recital in police report that deceased had married with Kamal Kumar against the wishes of their family members and there were regular quarrels between the accused and deceased. There is further recital in police report that accused persons have thrown kerosene gallon upon the deceased and thereafter lit the fire with match box due to which injuries were sustained by the injured upon her body and she died. There is further recital in police report that bail application was also filed before learned Sessions Judge Bilaspur but same was dismissed. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the applicant that applicant is a female and investigation is complete in present case and on account of special provision to release the females on bail present bail application filed by applicant be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** There is special provision to release the accused on bail who is under the age of 16 years or is a woman or is sick or infirm even qua offence punishable with death or imprisonment for life. In present case investigation is complete and applicant is not required for any investigation purpose. Trial of the case will be completed in due course of time. It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

7. Submission of learned Advocate appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce threat and influence the prosecution witnesses and on this ground anticipatory bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the view that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail in accordance with law.

8. In view of above stated facts and in view of fact that there is special provision of bail for women qua offence punishable with death or imprisonment for life applicant is released on bail as per special provision subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which she is accused. Bail application filed under Section 439 Cr.P.C. stands disposed of.

Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s), if any also disposed of.

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

State of Himachal Pradesh .....Appellant.
Vs.
Kurban Khan son of Shri Lal Khan ...Respondent.

Cr. Appeal No. 581 of 2008
Judgment reserved on: 1st September, 2014
Date of Decision: 18th October, 2014.

NDPS Act, 1985- Section 20- As per prosecution case, the accused was found in possession of 4.5 kgs. of poppy husk- PW-1, an independent witness, had not supported the prosecution version- another independent witness was not examined- The recovery memo could be proved only by the testimonies of marginal witnesses- Recovery memo was not proved in accordance with law- Further, the recovery was effected from Dhaba where third person had access, as such conscious and exclusive possession of the accused was not proved- Original seal was not produced in the Court for comparison- held, in these circumstances the prosecution case is not proved beyond reasonable doubt- Accused acquitted.

(Para-10 to 14)

Cases referred:

Nanha vs. State; Also see (1998)8 SCC 449 State of Rajasthan vs. Gopal, Latest HLJ 2011 HP 1195 (DB)

Shashi Pal and others vs. State of HP, 1998(2) S.L.J. 1408

State of H.P. vs. Sudarshan Singh, 1993(1) SLJ 405

State of Himachal Pradesh vs. Inder Jeet and others, 1995 (3) SLJ 1819

State of H.P. vs. Diwana and others, 1995(4) SLJ 2728

Mookkiah and another vs. State, (2013)2 SCC 89

State of Rajasthan vs. Talevar, 2011(11) SCC 666

Surendra vs. State of Rajasthan, AIR 2012 SC (Supp) 78

State of Rajasthan vs. Shera Ram @ Vishnu Dutta, 2012(1) SCC 602

Balak Ram and another vs. State of U.P., AIR 1974 SC 2165

Allarakha K. Mansuri vs. State of Gujarat, (2002)3 SCC 57

Raghunath vs. State of Haryana, (2003)1 SCC 398

State of U.P. vs. Ram Veer Singh and others, AIR 2007 SC 3075

S. Rama Krishna vs. S. Rami Raddy (D) by his LRs. & others., AIR 2008 SC 2066 (2008) 11 SCC 186

Arulvelu and another vs. State, (2009)10 SCC 206

Perla Somasekhara Reddy and others vs. State of A.P., (2009)16 SCC 98

Ram Singh @ Chhaju vs. State of Himachal Pradesh, (2010)2 SCC 445

For the Appellant: Mr. Ashok Chaudhary, Additional Advocate General with Mr. Vikram Thakur Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the Respondent:Mr. Sanjay Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed by the State under Section 378 of Code of Criminal Procedure 1973 against the judgment passed by learned Sessions-cum-Special Judge Solan under Narcotic Drugs and Psychotropic Substances Act in Sessions Trial No. 4-S/7 of 2006 titled State vs. Kurban Khan.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 11.11.2005 at about 4.05 PM in Guru Nanak restaurant at Dedgharat accused was found in conscious and exclusive possession of 4 Kg. 500 grams of poppy husk. It is alleged by prosecution that PW12 Het Ram HC CIA Staff Solan along with HC Hardev, C. Chhabil Kumar, C. Ajay Kumar and C. Rajesh Kumar on dated 11.11.2005 at about 3.55 PM were on patrolling duty at Kandaghat where they received a secret information that person in Guru Nanak restaurant at Dedgharat was selling poppy husk. It is further alleged by prosecution that on receipt of secret information reason of belief sent to S.P. Solan through C. Rajesh Kumar. It is further alleged by prosecution that thereafter PW12 HC Het Ram associated independent witnesses Dhian Singh and Gulshan Kumar PW11 and proceeded towards Dedgharat and reached Guru Nanak restaurant at about 4.30 PM. It is further alleged by prosecution that accused was standing on counter of restaurant. It is further alleged that thereafter accused was apprised about his right to be searched by a Magistrate or gazetted officer. It is alleged by prosecution that thereafter raiding party had given their personal search to the accused vide memo Ext.PW9/A. It is further alleged by prosecution that thereafter restaurant was searched in presence of witnesses and from the kitchen a tin was found concealed under a wooden plank containing a bag. It is further

alleged by prosecution that in tin poppy husk measuring 4 Kg. 500 grams was kept. It is further alleged by prosecution that thereafter two samples of 500 grams each were taken out from the recovered poppy husk for sample purpose and were sealed with seal impression 'H'. It is also alleged by prosecution that NCB form also filled and thereafter seal after use was handed over to witness Dhian Singh. It is further alleged by prosecution that site plan Ext.PW12/E was prepared. It is further alleged that thereafter ruka Ext.PW9/C was sent to P.S. for registration of FIR Ext.PW10/A and thereafter grounds of arrest were prepared vide memo Ext.PW12/F. It is also alleged that thereafter case property along with NCB form and sample of seal deposited with Brij Lal. It is further alleged by prosecution that special report was prepared and sent to S.P. Solan regarding search and seizure and sample parcel with NCB form and seal impression sent to CTL Kandaghat through HHC Ramji Dass. It is alleged by prosecution that thereafter Chemical Examiner report Ext.PZ was obtained.

3 Learned trial Court framed charge against the accused under Section 15(b) of Narcotic Drugs and Psychotropic Substances Act. Accused did not plead guilty and claimed trial.

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

Sr.No.	Name of Witness
PW1	LC Vijay Negi
PW2	Rajesh Kumar
PW3	Vinod Kumar
PW4	Yogender Singh
PW5	Ramji Dass
PW6	Babu Ram
PW7	Brij Lal
PW8	Surender Pal
PW9	Chhabil Kumar
PW10	Sohan Singh
PW11	Gulshan Kumar
PW12	Het Ram

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

Sr.No.	Description:
Ex.PW1/A.	Rapat no. 4 dated 26.12.2006
Ex.PW2/A.	Information under Section 42(2) of NDPS Act
Ex.PW3/A	Resealing certificate
Ex.PW4/A	Special Report
Ex.PW7/A	Extract of Malkhana register
Ex.PW7/B	Copy of Road Certificate
Ex.PW7/C	Copy of road certificate
Ex.PW9/A	Search memo
Ex.PW9/B	Recovery memo
Ext.PW9/C.	Rukka
Ext.PW10/A	Copy of FIR
Ext.PW10/B	Certificate regarding possession and resealing of case property
Ex.PW10/C	Sample impression of seal on the piece of cloth
Ext.PW11/A	Consent memo
Ext.PW11/B	Identification memo
Ext.PW12/A	Sample impression of seal on piece of cloth
Ext.PW12/B	NCRB Forms
Ext.PW12/C	Receipt of seal
Ext.PW12/D	Memo of seal 'H'
Ext.PW12/E	Spot map
Ext.PW12/F	Arrest information memo
Ext.PW12/G	Statement under Section 161 Cr.P.C. of Gulshan Kumar for contradiction purpose.

5. Learned trial Court acquitted accused qua offence punishable under Section 15(b) of ND&PS Act. Feeling aggrieved against the judgment passed by learned Sessions-cum-Special Judge Solan State of H.P. filed present appeal.

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

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

ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Lady C. Vijay Negi has stated that in the year 2005 she was posted as M.C. CIA Staff Solan. She has brought the original roznamcha dated 11.11.2005 rapat No. 4 with her. She has stated that copy of rapat is Ext.PW1/A.

8.2 PW2 C. Rajesh Kumar has stated that in the year 2005 he was posted as Constable in CIA staff Solan and on dated 11.11.2005 he along with HC Het Ram, C. Ajay Kumar, C. Chhabil Kumar and HHC Ajit were on patrolling duty and were present at Kandaghat. He has stated that HC Het Ram received secret information that on National Highway in Guru Nanak restaurant one person namely Kurban Khan who was running restaurant was dealing in the trade of poppy husk. He has further stated that in case raid is conducted poppy husk could be recovered. He has further stated that on receipt of secret information HC Het Ram prepared reason of belief and same was handed over to Reader of SP Solan. He has stated that copy of reason of belief is Ext.PW2/A. He has denied suggestion that no reason of belief was prepared in his presence. He has denied suggestion that he did not take reason of belief to S.P. office Solan.

8.3 PW3 Vinod Kumar has stated that he is running a restaurant on National Highway near Dedgharat Kandaghat in the name of Guru Nanak Restaurant for the last four years. He has stated that accused Kurban Khan was employed as cook in the said restaurant for the last three years. He has stated that document Ext.PW3/A bears his signatures.

8.4 PW4 HC Yoginder Singh has stated that on dated 11.11.2005 C. Rajesh Kumar CIA Staff Solan brought reasons of belief Ext.PW2/A in the office of S.P. Solan and he produced the same before S.P. Solan who after perusing the same appended his report and signatures and handed over the same alongwith carbon body. He has stated that he has brought original reason of belief with him. He has further stated that on dated 12.11.2005 C. Ajay Kumar of CIA Staff Solan brought special report to the office of S.P. Solan. He has stated that special report is Ext.PW4/A. He has denied suggestion that reason of

belief Ext.PW2/A was not received in the office of S.P. Solan. He has stated that no separate register is maintained in the office of S.P. Solan for entering the special report Ext.PW4/A. He has denied suggestion that special report was not received in the office of S.P. Solan.

8.5 PW5 HHC Ramji Dass has stated that for the last two years he was posted at P.S. Kandaghat. He has stated that on dated 14.11.2005 MHC Brij Lal handed over one docket along with RC No. 59/05 and sample of seal and NCB form to be deposited with CTL Kandaghat. He has stated that he took back all documents and samples and returned the same to MHC Brij Lal. He has further stated that he again handed over aforesaid documents and samples of poppy husk and directed him to deposit the same at FSL Junga on the same day. He has stated that officials of FSL Junga refused to receive and he again came back and he handed over all documents and sample of poppy husk to MHC Brij Lal. He has stated that documents and sample of poppy husk remained non-tampered during his custody. He has denied suggestion that no sample was handed over to him along with NCB form.

8.6 PW6 HHC Babu Ram has stated that for the last two years he is posted as HHC at P.S. Kandaghat and on dated 28.11.2005 MHC P.S. Kandaghat Brij Lal handed over to him one sealed sample parcel and sample seales 'H' and 'P', one docket and RC No. 61/05 and NCRB forms to be deposited in CTL Kandaghat which he deposited on the same date in the laboratory. He has further that receipt of same was obtained on road certificate and sample parcel remained intact and remained non-tampered so far they remained with him. He has denied suggestion that case property was not deposited in CTL Kandaghat.

8.7 PW7 HC Brij Lal has stated that he remained posted as MHC at P.S. Kandaghat in the year 2005 and on dated 11.11.2005 SI/SHO Sohan Singh deposited with him sealed parcels three in nature. He has stated that bulk parcel was containing 3 Kg. 500 grams poppy husk and two sample parcels were also sealed with seal impressions 'H' and 'P'. He has stated that one tin which was marked R2 was also deposited along with NCB form and he entered the case property in malkhana register. He has stated that case property remained intact in his custody. He has denied suggestion that case property was not produced before SHO P.S. Kandaghat.

8.8 PW8 SI/SHO Surender Pal has stated that he remained posted as SHO at P.S. Kandaghat from June 2006 and after completion of investigation he prepared challan.

8.9 PW9 Chhabil Kumar has stated that he remained posted as Constable in CIA Staff Solan during the year 2005. He has stated that on dated 11.11.2005 he along with HC Het Ram, C. Ajay Kumar, C. Rajesh Kumar and HHC Hardev Kumar were present at Kandaghat chowk in connection with patrolling and checking. He has stated that two persons had given information to HC Het Ram that they had to go to Dedgharat to recover poppy husk. He has stated that then they went to Dedgharat and then went to restaurant of Kurban Khan at Dedgharat. He has stated

that two persons Gulshan Kumar and Dhian Singh were also with them. He has further stated that when they reached Dedgharat at 4 PM accused was present in restaurant and thereafter accused disclosed his name and thereafter police officials have given their personal search to accused and memo Ext.PW9/A was prepared. He has further stated that thereafter restaurant was searched and from kitchen room where utensils used to be washed, there was one plank under which a pit was dug and inside the pit one container was kept. He has stated that in the container poppy husk was kept measuring 4 Kg. 500 grams. He has stated that two samples of 500 grams each were took out and sealed in separate parcels. He has stated that seal after use was handed over to witness. He has further stated that recovery memo Ext.PW9/B was prepared. He has stated that HC Het Ram prepared Ruka Ext.PW9/C and thereafter he had given ruka to MHC Kandaghat. He has denied suggestion that witnesses Dhian Singh and Gulshan Kumar were not present. He has denied suggestion that poppy husk was not weighed and he has also denied suggestion that no poppy husk was recovered from accused.

8.10 PW10 ASI Sohan Singh has stated that in the month of November 2005 he was posted as ASI P.S. Kandaghat and on dated 11.11.2005 SHO was out of station and he was having official charge of P.S. Kandaghat. He has stated that C. Chabbil Kumar prepared ruka Ext.PW9/C and on the basis of Ruka FIR Ext.PW10/A was registered. He has further stated that one sealed parcel having seal 'H' containing 3.5 Kg. of poppy husk and two sealed parcels with sample seal containing samples of poppy husk weighing 500 grams produced and he affixed his own seal on all these three parcels for the purpose of resealing and issued resealing certificate Ext.PW10/B. He has stated that he also took the sample impression of the seal. He has denied suggestion that no sealed parcels were produced before him for the purpose of resealing.

8.11 PW11 Gulshan Kumar has stated that about one year ago he was in Kandaghat market and three police officials of CIA Staff met him and asked him to accompany them. He has stated that accused was present in restaurant and he reached in restaurant at 4.30 PM and further stated that CIA staff took search of the restaurant. He has further stated that tin was kept outside the restaurant. The witness was declared hostile by prosecution. He has denied suggestion that canister was recovered from kitchen of restaurant.

8.12 PW12 HC Het Ram has stated that on dated 11.11.2005 he along with HC Hardev, C. Chhabil Kumar, C. Ajay Kumar, C. Rajesh Kumar were present at Kandaghat in connection with patrolling and checking. He has stated that he received secret information and prepared reason of belief Ext.PW2/A and sent to S.P. office Solan through C. Rajesh Kumar. He has stated that he associated witnesses Dhian Singh and Gulshan Kumar and proceeded to Dedgharat. He has stated that when he reached at Guru Nanak restaurant at Dedgharat at 4/5 PM accused was standing in the counter. He has stated that he apprised about the secret information. He has further stated that accused was

apprised of his right to be searched before a Magistrate or a Gazetted Officer, but accused agreed to be searched before police officials. He has stated that thereafter police officials have given their personal search to accused and thereafter restaurant was searched in presence of accused and witnesses. He has stated that from kitchen where utensils used to be cleaned a canister was concealed beneath the wooden plank. He has further stated that 4 Kg. 500 grams of poppy husk was found. He has stated that two samples of 500 grams each were took out and sealed it on separate cloth parcel and he prepared spot map. He has stated that thereafter case property was deposited with SHO. He has stated that he also prepared special report Ext.PW4/A and sent it to S.P. Office Solan through C. Ajay Kumar. He has stated that on completion of investigation case file was handed over to SHO and further stated that case property i.e. sample Ext.P1, bulk of poppy husk Ext.P2 and canister Ext.P3 were recovered from restaurant of accused. He has denied suggestion that police officials did not give their personal search. He has denied suggestion that canister was not recovered from the kitchen and he has denied suggestion that canister was lying outside the restaurant. He has denied suggestion that all documents prepared at later stage and also denied suggestion that no NCB form was filled up and also denied suggestion that no sealing process took place and further denied suggestion that no poppy husk was recovered from possession of accused.

9. Statement of accused was recorded under Section 313 Cr.P.C. Accused has stated that nothing was recovered from the restaurant and further stated that there were 2/3 servants besides the owner of restaurant and all of them were residing in same restaurant in night time. Accused has stated that he is innocent and he has been falsely implicated in present case. Initially accused stated that he would lead defence evidence, but later on accused did not lead any defence evidence.

Testimony of independent witness Gulshan Kumar is fatal to the prosecution in present case

10. It is the case of prosecution that 4 Kg. 500 grams poppy husk was recovered from exclusive and conscious possession of accused which was kept in kitchen of restaurant as shown in site plan Ext.PW12/E in presence of independent witnesses Dhian Singh and Gulshan Kumar. Prosecution has prepared seizure memo Ext.PW9/B placed on record. The marginal witnesses of seizure memo Ext.PW9/B placed on record are Dhian Singh and Gulshan Kumar. Prosecution examined one marginal witness of seizure memo Gulshan Kumar as PW11. We have carefully perused the testimony of PW11 Gulshan Kumar who was marginal witness of seizure memo. PW11 has specifically stated in positive manner that tin was kept outside the restaurant when he reached there and he has denied suggestion that poppy husk was recovered from kitchen of restaurant in a canister. PW11 Gulshan Kumar did not support the prosecution story as alleged by prosecution. Hence it

is held that testimony of PW 11 Gulshan Kumar has become fatal to prosecution case.

Non-examination of another marginal witness Dhian Singh is also fatal to prosecution case

11. In present case another marginal witness of seizure memo Ext.PW9/B is Dhian Singh. Prosecution did not examine Dhian Singh when Gulshan Kumar did not support the prosecution story. No reason has been assigned by prosecution as to why prosecution did not examine another marginal witness of seizure memo Ext.PW9/B namely Dhian Singh when Gulshan Kumar PW11 did not support the prosecution story as alleged by prosecution. Learned Public Prosecutor namely Ashwani Kumar on dated 26.12.2006 did not examine PW Dhian Singh who was present in Court on dated 26.12.2006 on the ground that Dhian Singh witness was won over by accused. Plea for his non-examination that Dhian Singh another marginal witness who was present in Court on dated 26.12.2006 was won over by accused is not sufficient. It is well settled law that due opportunity is given to prosecution to cross examine the eye witness who is declared hostile by prosecution. No reason has been assigned by prosecution as to why prosecution did not examine another independent marginal witness Dhian Singh when he was present in Court on dated 26.12.2006 by way of declaring him hostile or by way of cross examining him on relevant facts. Hence it is held that non-examination of Dhian Singh another marginal witness of seizure memo is also fatal to prosecution in present case.

Testimonies of PW9 Chhabil Kumar and PW2 Rajesh Kumar are not helpful to prosecution case as PW9 Chhabil Kumar and PW2 Rajesh Kumar are not marginal witnesses of seizure memo Ext.PW9/B

12. Submission of learned Additional Advocate General appearing on behalf of the State that accused be convicted in present case on testimonies of police officials namely PW9 Chhabil Kumar and PW2 C. Rajesh Kumar is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimonies of PW9 Chhabil Kumar and PW2 C. Rajesh Kumar and we have also carefully perused seizure memo Ext.PW9/B. PW9 Chhabil Kumar and PW2 C. Rajesh Kumar are not marginal witnesses of seizure memo Ext.PW9/B. It is well settled law that contents of document should be proved by way of marginal witnesses of document only. As PW9 Chhabil Kumar and PW2 C. Rajesh Kumar are not marginal witnesses of seizure memo Ext.PW9/B we are of the opinion that it is not expedient in the ends of justice to rely upon the testimonies of PW9 Chhabil Kumar and PW2 C. Rajesh Kumar who are not marginal witnesses of seizure memo Ext.PW9/B. It is well settled law that contents of document should be proved by examination of marginal witnesses only as per Indian Evidence Act 1872. As per Section 61 of Indian Evidence Act 1872 contents of documents should be proved by way of primary evidence only and it is well settled law that contents of document should be proved by testimonies of marginal witnesses only as per Indian Evidence Act 1872. In view of contradictory testimony of PW11 Gulshan Kumar it is not

expedient in the ends of justice to convict the accused solely on the testimonies of PW9 Chhabil Kumar and PW2 C. Rajesh Kumar who are not signatories to seizure memo of poppy husk Ext.PW9/B placed on record.

Non-access of third person in kitchen not proved beyond reasonable doubt by prosecution in present case which is fatal to the prosecution case

13. It is the case of prosecution that poppy husk was recovered from utensils wash room and it is the case of prosecution that plank was kept and under the plank there was pit and in the pit there was one canister containing 4 kg 500 grams poppy husk. There is no evidence on record in order to prove that place where alleged poppy husk was recovered was accessible to accused only. Accused has stated in his statement under Section 313 Cr.P.C. that there were 2/3 additional servants in restaurant along with owner of restaurant. Involvement of third person could not be ruled out in present case in view of the fact that 2/3 additional servants and owner of restaurant were also accessible to the place of alleged recovery and access of third person could not be ruled out in the present case to the place of alleged recovery.

Original seal not produced in Court for comparison purpose which is fatal to prosecution case

14. In present case prosecution did not produce original seal in Court in order to compare the original seal with sample seal of parcel. It is held that non-production of original seal in Court for the purpose of comparison is fatal to the prosecution case. **(See: Latest HLJ 2011 HP 1195 (DB) titled Nanha vs. State; Also see (1998)8 SCC 449 titled State of Rajasthan vs. Gopal.)**

The accused is entitled for benefit of two views theory:-

15. In present case two views have emerged. Independent witness Gulshan Kumar has stated that poppy husk was not recovered in his presence from exclusive and conscious possession of accused and he has stated in positive manner that canister of poppy husk was kept outside the restaurant when he reached at restaurant. On the contrary PW9 Chhabil Kumar and PW2 C. Rajesh Kumar have stated that poppy husk was recovered from utensils wash room. It was held in case reported in **1998(2) S.L.J. 1408 Shashi Pal and others vs. State of HP** that if two versions appear in prosecution evidence then version beneficial to the accused, should be adopted. **(Also see 1993(1) SLJ 405 titled State of H.P. vs. Sudarshan Singh**, **See 1995 (3) SLJ 1819 titled State of Himachal Pradesh vs. Inder Jeet and others**, **See 1995(4) SLJ 2728 titled State of H.P. vs. Diwana and others**. It is well settled principle of law that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. **(See (2013)2 SCC 89 titled Mookkiah and another vs. State See 2011(11) SCC**

666 titled State of Rajasthan vs. Talevar, **See AIR 2012 SC (Supp) 78 titled Surendra vs. State of Rajasthan** , **See 2012(1) SCC 602 State of Rajasthan vs. Shera Ram @ Vishnu Dutta.)** It is also well settled principle of law (i) That Appellant Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal Appellant Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable. (iii) That Appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into considered any admissible fact and (iv) That learned trial Court failed to take into consideration evidence brought on record contrary to law. **(See AIR 1974 SC 2165 titled Balak Ram and another vs. State of U.P., See (2002)3 SCC 57, titled Allarakha K. Mansuri vs. State of Gujarat, See (2003)1 SCC 398 Raghunath vs. State of Haryana, See AIR 2007 SC 3075 State of U.P. vs. Ram Veer Singh and others, See AIR 2008 SC 2066 (2008) 11 SCC 186 S. Rama Krishna vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others vs. State of Maharashtra, (2009)10 SCC 206 titled Arulvelu and another vs. State, (2009)16 SCC 98 Perla Somasekhara Reddy and others vs. State of A.P. and (2010)2 SCC 445 titled Ram Singh @ Chhaju vs. State of Himachal Pradesh.)**

16. In view of above stated facts, it is held that learned trial Court did not commit any miscarriage of justice and it is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. Appeal filed by State is dismissed and judgment passed by learned trial Court is affirmed. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, 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. <u>LPA No. 84 of 2011</u>

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- The 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 challenge the order in case, the same goes against the petitioners.

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.

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

10. 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

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- Courts 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...
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> * * *
>
> 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 the objector 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 set up 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 ₹ 40,000/- per month and that she was also taking tuitions- salary statement of the petitioner showed that she was getting gross salary of ₹ 47,991/- and net salary of ₹ 40,605/-- respondent was getting gross salary of ₹ 46,658/- and net salary of ₹ 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- An FIR was registered against the petitioner- petitioner alleged that a sum of ₹ 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 No.143 of 2013.
Reserved on:09/10/2014.
Date of Decision :October 18, 2014.

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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 ₹ 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 with 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 L 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. <u>Criminal Appeal No.143 of 2013</u>:

For the Appellant: Mr.Ashok Chaudhary, Additional Advocate General.

For the respondent: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

<u>Per Sureshwar Thakur, Judge</u>

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 No.222 of 2011.
Reserved on:09/10/2014.
Date of Decision :October 18, 2014.

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1. <u>Criminal Appeal No.176 of 2011</u>:

Sat Pal ...Appellant.

Versus

State of H.P. ...Respondent.

2. Criminal Appeal No.222 of 2011:

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 or discrepancy in the testimony of the official witnesses does 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- 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 seat adjacent to accused 'S'- held, that there was no evidence to connect accused 'R' with 'S'- hence, acquittal of '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:

Per 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 attract 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:

Per 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.

4. 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.

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

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

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

8. 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.

9. 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.

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

11. 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.

12. 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.

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

14. 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.

15. 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.

16. 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 a distance of 500 meters from 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 ₹ 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 ₹ 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 ₹ 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 traceable 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 a Gardner after completing the training- he was not regularized- according to the petitioner, respondents were taking the work of the clerk from him- 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 to 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)

Case referred:
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 is 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)

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:-

3. 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 against 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.1 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 regular 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 Rs12,000/- 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 ₹ 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 ₹ 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 ₹ 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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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE.

Randeep Singh. ...Petitioner.

Versus

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

Cr.MMO No. : 4040 of 2013
Decided on : 8.10. 2014

Bonded Labour System (Abolition) Act, 1976– Section 25- An application was filed before District Magistrate regarding the bonded

labour- he ordered inquiry by Sub Divisional Magistrate - Sub Divisional Magistrate recorded the statements of the parties and witnesses and concluded that the respondent No. 3 and her family members were working as bonded labourers- District Magistrate accepted the report and declared respondent No. 3 as bonded labour- the debt given by the petitioner to the respondent No. 3 was declared as bonded debt and was ordered to be extinguished- held, that the District Magistrate had rightly concluded that respondent No. 3 and her family members were working as bonded labourers for a sum of ₹73,000/- jurisdiction of the Court is barred under Section 25 of the Act- Petition dismissed. (Para-12)

For the Petitioner: Mr. Tek Chand Sharma, Advocate.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. for respondents No.1 and 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against order dated 3.7.2013 rendered by District Magistrate, Sirmaur in case No. 1/2013.

2. "Key facts" necessary for the adjudication of this petition are that respondent No.3 moved an application before respondent No.2 regarding bonded labourer and wages on 6.4.2013. Respondent No. 2 ordered immediate inquiry to be conducted by Sub Divisional Magistrate, Sangrah vide office order dated 6.4.2013. He also directed to associate Station House Officer, Sangrah and District Labour Officer in the inquiry. Sub Divisional Magistrate, Sangrah submitted a report to the District Magistrate, Sirmaur. The District Magistrate, Sirmaur, on the basis of documents and evidence placed on the file and the opinion of the NHRC given in various instructions, concluded that there were sufficient evidence on record to establish that respondent No. 3 has been a bonded labourer of the petitioner, as defined in the Bonded Labour System (Abolition) Act, 1976 and the debt due from respondent No.3 was a bonded debt. Respondent No.3 was certified as a bonded labour. She was ordered to be released from bondage and declared that debt of Rs. 73,000/- given by the petitioner as bonded debt shall stand extinguished vide impugned order. Petitioner has challenged the order dated 3.7.2013.

3. Respondent No.3 has levelled the following three accusations against the petitioner:

1. **Randeep Singh has kept Smt. Kubja Devi, her late husband Jiwnoo and other family members as bonded labourers.**
2. **Randeep Singh used to abuse and threaten to do away with the life of Smt. Kubja Devi, her sons and daughter-in-law.**

3. On the complaint of Randeep Singh, concerned Department stopped the pension of Smt. Kubja Devi.

4. Statements of Kubja Devi, her son Dharampal, her daughter-in-law Kaushalya, Sant Ram and Randeep Singh were recorded on 8.4.2013. Both the parties were given ample opportunities to produce their witnesses and to lead evidence.

5. Respondent No. 3 in her statement made before the Sub Divisional Magistrate, Sangrah has deposed that earlier her husband and she worked for 5 years with the petitioner. She lost her husband in the year 2003. They were just provided with food for the work they used to do for the petitioner. They worked for another 5 years after the death of her husband with the petitioner. Her son Dharampal and daughter-in-law Kaushalya also worked with the petitioner. They were not paid any wages. They used to stay in the house of the petitioner. She left the house of the petitioner two years ago. She used to do agricultural work.

6. Version of respondent No.3 was supported by her son Dharampal. According to him, he was married to Kaushalya Devi about 15 years ago. He has 5 children. Even prior to his marriage they were just offered meals. However, no wages were paid to them. He had borrowed a sum of Rs.38,000/- from the petitioner. He has returned Rs.12,000/- in the year 2002. Thereafter, he returned Rs.6,000/- from the subsidy received under BPL Scheme in the year 2008. He was told in the year 2009 that a sum of Rs.73,000/- was due to the petitioner. He has also made a complaint to the Deputy Commissioner to this effect. He worked with the petitioner with effect from 2002 to December, 2006. No agreement was executed between him and the petitioner. He used to work in the fields of petitioner. He used to work from 6 A.M. to 7 P.M.

7. Smt. Kaushalya Devi wife of Dharampal, has deposed that her marriage was solemnized with Dharampal about 15 years ago. She used to work in the house of the petitioner with her father-in-law, mother-in-law and her husband. She used to work in the fields of the petitioner. She was offered only meals twice in the morning and evening.

8. Petitioner has deposed that he has never employed respondent No.3, her son Dharampal or daughter-in-law of respondent No. 3 and her husband late Jiwnoo. He has denied that Dharampal has taken a sum of Rs.38,000/- from him in the year 2002. He has never advanced a sum of Rs.38,000/- to the family of respondent No. 3. He had filed a case in the Court of Civil Judge, Rajgarh for the recovery of Rs. 73,000/-. The decree was passed on 31.8.2012.

9. Statements of Yashpal Singh and Tripta Devi were also recorded. They had no specific knowledge about the case.

10. Statement of Sant Ram was also recorded at the instance of respondent No. 3. According to him, respondent No. 3 and her husband used to work in the house of Randeep Singh. After the death of Jiwnoo, Dharampal and his wife used to work with the petitioner.

11. Sub Divisional Magistrate, Sangrah on the basis of statements as discussed herein above, has concluded that respondent No. 3 and her family members used to work as bonded labourers with the petitioner till 2008. When petitioner filed a case against respondent No. 3, thereafter they started residing in their house and they were not bonded labourers as of now.

12. District Magistrate, on the basis of the report, has declared respondent No. 3 as a bonded labourer. According to him, respondent No. 3 was forced to work in lieu of advance / financial obligations. They were paid nominal wages. The debt of Rs.73,000/- given by the petitioner was declared to be bonded debt. It was ordered to be extinguished. The District Magistrate has passed the order after receiving the report from the Sub Divisional Magistrate concerned. The District Magistrate has taken into consideration various mandatory provisions of the Bonded Labour System (Abolition) Act, 1976 before passing the order. District Magistrate has rightly concluded that respondent No.3 was kept as bonded labourer and her son was also working as bonded labourer with the petitioner. Family members of respondent No.3 were advanced loan of Rs.38,000/- and later on petitioner claimed a sum of Rs.73,000/- from them and in lieu of that respondent No.3 and her family members were working for the petitioner as bonded labourers. Moreover, the jurisdiction of the Civil Court is barred under section 25 of the Bonded Labour System (Abolition) Act, 1976 in respect of any matter to which any provision of the Act applies. There is neither any illegality nor any perversity in the order dated 3.7.2013 passed by the District Magistrate.

13. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Thakur Dass & ors. .....Appellants.

Versus

Roshan Lal & ors. .....Respondents.

RSA No. 124 of 2013.
Reserved on: October 07, 2014.
Decided on: October 15, 2014.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that defendant had instituted a suit for foreclosure, which was compromised- plaintiff had orally relinquished the title and possession of some land in favour of the defendants and the defendants had relinquished the title of the suit land in favour of the plaintiff- plaintiff was in possession of the suit land- one of the plaintiffs filed an application for confirmation of the possession, which was allowed -the defendants resiled from the relinquishment and threatened to dispossess

the plaintiffs- defendants denied the claim of the plaintiffs- held, that the plaintiffs had failed to prove that any demarcation was conducted on the spot- relinquishment deed was also not proved and the tatima was prepared without any demarcation, therefore, the version of the plaintiff could not be relied upon- Appeal dismissed. (Para-17)

For the appellant(s): Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.
For the respondents: Mr. Ashwani Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge (Fast Track Court), Ghumarwin, Distt. Bilaspur, dated 31.10.2012 passed in Civil Appeal No. 57/13 of 2008.

2. Key facts, necessary for the adjudication of this appeal are that the predecessor-in-interest of the plaintiffs-appellants (hereinafter referred to as the plaintiffs, for the convenience sake), Sh. Ganga Ram filed a suit for declaration with prayer for consequential relief of permanent injunction against the respondents-defendants (hereinafter referred to as the defendants). The case of the plaintiffs, in a nut shell, is that the defendants had instituted a suit for foreclosure of land measuring 23.6 bighas comprised in Khasra No. 49, 65, 70, 71, 76, 70 and 87 situated in village Kyari, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P. claiming the same to be in their possession since 26.7.1988. The litigation came up to this Court. Thereafter, the parties have arrived at amicable settlement on 20.8.2001, whereby the plaintiff Ganga Ram had orally relinquished the title and possession of the land measuring 2 bighas comprised in Kh. No. 71/3 and land measuring 8 biswas in Kh. No. 65/1 and land measuring 0.12 bighas out of Kh. No. 54 in favour of the defendants while defendants relinquished their title orally in favour of plaintiff of the rest of the suit land. The suit land was in the possession of the plaintiffs. Plaintiff- Ganga Ram, thereafter filed an application for the verification of the physical possession of the spot and Field Revenue Staff visited the spot. The possession of the parties was confirmed by the revenue staff. In the alternative, plaintiffs have asserted that the predecessor-in-interest of defendants No. 16 to 20 have left 1.13 bighas land in favour of plaintiff Ganga Ram on 30.11.1960. Thus, the entries in the revenue record are illegal. The plaintiffs deserves to be declared co-owners in joint possession to the extent of 2/3rd share of all the property of Sh. Kundan son of Sh. Laturia, on the basis of the registered 'Will' dated 5.7.1976. The cause of action arose to the plaintiffs on 25.9.2001 when the defendants resiled from the oral relinquishment/settlement dated 20.8.2001 and threatened to dispossess the plaintiffs. The plaintiffs have prayed for a declaration to the effect that the plaintiff No. 1 has become owner in possession of land

measuring 20.18 bighas comprised in Khasra No. 65/2, 71/1, 71/2, 49, 76, 79, 70, 87, khata No. 3 min Khatoni No. 3 & 5 situated in Village Kyari, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P on the basis of relinquishment dated 20.8.2001. The plaintiffs have further prayed that a decree of declaration be passed to the effect that plaintiffs are owner in possession over the suit land measuring 1.13 bighas comprised in Kh. No. 65/2 on the basis of compromise dated 30.11.1960 executed by Smt. Judhya Devi wife of Ruwalu Ram. It was also prayed that mutation No. 133 sanctioned on 31.5.1984 in favour of plaintiff Ganga Ram and defendant No. 21 Sant Ram be declared illegal and wrong. Plaintiffs have prayed for decree of permanent injunction restraining the defendants from dispossessing the plaintiffs and creating any charge or interfering in the suit land.

3. The suit was contested by the defendants. According to the defendants, the suit for foreclosure was filed by them which was decreed. The appeal filed by Ganga Ram, predecessor-in-interest of the plaintiffs was dismissed by the learned District Judge, Bilaspur, H.P. and Regular Second Appeal was also dismissed by the High Court. It was denied that the suit land remained in the possession of the plaintiffs. It was also denied that the parties have entered into amicable settlement or relinquishment dated 20.8.2001. There was no spot inspection made by the revenue officials. The plaintiffs were not entitled to the relief of declaration or any other alternative relief.

4. Replication was filed by the plaintiffs. Issues were framed by the learned Civil Judge (Jr. Divn.), Ghumarwin on 5.11.2007. The learned Civil judge (Jr. Divn.), Ghumarwin dismissed the suit on 22.10.2008. The plaintiffs preferred an appeal before the learned Addl. District Judge, Ghumarwin. He dismissed the same on 31.10.2012. Hence, this regular second appeal.

5. Mr. G.D.Verma, Sr. Advocate, on the basis of substantial questions of law framed, vehemently argued that both the Courts' below have misread and misconstrued the oral as well as documentary evidence. According to him, the plaintiffs have proved the relinquishment dated 20.8.2001. On the other hand, Mr. Ashwani Sharma, Advocate, has supported the judgments and decrees passed by both the Courts' below.

6. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

7. Since all the questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

8. The original plaintiff Sh. Ganga Ram died during the pendency of the suit before the learned Civil Judge (Jr. Divn.), Ghumarwin. His legal representatives were brought on record during the trial.

9. PW-1 Parkash Chand, Record Keeper, Tehsildar Office, Ghumarwin has produced his affidavit Ext. PW-1/A and produced the record of file No. 97/8 of 2001 titled as Ganga Ram versus Geetan Devi.

10. The plaintiff Thakur Dass has appeared as PW-2 and has led his evidence by filing affidavit Ext. PW-2/A. He has referred to the earlier litigation between the parties. According to him, after the litigation, the parties arrived at an amicable settlement dated 20.8.2001. He filed an application for verification of physical possession. Revenue field staff visited the spot and confirmed the possession of the parties on the spot. The plaintiffs and defendants were entitled to possession as per the relinquishment. In the alternative, he has prayed that plaintiffs be declared co-owners in joint possession to the extent of 2/3rd share in the property of Sh. Kundan son of Sh. Laturia on the basis of the registered 'Will' dated 5.7.1976. According to him, the defendants have resiled from the oral relinquishment/settlement deed. PW-2 has produced the copy of Jamabandi Ext. PA, Will Mark-X, Jamabandi Ext. PB, Application Ext. PC, copy of mutation Ext. PD and Ext. PE pedigree table, Ext. PF compromise Mark 'Z', report of Kanungo Mark 'Y', copy of order dated 28.11.1988 Ext. PG and copy of Decree Sheet Ext. PH.

11. PW-3 Devinder Kumar, Patwari has led his evidence by filing affidavit Ext. PW-3/A. According to him, he was posted as Patwari in the year 2001 in Patwar Circle, Ghumarwin. Field Kanungo alongwith him demarcated the suit land. Tatima was prepared as per the demarcation. He has produced Tatima Ext. PW-3/B and *Itlahnama* Ext. PW-3/C.

12. PW-4 Gian Chand, retired Kanungo has led evidence by filing affidavit Ext. PW-4/A. According to him, he was posted as Field Kanungo at Kanungo Circle, Ghumarwin. On the basis of application of Sh. Ganga Ram, he visited the spot and in the presence of witnesses prepared report dated 13.9.2001. He recorded the statements of witnesses and prepared tatima on the basis of physical position on the spot. He has proved copy of report Ext. PW-4/B and Ext. PW-4/C.

13. PW-5 Jagar Nath has deposed that Field Kanungo alongwith the Patwari visited the spot in the presence of the number of witnesses and prepared the report.

14. PW-6 Gulabu Ram, deposed that revenue field staff visited the spot alongwith the witnesses. They recorded the statements of the witnesses and prepared the report.

15. PW-7 Duni Chand also deposed that Field Kanungo alongwith the Patwari visited the spot in the presence of number of witnesses.

16. Defendant, Sant Ram has appeared as DW-1. He led his evidence by filing affidavit Ext. DW-1/A. According to him, there was an earlier suit pending between the parties for the foreclosure which was decreed. The appeal was preferred before the learned District Judge, Bilaspur by the plaintiff which was dismissed. The judgment was

assailed by filing Regular Second Appeal which was also dismissed. The plea of the plaintiffs with regard to the document dated 7.6.1958 was rejected by the Courts' below. The suit was filed by the plaintiffs to delay the proceedings. There was no compromise dated 20.8.2001. It was denied that the plaintiffs were in possession of the suit land.

17. According to PW-3 Devender Kumar, Patwari, he alongwith the Field Kanungo got demarcated the suit land and tatima was prepared. The demarcation report was prepared and verified by Kanungo. However, as per PW-4, no demarcation was carried out on the spot and the tatima was prepared merely on the basis of physical possession by the Patwari. PW-4 Gian Chand has admitted in his cross-examination that he has not recorded any statement of the defendants. According to him, the defendants had run away from the spot. He has also admitted that on application Ext. PC, the word "*Va Moka"* have been added with different ink. PW-7 Duni Chand was unaware of the respective possession of the parties. The plaintiffs have failed to prove that any demarcation was carried out on the spot by the revenue staff. According to the revenue staff, Ganga Ram was present on the spot, however, PW-5 Jagar Nath has testified that Ganga Ram was expired and was not present on the spot at the time of preparation of the report. He also admitted that he did not inform the revenue officials about the possession of the parties and the possession was disclosed by the Patwari and Kanungo. The plaintiffs have miserably failed to prove relinquishment dated 20.8.2001. There is no tangible evidence placed on the record oral or documentary to establish the execution of relinquishment or settlement deed dated 20.8.2001. Tatima Ext. PW-3/B has been prepared without any demarcation. The defendants were never party to report Ext. PW-4/C. All the defendants were not properly served. Thus, no credence can be given to report Ext. PW-4/C. The 'Will' mark "X" has not been proved in accordance with law. The onus was on the plaintiffs to prove the same. The plaintiffs have failed to prove their possession over the suit land. The suit was also barred by *res judicata*. The defendants have earlier filed Civil Suit for foreclosure against the plaintiffs before the Civil Judge, Ghumarwin. The suit was decreed vide Ext. D-1. The judgment rendered in case No. 168 of 1984 and decree dated 28.11.1988 passed by the learned Sub Judge, Ghumarwin was upheld by the learned District Judge. The regular Second Appeal preferred against the judgment and decree of the learned District Judge, dated 27.3.2000 was dismissed by this Court in RSA No. 329 of 2000 on 13.7.2001. The judgment was implemented. Mutations were also attested and necessary entries were also made in the *jamabandis*. The substantial questions of law are answered accordingly.

18. Consequently, the learned Courts' below have correctly appreciated the oral as well as documentary evidence placed on record. The plaintiffs have miserably failed to prove the relinquishment/settlement deed dated 20.8.2001. There is no merit in this appeal, the same is dismissed.

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

FAO No. 4094 of 2013 along with FAO No. 4053 of 2013 and Cross Objections No. 4026 of 2013 in FAO No. 4094 of 2013.
Date of Decision : 17th October, 2014.

1. FAO No. 4094 of 2013

Manoj Kumar .....Appellant.
Versus
Sudarshana Kumari and others .....Respondents.

2. FAO No. 4053 of 2013.

Manoj Kumar .....Appellant.
Versus
Asha Devi and others .....Respondents.

3. Cross objections No. 4026 of 2013 in FAO No. 4094 of 2013.

Manoj Kumar .....Non objector/Appellant.
Versus
Sudarshana Kumar and others
....Cross objectors/Respondents.

Motor Vehicle Act, 1988- Section 149- MACT fastened the liability to pay the compensation upon the owner and driver due to the fact that driver had a license authorizing him to drive transport vehicle but he was driving heavy goods vehicle and the license was not valid- held, that gross unladen weight of vehicle was more than 7500 kilograms and, therefore, it fell within the definition of heavy goods vehicle- finding recorded by MACT that driver did not possess the valid and effective driving license did not suffer from any infirmity. (Para-7)

Motor Vehicle Act, 1988- Section 166- Deceased was 51 years old- Tribunal had applied multiplier of 10- held, that the multiplier of 11 was to be applied- Tribunal had awarded interest @ 7.5% per annum- respondents were directed to pay interest @ 9% per annum from the date of the filing of the petition till realization. (Para- 10 to 13)

Cases referred:

National Insurance Company Ltd. versus Annappa Irappa Nesaria alias Nesaragi (2008)3 SCC 464

Sarla Verma and others versus Delhi Transport Corporation and another, (2009)6 SCC 121

For the Appellant(s): Mr. Sunil Mohan Goel, Advocate.
For the Respondents: Mr. Dheeraj K. Vashist, Advocate, for respondents No. 1 to 3 in FAO No. 4094 of 2013.

Mr. Jagidsh Thakur, Advocate, respondent No.4 in FAO No. 4094 of 2013 and for respondent No.5 in FAO No. 4053 of 2013
Mr. Anil Kumar, Advocate vice Mr. Anup Rattan, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both these appeals as also the cross-objections are being disposed of by a common order as common questions of fact and law are involved therein. Besides they arise out of the same accident.

2. These appeals are directed at the instance of the owner of the offending vehicle, who has been burdened with the liability to pay compensation to the respondents/claimants as assessed under awards of 21.03.2013 rendered in MACP No. 19 of 2011 and in MACP No. RBT 55/12/11 by the learned Motor Accident Claims Tribunal-II, Una, District Una, Himachal Pradesh.

3. The learned Motor Accident Claims Tribunal had proceeded to fasten the liability to defray compensation as assessed by it in favour of the claimants vicariously upon respondents No.1 and 3, on the score of the driver (respondent No.1 before the learned Tribunal) of the offending vehicle not holding a valid and effective driving licence to drive it, inasmuch, as though the registration certificate of the offending vehicle, comprised in Ex.RW1/B depicting it to be falling in the category of "heavy goods vehicle", yet the driving licence, comprised in Ex.RW1/A, authorizing its holder, who was respondent No.1 before the learned Tribunal, to drive a "transport vehicle", without an endorsement in it of his being authorized to drive a "heavy goods vehicle", hence the respondent No.1 was held not authorized at the relevant time to drive the offending vehicle i.e. "heavy goods vehicle".

4. The learned counsel appearing for the appellant has with force and vigour while relying upon a judgment of the Hon'ble Apex Court reported in ***National Insurance Company Ltd. versus Annappa Irappa Nesaria alias Nesaragi (2008)3 SCC 464*** canvassed before this Court that in the face of Form No. IV, which is extracted hereinafter contemplating three categories of vehicles i.e. Light Motor Vehicles, Transport Vehicle and Motor vehicle of the following description and the driving licence held by respondent No.1 bearing an endorsement of its holder being authorized to drive a "transport vehicle" constituted compliance with the mandate of the prescription envisaged in Form IV. In other words, the learned counsel for the appellant/owner has espoused before this Court that, hence, the non-revelation or non-enunciation in the driving licence held by respondent No.1 at the relevant time, of its holder being authorized to drive a "heavy goods vehicle" is dispensable as well as inconsequential. As a corollary he

contends that the driving licence held by respondent NO.1 at the relevant time and its marking an endorsement of his being authorized to drive a "transport vehicle" was sufficient and did not debar him to drive a "heavy goods vehicle" as was the category of the offending vehicle. However, the said contention of the learned counsel appearing for the appellant has no succor or strength. The reason which constrains this Court to do so is comprised in the fact of the judgment as relied upon by the learned counsel appearing for the appellant when omits to divulge that the category of the vehicle as driven by the driver in the case relied upon was of a category analogous to the one as was being driver by the driver in the instant case, inasmuch, as it fell in the category of a heavy goods vehicle, rather the category of the vehicle as driven by the driver in the case relied upon the learned counsel appearing for the appellant was a Matadoor Van having an unladen weight of 3500 kilograms, hence constituted it to fall in the category of "Light Motor Vehicle", as such, when the offending in the instant case falls in the category of "heavy goods vehicle" the judgment relied upon by the learned counsel appearing for the appellant is inapplicable to the driving licence qua the vehicle at hand. Thereupon the Hon'ble Appex Court in the judgment relied upon construed that even in the absence of the driver of the offending vehicle in the case aforesaid having a driving licence to drive a "light motor vehicle" without an endorsement in it of his being authorized to drive even a transport vehicle, it did not constitute any breach of the insurance policy. Form IV is extracted hereinabelow:-

> "Form 4
>
> * * * * *
>
> I apply for a licence to enable me to drive vehicles of the following description:
>
> * * * * *
>
> (d) Light motor vehicle
>
> (e) Medium goods vehicle
>
> * * * * *
>
> (J) Motor Vehicle of the following description."

After amendment the relevant portion of Form 4 reads as under:

> "Form 4
>
> I apply for a licence to enable me to drive vehicles of the following description:
>
> * * * *
>
> (d) Light motor vehicle
>
> (e) Transport vehicle
>
> * * * * *
>
> (J) Motor Vehicle fo the following description."

5. Reiteratedly, given the definition of "Light Motor Vehicle" as was the category of the offending vehicle driven by the driver in the judgment relied upon by the counsel appearing for the appellant and its divulging the fact that it encompasses both a "transport vehicle" as well as a "light motor vehicle" or omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which does not exceed 7500 kilograms, as was the weight of the offending vehicle in the said case, that hence, even in the absence of an endorsement in the driving licence held by the driver in the said case or its not carrying any endorsement in it authorizing its holder to drive a "transport vehicle" that it was concluded that he was authorized to drive a "light motor vehicle" especially given the fact that its gross unladen weight did not exceed 7500 kg. Preponderantly the factum of its weight not exceeding 7500 kg was, hence, held sufficient in the face of the definition of the light motor vehicle, which is extracted herein after, to authorize him to drive it even as a "transport vehicle". However, for the reasons hereinafter mentioned, the gross unladen weight of a "heavy goods vehicle" is more than 7500 kilograms, as such, the judgment relied upon by the learned counsel for the appellant is inapplicable to the category of "heavy goods vehicle". Section 2(21) defines "light motor vehicle" as under:-

> "2. (21) 'light motor vehicle' means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms."

6. Furthermore, the learned counsel for the appellant has also proceeded to further urge that obviously when in the case at hand, the R.C. of the offending vehicle comprised in Ex.RW1/B is loudly communicative of the fact that the offending vehicle falls in the category of "heavy goods vehicle". However, the driving licence held by respondent No.1 while driving it as divulged by Ex.RW1/A, though does bear an endorsement authorizing its holder to drive a "transport vehicle", which authorization comprised in the driving licence, has been contended to be sufficient and adequate to empower respondent No.1 to drive even a "heavy goods vehicle" as was the category of the offending vehicle, yet it does not specifically carry any endorsement of its holder being authorized to drive a "heavy goods vehicle". The said argument is built upon the definition of "transport vehicle" occurring in Section 2(47) of The Motor Vehicles Act, 1988, which definition is extracted hereinafter inasmuch as while its encompassing even a "goods carriage vehicle" as was the category of the offending vehicle rendered the respondent No.1 fit and empowered to drive it even when the driving licence issued to him did not carry in it an apposite endorsement by the Authority concerned of its holder being fit to drive a "heavy goods vehicle". Nonetheless, the learned counsel for the appellant has remained oblivious to and aloof to the factum of a separate and distinct definition borne by the phrase "heavy goods vehicle" existing in Section 2(16) of The Motor Vehicles Act, 1988, which is extracted hereinafter, vis-à-vis the definition of a "Light Motor Vehicle" which distinct definitions borne by two separate

categories of vehicles per se marks and voices the factum of the driver while driving any of the aforesaid categories of vehicle being enjoined to carry in the driving licence held by him an endorsement of his being fit to drive either a "light motor vehicle", a "transport vehicle" or a "heavy goods vehicle". However, the said endorsement is amiss. The definition of the "transport vehicle" defined in Section 2(47) of the Motor Vehicles Act, reads as under:

> "2(47). "transport vehicle" means a public service vehicle, a goods carrier, an educational institution bus or a private service vehicle;"

The definition of the "heavy goods vehicle" defined in Section 2(16) reads as under:

> "2(16). "heavy goods vehicle' means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms;"

7. In the legislature while affording diverse and distinct definitions to distinct categories of vehicle did so, to mark the fact that the driving licences issued qua each of the distinct categories of the vehicle compatibly too, distinctly and lucidly voicing in them, besides being communicative of the fact of its holder being specifically authorized to drive each of the distinctly defined categories of the vehicles. The mere fact of an endorsement of "transport vehicle" occurring in the driving licence held by respondent No.1, in the absence of an endorsement in it authorizing him to drive a "Heavy Goods Vehicle", does not constitute the driving licence held by the respondent No.1 to be an effective and valid driving licence. The import of the phrase "transport vehicle", though encompassing within its amplitude even a "goods carriage", which even a "heavy goods vehicle" may be so as to foist a tenable inference that the contention as raised by the learned counsel for the appellant to fasten it with legality may be tentatively vindicable. Nonetheless, the factum of a "transport vehicle" encompassing within its scope and amplitude a "goods carriage" is to be read in conjunction with a compatible phraseology occurring in the definition of a "light motor vehicle". Now given the fact that the phraseology "transport vehicle" occurs in the definition of a light motor vehicle, whereas, it does not occur in the definition of "transport vehicle". Hence, given its existence in the definition of light motor vehicle and its non reflection in the definition of "heavy goods vehicle", as a sequel its implication and import is to convey that the legislature while defining a "transport vehicle" in Section 2(47) of the Motor Vehicles Act, 1988 has proceeded to amplify the signification borne by the phraseology "transport vehicle" with its occurring only in the definition of a "light motor vehicle". The omission of the phrase "transport vehicle" in the definition of "heavy goods vehicle" is also with an obvious intention of the legislature to its signification being not carried forth or un-importable/un-introducible qua the definition of a "heavy goods vehicle". In other words, the amplitude, scope and import of the phrase "transport vehicle" is circumscribed to a "light motor vehicle' or it amplifies the scope of the definition of a light motor vehicle as also it further elucidates the fact that the import of a

transport vehicle is to be restricted to its being a "goods carriage" bearing or carrying an unladen weight of 7500 kilogram. Obviously its import does not extend to or amplify the signification borne by words "goods carriage" occurring in the definition of "heavy goods vehicle" as a "heavy goods vehicle" is constituted by a "goods carriage" whose unladen weight exceeds 12000 kg. Consequently, the factum of a "transport vehicle" taking within its ambit a "goods carriage" as may be category of the offending vehicle driven by the respondent No.1 while its being a "heavy goods vehicle", nonetheless, when the weight of the different categories of the vehicle, inasmuch, as of vehicles constituting "heavy goods vehicles" and of vehicles constituting "light motor vehicles" too is also significant for testing the signification conveyed by the phrase "transport vehicle" especially when its amplitude is limited to the definition of a "light motor vehicle" wherein it occurs, as a corollary, the driver of each of the distinct categories of vehicles bearing different unladen weights was enjoined to possess diverse skills and proficiency, which skills and proficiency possessed by the driver driving a heavy goods vehicle was to be higher vis-à-vis the skills and proficiency possessed by a driver of a "light motor vehicle". Obviously, then the driving licence held by the respondent No.1 had to explicitly contain an expression of the driver being, prior to its issuance, tested for his possessing skill and proficiency to drive a "heavy goods vehicle" and its then carrying an endorsement in it of his being fit to drive it. Necessarily, then given the definition of a "transport vehicle" and its occurrence in the driving licence of its holder, is to be construed to be voicing the mere fact or it authorizing him only to drive a "light motor vehicle" and not a "heavy goods vehicle". Furthermore, the mere fact of Form No. IV as extracted hereinabove classifying three categories of vehicle and a transport vehicle being one of the categories enunciated in it and the driving licence held by respondent No.1 carrying an endorsement of his being authorized to drive a "transport vehicle", whereas the category of "heavy goods vehicle" not existing in it would not constrain this Court to conclude that there was no necessity of an endorsement in his driving licence of his being authorized to drive even a "heavy goods vehicle". The narration of the category of vehicles in Form IV does not govern or regulate the purpose and objective of the legislature. Consequently, necessity is enjoined of its holder to held a licence specifically authorizing him to drive a separately and distinctly defined category of vehicle in the Statute.

8. Even otherwise the non occurrence of the term "heavy goods vehicle" in Form No. IV extracted hereinabove does not curtail the power of the Licensing Authority to issue a driving licence qua a vehicle specifically falling within the description or definition of "heavy goods vehicle". A perusal of Section 10(2) of the Motor Vehicles Act, which is extracted hereinafter when divulges that it enjoins a necessity upon the Licencing Authority while issuing a driving licence to communicate in it of its holder to be, besides his driving icence authorizing him to drive a "transport vehicle", his being also specifically authorized to drive a motor vehicle of a specified description. Consequently, since the category of "heavy goods vehicle" falls in the category of a motor vehicle of a specified

description, hence, even if it is not explicitly enunciated in Section 10(2) of the Act, yet it being a statutory category of motor vehicle, concomitantly, the said expression had to be lucidly communicated in the driving licence held by respondent No.1, inasmuch as of his being authorized to drive the aforesaid statutorily specified/described category of a motor vehicle. Section 10(2) of the Motor Vehicles Act reads as under:

> "10(2). A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-
>
> (a) motor cycle without gear;
> (b) motor cuycle with gear;
> (c) invalid carriage;
> (d) light motor vehicle;
> (e) transport vehicle
> (i) road roller;
> (j) motor vehicle of a specified description."

9. For the foregoing reasons the findings of the learned Tribunal on the issue relating to the fact of respondent No.1 not holding a valid and effective driving licence do not suffer from any infirmity or absurdity rather are anvilled upon mature and balanced appreciation of the evidence and material before it and apposite application of law to it.

Cross Objection No. 4026 of 2013 in FAO No. 4094 of 2013.

10. Mr. Dheeraj Vashist, the learned counsel appearing for the claimants/respondents/cross-objector canvassed before this Court that the deceased Ram Swaroop at the time of the accident was 51 years of age as divulged by the post mortem report of deceased Ram Swaroop, hence, the learned Tribunal has erroneously applied a multiplier of 10 while assessing compensation payable under the head of the loss of dependency to the respondents/claimants. The contention of the learned counsel has succor as it is divulged by the post mortem report of the deceased that at the time of the accident he had attained the age of 51 years, hence, in the face of the principle laid down in judgment reported in ***Sarla Verma and others versus Delhi Transport Corporation and another, (2009)6 SCC 121***, of a multiplier of 11, hence, being applicable to the multiplicand, the learned tribunal has erroneously and inappropriately applied a multiplier of 10 while assessing compensation to the petitioner/claimants under the head of the loss of dependency, as such, the impugned award to this extent suffers from an infirmity. Accordingly, that portion of awarded passed by the Learned Motor Accident Claims Tribunal is set aside and this Court proceeds to apply a multiplier of 11 to the multiplicand while assessing the compensation payable to the claimants/respondents under the head of loss of dependency. While applying a multiplier of 11 to the annual income of the deceased as assessed by the learned Motor Accident Claims Tribunal, the total compensation payable to the respondents/claimants under the head of loss of dependency comes to {Rs.2,02,726/- (annual income) x

11}, Rs.22,29,986/-. Now adding a sum of Rs.10,000/- on account of loss of love and affection and another sum of Rs.10,000/- on account of funeral expenses and other conventional charges as assessed by the learned Motor Accident Claims Tribunal as compensation payable to the respondent/claimants under the head of loss dependency, the total compensation assessable in favour of the respondents/claimants is computed at Rs.22,49,986/-. Furthermore, the learned Tribunal has erroneously quantified interest payable at the rate of 7.5% whereas the rate of interest to be afforded is at a rate of 9% per annum from the date of the filing of the petition till the realization of compensation. Consequently, it is directed that the compensation as determined by this Court shall carry interest at the rate of 9% per annum from the date of filing of the petition till its realization.

11. Mr. Anil Kumar, learned counsel appearing for the respondents/claimants in FAO No. 4053 of 2013 submits that the learned Tribunal has erroneously afforded rate of interest at the rate of 7.5 % per annum from the date of filing of the petition whereas it has to afford the interest at the rate of 9% per annum from the date of filing of the petition and in support of his submission the learned counsel pressed into service the provisions of Order XLI, Rule 33 of the Code of Civil Procedure. The provisions of Order XLI, Rule 33 of the CPC clothe this Court with a plenary jurisdiction to pass or make such further and other decree or order as the case may require. The provisions of Order XLI, Rule 33 of the CPC reads as under:

> 33. Power of Court of Appeal- The Appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:"

12. The said power vested in this Court under the provisions of Order XLI, Rule 33 of the CPC extracted hereinabove are open to be exercisable by the Court of Appeal as this Court is, even in the absence of any of the respondents in the memo of parties before the Appellate Court having omitted to file any cross appeal or cross-objections ventilating therein their grievance against the award impugned. Consequently, to afford parity of treatment to the respondents/claimants in FAO No. 4053 of 2013 with the respondents/claimants in FAO No. 4994 of 2013 in terms of provisions of Order XLI and Rule 33, even when the formers have not filed any cross-objections or appeal, as such, the impugned award passed in MACP No. RBT 55/12/11 by the learned Tribunal which is impugned in FAO

No.4053 of 2013 before this Court is modified to the extent that the amount of compensation as assessed by the learned Tribunal shall carry interest at the rate of 9% per annum from the date of filing of the petition and till its realization.

13. For the foregoing reasons, I find no merits in the appeals preferred by the appellant(s)/owner, which are accordingly dismissed and the cross-objections No. 4026 of 2013 preferred by the respondents/claimants in FAO No. 4094 of 2013 are allowed and the award of the learned Tribunal in MACP No. 19 of 2011 is modified to the extent that the respondents/claimants are entitled to a total compensation of Rs.22,49,986/- which shall also carry interest at the rate of 9% per annum from the date of filing of the petition till its realization. Further, the award passed by the learned Tribunal in MACP No. RBT 55/12/11 which is impugned before this Court in FAO No. 4053 is also modified with the direction that the compensation as awarded by the Learned Motor Accident Claims Tribunal in its award shall carry interest at the rate of 9% per annum from the date of filing of the petition till its realization. No costs. All the pending application(s) also stand disposed of.

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

State of Himachal Pradesh .....Appellant.
Versus
Hans Raj alias Raja .....Respondent.

Cr. Appeal No. 586 of 2008.
Reserved on: October 16, 2014.
Decided on: October 17, 2014.

Indian Penal Code, 1860- Sections 363, 366 and 376- Prosecutrix aged 17 years left her home- matter was reported to the police- prosecutrix was recovered at the instance of the accused- the evidence showed that the prosecutrix had voluntarily gone to Pandoh Colony, which was thickly populated- she had crossed Mandi town in the bus- she admitted that she was writing letters to the accused and had handed over her photographs to him-held that, these circumstances, show that the prosecutrix was not kidnapped but she had voluntarily gone with the accused. (Para- 20 to 24)

For the appellant: Mr. Parmod Thakur, Addl. Advocate General.

For the respondent: Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 31.5.2008 of the learned Presiding Officer, Fast Track Court, Mandi, H.P., rendered in Sessions Trial Nos. 39 of 2003 & 42 of 2004, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offences under Sections 363, 366 and 376 IPC, has been acquitted of the charges framed against him.

2. The case of the prosecution, in a nut shell, is that Sh. Durga Dass father of the prosecutrix reported the matter in Police Station, Sundernagar to the effect that he was posted in B.S.L. Security and Vigilance Department. He was residing with his family members in Quarter No.512-157, BBMB Colony, Sundernagar. On 30.6.2003, the prosecutrix, his daughter aged 17 years alongwith her cousin Kajal, daughter of Braham Dass, resident of Malori had left his quarter at about 1:30 PM. He inquired from his brother at about 7:00 PM. His *'Bhabhi'* Smt. Saroj Arya told him that at 4:00 PM his daughter and niece Kajal were seen going towards the side of Mandi Bazar. On the road at Pul Gharat the accused and Paramvir resident of Pandoh who were going on the motor cycle met them and stopped the motor cycle and talked with the prosecutrix. The prosecutrix told Kumari Kajal that she should go to the Bazar and she will go to her house. His daughter has not reached at his house on 30.6.2003. On 1.7.2003, he had gone to Pandoh to enquire from the friend of the prosecutrix about the whereabouts of the prosecutrix. He came to know that the prosecutrix was seen on 30.6.2003 and 1.7.2003 in the company of the accused in the quarter of Papu. On 30.6.2003 both have stayed in the quarter of Papu. On 1.7.2003, Babita who is studying in 10+1 class at Pandoh had seen the accused and the prosecutrix roaming near the School. On 2.7.2003 when he was at the bus stand Sundernagar, in the search of the prosecutrix, the accused met him at bus stand Sundernagar. He enquired from the accused regarding the prosecutrix and the accused refused to divulge anything. He and his brother Gopi Chand took the accused to the police Station, Sundernagar. The prosecutrix was recovered and custody was handed over to him on superdari. The investigation was completed and challan was put up after completing all the codal formalities. Initially, the FIR was registered under Section 363 IPC. Thereafter, the same was converted under Sections 363, 366 and 376 IPC.

3. The prosecution has examined as many as 16 witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has denied the entire version of the prosecution and pleaded innocence and claimed that he was falsely implicated. The learned Trial Court acquitted the accused, as stated hereinabove. Hence, this present appeal at the instance of the State.

4. Mr. Parmod Thakur, learned Addl. Advocate General has vehemently argued that the prosecution has proved the case against the accused. On the other hand, Mr. G.R.Palsra, Advocate, has supported the judgment of the learned trial Court dated 31.5.2008.

5. We have heard learned counsel for both the sides and gone through the material available on record very carefully.

6. PW-1, Parvinder Kumar deposed that accused was his maternal Uncle from distant relation. His father was having a quarter at BBMB Colony at Pandoh. The accused had never asked him to give the key of the quarter of his father. He was declared hostile and cross-examined by the learned Public Prosecutor.

7. PW-2 Paramvir, deposed that he had gone to Pandoh on his motor cycle alongwith the accused. He has not seen the prosecutrix talking with the accused at Pul Gharat. He was also declared hostile and cross-examined by the learned Public Prosecutor.

8. PW-3 Gopi Chand, deposed that the prosecutrix was his niece. He was informed by his brother on 30.6.2003 at about 8:00 PM that his daughter was missing. He came to Sundernagar. They went in search of the prosecutrix at Pandoh. Paramvir met them at Pandoh. He told that the prosecutrix was seen with the accused. On 2.7.2003, Hans Raj met them at Sundernagar bus stand and they enquired from him about the prosecutrix. He did not divulge anything. Thereafter, he and his brother took him to Police Station. The personal search was carried out. One broken wrist watch, one leather purse, one photograph of his niece, one page of diary and one letter were found. These articles were taken into possession by the police vide memo Ext. PW-3/A. He had no personal knowledge regarding the staying of the prosecutrix with the accused as per his statement in the cross-examination. He did not know that the prosecutrix stayed at Kanaid with one Vijay Kumar alongwith his parents. In his presence, his brother has not told the police that the writing contained in Ext. P-1, P-2 and P-4 was in the hand of the prosecutrix.

9. PW-4 Simro Devi, is the mother of the prosecutrix. According to her, the prosecutrix had gone to the house of brother of her husband, namely, Braham Dass on 30.6.2003. On 30.6.2003, her husband telephonically asked his brother Braham Dass about the arrival of the prosecutrix and Kajal. He told that the prosecutrix had gone to bazaar alongwith Kajal. Kajal had gone to market but his daughter, the prosecutrix wanted to go to Sundernagar. When she reached at Pul Gharat, two persons, namely, Hans Raj and Paramvir took his daughter on the motorcycle to Pandoh. The prosecutrix and accused used to study together at Pandoh. On 4.7.2003, her daughter was recovered by the police. She was handed over to her husband in the presence of Gopi Chand vide recovery memo Ext. PW-3/B. Her daughter told them that the accused had taken her to his quarter and kept there and committed sexual intercourse with her. In her cross-examination, she admitted that she was deposing regarding the aforesaid fact for the first time in the

Court. She had no personal knowledge regarding the incident. She also admitted that her daughter used to reside at Kanaid but did not disclose from which date she stayed there nor the police has investigated this fact.

10. PW-5 Saroj Arya, deposed that on 30.6.2003 at about 4:15 PM, she was going to her Village Malori. She saw her daughter Kajal and her niece. After two hours, her daughter reached at home and told her that two persons, namely, Hans Raj alias Raja and one Paramvir met them in the Bazar. Kajal also told her that both the persons were compelling the prosecutrix to accompany them on their motor cycle. Her niece was recovered after about 3 days. In her cross-examination, she admitted that the prosecutrix had not told her anything about the incident. Her daughter Kajal has not told her that the persons sitting on the motor cycle had forcibly kidnapped the prosecutrix in her presence. Kajal also told her that the prosecutrix had told her that she will go to her house to Sundernagar and she may go to the Bazar for tuition. She admitted that there were many shops near the bridge at Pul Gharat and persons of the nearby locality might have seen the occurrence. She did not know that the prosecutrix used to reside in the house of Vijay Kumar at village Kanaid. She knew that the prosecutrix was in love with the accused.

11. PW-6 Devinder Kumar, deposed that he was owner of Vehicle No. HP-33-4069. He was called to Police Station by the father of the prosecutrix. Accused was known to him. He has not seen the prosecutrix alighting from the bus at Pandoh. The witness was declared hostile and cross-examined by the learned Public Prosecutor. He denied in his cross-examination that he has seen the prosecutrix at Jaral Colony while she was alighting from the bus.

12. PW-7 Durga Dass, is the father of the prosecutrix. He deposed that on 30.6.2003, his daughter had gone to his elder brother's house at Malori with his niece at 1:30 PM from Sundernagar. At about 7:30 PM he was told by his elder brother's wife about the arrival of the prosecutrix and Kajal that they were coming on foot to their house. They met two persons, who were riding in one motor cycle. One person started talking with the prosecutrix. Thereafter, his daughter told his niece Kajal that she may go to her house and she will go back to her house. She did not reach home. He kept on searching her and on 2.7.2003, he alongwith his younger brother Gopi Chand went to search the prosecutrix at Sundernagar. He found Hans Raj at bus stand Sundernagar. Hans Raj did not divulge anything. He was taken to the Police Station. Diary Ext. P-1, letter Ext. P-2, photographs Ext. P-3 and one paper diary Ext. P-4 were in the hand writing of his daughter, which were addressed to Hans Raj. He produced school certificate. In his cross-examination, he admitted that he had no personal knowledge regarding the incident and reported the matter at Police Station Sundernagar on the information of others. He came to know from the contents of Ext. P-1, P-2 and Ext. P-4 that his daughter was in love with accused Hans Raj.

13. PW-8, Saroj Abrol, is a formal witness.

14. PW-9 Dr. Sapna Sharma, has medically examined the prosecutrix. She has issued MLC Ext. PW-9/C. According to her, the prosecutrix was exposed to coitus. She did not say as to when the last coitus has taken place. She has sent the clothes of the prosecutrix to FSL, Junga. In her cross-examination, she admitted that there was no injury of any kind on her body and there was no possibility of rape.

15. PW-10 is the prosecutrix. She deposed that she was studying in 10+ 1 class in Girls School, Sundernagar, District Mandi. She had gone to the house of her father's brother with his daughter Kajal on 30.6.2003. They left for Malori at 1:30 PM. When they reached at Pul Gharat at about 2:30 PM, they met accused Hans Raj and his friend Param Dev. Thereafter, accused asked her to come to Pandoh. On her refusal, the accused threatened her to do away with her life. Accused threatened her to visit Pandoh i.e. Jaryal Colony. When she was studying at Pandoh in 10+1 class, she had given one photo, one diary and letters to the accused Hans Raj. These were Ext . P-3, Ext. P-1 and Ext. P-2 and Ext. P-4. She had liking for the accused. The accused started blackmailing her. She had gone to Jaral Pandoh in a private bus. Paramvir told her that accused Hans Raj will meet her in Colony or at his residence. Accused Hans Raj had met her at Colony and asked her to wait. The accused left for bringing the key of a quarter of his sister's son (Bhanja). Parminder had brought the key and after sitting for some time in the quarter, he had left the quarter. Thereafter, they remained in the quarter. The accused asked her to sleep on the bed and he himself slept on the ground. The accused asked her that that as they are going to marry shortly and why don't she come to his bed. She refused. The accused forcibly entered into her bed and committed sexual intercourse with her. She could not make hue and cry as there was none to hear her cries. On the second day, the accused took her to Pandoh Bazar and they both were roaming in the Pandoh Bazar. At 5:00 PM, the accused asked her to go to her house and told her to see him on 4.7.2003. The accused compelled her to board the bus in order to go to home. She sat in the bus. The accused accompanied her to Sundernagar in the bus. She did not go to her house and had gone to the house of Nishant. She went back to Pandoh. On the way to Pandoh, one *Bhanja* of accused looked her and asked her to alight from the bus at Jaral Pandoh. He informed the Police Post, Pandoh and police brought her to the Police Station, Sadar Mandi. She was handed over to her father. She was medically examined on the same date at Zonal Hospital, Mandi. In her cross-examination, she admitted that on 30.6.2003, she did not reach at Malori village. Her statement portion A to A of Mark-X was incorrect. She has not given such statement to the police. Her statement portion B to B of Mark-X was also incorrect. She has not given such statement to the police. She and Kajol had not come from Village Malori to Pul Gharat. She also admitted that she has not disclosed to the police in her statement under Section 161 Cr.P.C that the accused had threatened her to do away with her life, if she will not go to Jaryal Colony at Pandoh according to his instructions. She has not disclosed this incident to

anybody else and had given this statement for the first time in the Court. She also admitted that near Pul Gharat there are many shops and people were also present there. She also admitted that there are shops near the bridge. The accused and Paramvir never met them at Pul Gharat nor accused Hans Raj asked her to come to Pandoh at Pul Gharat. She had told the police that the accused Hans Raj and Paramvir met them 300 meters away on Malori road (confronted with her statement under Section 161 Cr.P.C. Mark-X wherein it is not so recorded). She also admitted that the accused never met her at Pul Gharat where shops were situated and her statement portion C to C of Mark-X is incorrect. She has not told to anybody that the accused met her on a motor cycle at Pul Gharat on Sundernagar road nor she has disclosed this fact to the police. She admitted that she boarded the bus to Jaryal Colony Pandoh of her own without any pressure from anybody at that time. Volunteered that, the accused had asked her to come and has pressurized her at village Malori. She had disclosed the police in her statement under Section 161 Cr.P.C. that she was pressurized by the accused to come to Pandoh in a bus at Village Malori when he met her. (confronted with her statement under Section 161 Cr.P.C. Mark X, wherein it is not so recorded). She also admitted that Jaryal Colony is thickly populated and there is bazaar and people were coming and going at that time. She also admitted that there were many passengers in the bus going to Pandoh. She has not disclosed to anybody regarding the threats advanced by the accused. She knew that Police Station Sadar Mandi is situated at Paddal which is situated about 600-700 yards. She has not reported the matter to the police at that time though she could have reported the same to the police. She has not told the police that Parvinder brought the keys of the quarter where they stayed at night. She told this fact for the first time in the Court and had not disclosed the same to anybody else including her parents. She reached at Pandoh at 8:00 PM on 30.6.2003. There were lights in the neighbourhood. She did not disclose to anybody at that time that accused has asked her to come to Pandoh by pressurizing her. She has admitted that her father had asked the accused to marry her.

16. PW-11 Sh. Rajesh Kumar, has issued the birth certificate of the prosecutrix vide Ext. PW-11/A. In his cross-examination, he has admitted that there was no serial number of this entry in the birth register. There was no mention of the name of the informant at whose instance the entries were made. He also admitted that there was no signature of any Panchayat Secretary who had made these entries outside the column and the said entries were not signed by any Secretary and also not verified by any competent Officer. He also admitted that there was no mention in the register that on which date this entry was made in the register.

17. PW-12 Kumari Kajal, deposed that on 30.6.2003, she had come to her house at village Malori due to summer vacation in the School. While going to Mandi town, they met two persons namely Paramvir and Hans Raj coming on motorcycle from Mandi towards Sundernagar. They met them at Pul Gharat on Mandi Sundernagar road. The accused called the prosecutrix to talk with her. She went to

talk with the accused and she waited for her. After some time, she came with the accused. She told her that the accused was her class fellow and was asking about some books. She left for the bazaar and the prosecutrix stayed there. She narrated the whole story to her mother. At about 7:30 PM her uncle Durga Dass rang up her mother and enquired about the prosecutrix. Her mother told him that she had gone to her house at Sundernagar. She was ready to go to Mandi town with her but after meeting with the accused Hans Raj the accused might have taken away the prosecutrix. In her cross-examination, she admitted that both of them were talking nicely. She has not disclosed to anybody that she was pressurized or threatened by the accused to go to Pandoh. She has not told her that if she would not go to Pandoh, the accused would do away with her life. She has not disclosed anything about the incident to her.

18. PW13 Inspector Brijesh Sood, PW-14 HHC Baldev Singh and PW-15 HC Tulsi Ram, are formal witnesses.

19. PW-16 Narender Kumar, SI, CID investigated the matter. Ext. P-1, P-2, P-3 & P-4 were recovered. The prosecutrix was recovered at Pandoh while she was going to the quarter of the accused. She was handed over to her father on superdari. He obtained the report of FSL Ext. PW-16/B. The accused was also medically examined vide Ext. PW-16/C. The birth certificate Ext. PW-11/A was obtained from G.P. Kothuan. The statements of the witnesses were recorded. In his cross-examination, he admitted that he has not taken possession of the motor cycle.

20. What emerges from the evidence brought on record is that the prosecutrix was 17 years of age. The prosecution has failed to prove that the prosecutrix was forcibly taken by the accused to Pandoh. Rather, she has voluntarily gone to Pandoh Colony, which was thickly populated. She had gone in the bus. She had also crossed Mandi town. It has come in her statement that she knew where the Police Station, Sadar Mandi was but she has not got down to register the case. She also deposed that she had liking for the accused. She had been writing letters to the accused. She has also handed over her photograph to the accused. PW-1 Parvinder Kumar and PW-2 Paramvir were declared hostile. According to the prosecutrix, PW-1 Parvinder had brought the keys of the room but PW-2 Paramvir had denied the same.

21. The statement of the mother of the prosecutrix Smt. Simro Devi (PW-4) is only based upon hearsay. In her cross-examination, she has admitted that she was deposing regarding the incident for the first time in the Court. She has not seen the incident. PW-7 Durga Dass, the father of the prosecutrix has admitted in his cross-examination that he had no personal knowledge regarding the incident and he has reported the matter to the police at Police Station, Sundernagar on the basis of the information supplied by others. He had no personal knowledge whether his daughter was staying at Pandoh or Kanaid in the family of Vijay Kumar. He came to know about the love affair of his daughter with the accused after reading Ext. P-1, P-2 and P-4.

22. According to PW-9 Dr. Sapna Sharma, the prosecutrix was exposed to coitus. The duration could not be given as to when the last coitus has taken place. In her cross-examination, she has admitted that there was no injury of any kind on the body of the prosecutrix and there was no possibility of rape.

23. According to the prosecution case, the accused has met the prosecutrix and Kajal at Pul Gharat but according to PW-10, the prosecutrix, the accused met them 300 meters ahead of Pul Gharat. The prosecutrix has remained in the Pandoh Colony and thereafter she had come to the market place. She has admitted that she was roaming in the bazaar in the company of the accused. There are also contradictions in the statements of PW-10 prosecutrix and her cousin PW-12 Kajal. PW-16 S.I. Narender Kumar, has not even prepared the site plan of the spot.

24. The prosecution has miserably failed to prove the charge against the accused under Section 363 IPC. Similarly, charge under Section 366 IPC has also not been proved. In order to prove charge under Section 366 IPC, it is essential that the woman has been kidnapped or abducted and such kidnapping or abduction is with intent that she will be compelled to marry any person against her will or in order that she will be forced or seduced to illicit intercourse or by means of criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be, forced or seduced to illicit intercourse. In the instant case, the prosecutrix herself has gone to Pandoh voluntarily. She has stayed with the accused. The accused has not kidnapped her.

25. Consequently, in view of analysis and discussion made hereinabove, the prosecution has miserably failed to prove its case beyond reasonable doubt that the accused has committed rape upon the prosecutrix. The circumstances, as noticed hereinabove, create reasonable doubt in the version of prosecution.

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

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

CRMMO Nos.: 191 of 2014 and
192 of 2014.
Decided on: 20.10.2014.

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1. <u>CRMMO No.191 of 2014.</u>

Shashi Pal. ... Petitioner.

Versus

State of Himachal Pradesh and others. ... Respondents.

2. CRMMO No.192 of 2014.

Reshma Devi and others. … Petitioners.

Versus

State of Himachal Pradesh and another. … Respondents.

Code of Criminal Procedure, 1973- Section 482- Parties had entered into a compromise and had decided not to pursue the case- held, that when the matter has been compromised, and where wrong was done to the victim and not to the society, FIR can be quashed on the basis of compromise. (Para-4 to 7)

Cases referred:

Gian Singh Vs. State of Punjab and another, (2012) 10 SCC 303

Narinder Singh & Ors. v. State of Punjab & another, JT 2014(4) SC 573

For the Petitioners : Mr. Pawan Gautam, Advocate in CRMMO No.191 of 2014 and Mr. B.R. Sharma, Advocate in CRMMO No.192 of 2014.

For the Respondents : M/s D.S. Nainta, Virender Verma and Rupinder Singh, Additional Advocates General for respondent No.1 in both petitions.

Mr. B.R. Sharma, Advocate for respondents No.2 to 4 in CRMMO No.191 of 2014 and Mr. Pawan Gautam, Advocate for respondent No.2 in CRMMO NO.192 of 2014.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.(Oral)**:**

This judgment shall dispose of both petitions under Section 482 of the Code of Criminal Procedure filed with a prayer to quash the F.I.Rs. registered at the instance of the parties against each other in Police Station, Gagret, District Una.

2. Shashi Pal, the petitioner in CRMMO No.191 of 2014 is accused in FIR No.98 of 2011, registered against him at the instance of 2nd respondent, Smt. Reshma Devi under Sections 323 and 324 of Indian Penal Code. The police after investigation of the case has filed challan against him, which has been registered as Criminal Case No.6-1 of 2012/31-II of 2012 and pending disposal in the Court of Judicial Magistrate, Court No.2, Amb, District Una.

3. Similarly, a cross case vide FIR No.97 of 2011 has been registered at the instance of Shashi Pal, aforesaid against Smt. Reshma Devi, her husband Kishori Lal and son Anil Kumar, petitioners in CRMMO No.192 of 2014, under Sections 451 and 323 read with Section 34 of Indian Penal Code. Criminal Case No.8-1 of 2012 arising out of this FIR is also pending disposal in the Court of Judicial Magistrate, Court No.2, Amb, District Una. Both cases are presently at the initial stage, i.e. recording of prosecution evidence. The parties are neighbours. They belong to same community. It has come in their statements recorded separately that the occurrence took place at the spur of moment on account of some land dispute, trivial in nature. Therefore, in order to maintain friendly and cordial relations, they have decided not to prosecute the cases registered against each other at their instance. The deed of compromise duly signed by the parties on both sides in the presence of witnesses is Annexure P-2 to these petitions.

4. It is pertinent to note that an offence punishable under Sections 451 and 323 of Indian Penal Code is compoundable under Section 320 of the Code of Criminal Procedure. It is, however, the offence punishable under Section 324 of Indian Penal Code, is not compoundable. Since the petitioners in CRMMO No.192 of 2014 have allegedly committed the offence punishable under Sections 451 and 323 read with Section 34 of Indian Penal Code, therefore, the complainant in the said case, i.e. Shashi Pal could have compounded the offence in the trial Court itself. However, since the offence he allegedly committed under Section 324 of Indian Penal Code is not compoundable, therefore, both parties have approached this Court by filing these petitions under Section 482 of the Code of Criminal Procedure for quashing the proceedings against them.

5. The law on the issue is no more res-integra as the Apex Court in ***Gian Singh Vs. State of Punjab and another,*** **(2012) 10 SCC 303** has held that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure, may quash the FIR in such cases where the offence allegedly committed though is not compoundable, however, the victim and the accused have settled the dispute amicably, of course in appropriate cases having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions, matrimonial or relating to dowry etc. in which the wrong basically is done to the victim. However, as per this judgment, in the cases of serious nature like rape, dacoity and corruption cases etc. the practice of quashing FIR has been deprecated keeping in view that such offences have serious impact in the society at large. This judgment reads as follows:-

> *"58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt,*

crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed. "

6. The Apex Court in ***Narinder Singh & Ors.*** v. ***State of Punjab & another,*** JT 2014(4) SC 573 has laid down the following guidelines for being considered in a case of this nature:

"(I) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

(II) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

(III) Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in

nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

(IV) On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

(V) While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

(VI) Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

(VII) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the

evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

7. It is seen that both cases arising out of the F.I.Rs. registered against each other at the instance of both parties, are presently at the stage of recording prosecution evidence. The Apex Court in ***Narinder Singh's*** case (supra) has held that in a case where the evidence is yet to start or the evidence is still at infancy stage, the High Court may exercise the powers to quash the proceedings, however, after prima-facie assessing the given facts and circumstances of the case.

8. In the case in hand, the petitioners in both the petitions are the victims. They have settled the dispute amongst them. Compromise deed, Annexure P-2 has been filed in both the cases. Therefore, at this stage, when an amicable and complete settlement is already arrived at between the parties, this Court feels that to allow the proceedings in criminal cases to continue may amount to abuse of process of law. Otherwise also, when the complainants in both F.I.Rs. have arrived at a compromise and made statements in the Court, the chances of conviction in both cases are very bleak. Being so, I accept these petitions and quash FIR Nos.97 of 2011 and 98 of 2011 registered under Sections 451 and 323 read with Section 34 of Indian Penal Code and Sections 323 and 324 of Indian Penal Code respectively against the petitioners in Police Station, Gagret, District Una and also all the consequential proceedings, i.e. Criminal Cases No.6-1 of 2012/31-II of 2012 and 8-1 of 2012, pending disposal in the Court of learned Judicial Magistrate (2), Amb, District Una.

With the above observations, both petitions succeed. The same are accordingly allowed and stand finally disposed of.

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

State of H.P. .....Appellant.
Versus
Puran Chand & another .....Respondents.

Cr. Appeal No. 338 of 2008.
Reserved on: October 17, 2014.
Decided on: October 20, 2014.

N.D.P.S. Act, 1985-Sections 42 and 50- Accused were travelling in the Maruti van, which was found to be containing 3.5 k.g of charas- accused were acquitted by trial Court due to non-compliance of Sections 42 and 50 of N.D.P.S. Act- held, that the charas was recovered from the vehicle in a chance recovery and not by conducting personal search of the accused, therefore, provision of Sections 42 and 50 are not applicable.

(Para-18)

For the petitioner(s): Mr. Ashok Chaudhary, Addl. Advocate General.
For the respondent: Mr. N.S.Chandel, Advocate, for respondent No. 1.
Mr. G.R.Palsra, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come up in appeal against the judgment dated 6.12.2007 rendered by the learned Addl. Sessions Judge, Fast Track Court, Dharamshala, in Sessions Case No. 26-B/VII/07, Sessions Trial No. 30/07, whereby the respondents-accused (hereinafter referred to as accused) who were charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, were acquitted.

2. The case of the prosecution, in a nut shell, is that on 11.8.2007, the accused were travelling in a Maruti Van bearing No. HP-01-M-0518. It was driven by Ranu Ram and co-accused Puran Chand was sitting on the front seat. When the vehicle crossed Kangra-Mandi boundary check post and reached at a distance of half kilometer towards Baijnath, it was signaled to be stopped by the police party headed by ASI Partap Singh. *'Naka'* was laid on the spot. Accused Ranu Ram did not stop the Van. He dashed the vehicle with a stone at a distance of 50 mts. from the place of occurrence towards Baijnath. The police immediately swung into action. It was found that near the hand break of the Van, in between both the seats of the driver and co-accused, a bag was found. It was checked. It contained 3.700 kg charas in the shape of sticks. The police, after conducting search of the bag took two samples of 25 gms. each from the charas. The samples and the bulk of charas

were packed and sealed in cloth parcels. The police also filled in the NCB forms in triplicate. The accused were arrested. The case property was deposited with the MHC who made entry in the register and thereafter one of the samples was sent for chemical analysis to FSL Junga. The report was received and thereafter, the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 8 witnesses. The accused were also examined under Section 313 Cr.P.C. The accused have denied having committed any offence. Their defence was of complete denial. The learned trial Court acquitted both the accused, as noticed hereinabove. Hence, this appeal, at the instance of the State.

4. Mr. Ashok Chaudhary, learned Addl. Advocate, General has vehemently argued that the prosecution has proved its case against the accused. Mr. G.R.Palsra and Mr. N.S.Chandel, Advocates appearing for the respective accused have supported the judgment dated 6.12.2007 of the learned trial Court.

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

6. PW-1 HC Puni Chand deposed that on 11.8.2007**,** he alongwith other police officials accompanied ASI Partap Singh, HC Ajeet Kumar etc. on patrol. They intercepted Maruti Van which was coming from Mandi side. The vehicle was signaled to stop but the same dashed against a stone at a distance of 50 meters. The vehicle was taken into possession. On enquiry, the accused Ranu was found to be the driver of the vehicle. Puran Chand was travelling in that vehicle while sitting on the front seat. The search of the vehicle was conducted. It was a deserted place. Near the hand brake, one bag containing charas was found. It was weighed. It weighed 3.700 kgs. Two samples of 25 gms each were drawn out. The samples as well as the remaining bulk of charas were packed and sealed with seal 'P' at three places each in cloth parcel. Impression of seal 'P' were taken on two cloth pieces vide Ext. P-1 and P-2 and the same were taken into possession vide seizure memo Ext. PW-1/A. Seal after its use was handed over to Constable Ajit Kumar. NCB forms in triplicate were filled in. The codal formalities were completed and *'rukka'* was sent through HC Sampuran Singh to the Police Station. In his cross-examination, he deposed that barrier in between Mandi and Kangra was at village Ghatta, half kilometer away from where the accused were apprehended. They were on the Baijnath side. He admitted that there is a Forest Barrier and the forest officials remain on duty throughout day and night. Volunteered that, the barrier was 1 km. away from where they apprehended the accused. The *'naka'* was laid at about 5:00 PM.

7. PW-2 HC Sampuran Singh, also deposed the manner in which the accused have been apprehended and charas was recovered from the Van and samples were taken in accordance with law. He has taken the *'rukka'* Ext. PW-2/B to the Police Station. The vehicle was taken into possession alongwith charas vide seizure memo Ext. PW-1/A.

The FIR was registered vide Ext. PW-2/C. In his cross-examination, he deposed that the boundary of Kangra and Mandi is near village Ghatta. He was not aware that at that place there was forest check post. He left the spot at 7:30 PM.

8. PW-3 Const. Surinder Kumar, is a formal witness.

9. PW-4 Ravinder Kumar, deposed that his mother Smt. Dawarka Devi is the owner of Maruti Van No. HP-01-0518.

10. PW-5 HC Subhash Chand deposed that on 13.8.2007, Constable Surinder Kumar brought a sealed envelope containing special report Ext. PW-3/A. It was put by him before the Superintendent of Police.

11. PW-6 Const. Suresh Kumar, deposed that on 13.8.2007 vide R.C. No. 82/21, MHC handed over one sealed parcel and one NCB form and he deposited the same at FSL.

12. PW-7 ASI Partap Singh, also deposed the manner in which the Maruti Van was intercepted on 11.8.2007 and charas was recovered from it. The search and seizure processes were completed on the spot and *'rukka'* was sent through HC Sampooran Singh vide Ext. PW-2/B. FIR Ext. PW-2/C was registered. He prepared the site plan of the spot Ext. PW-7/B. He also prepared the arrest memos and handed over the case property to MHC alongwith NCB forms and impression of seal. Special report was sent on 13.8.2007 through Constable Surinder to the Superintendent of Police. On 14.8.2007, Ravinder produced RC Ext. PW-4/A and E.C. Ext. PW-4/B vide seizure memo Ext. PW-4/C. He recorded the statement of the witnesses. In his cross-examination, he deposed that Ghatta Chowki is at a distance of 1 km. from the place of occurrence. Ghatta village falls in Tehsil Jogindernagar.

13. PW-8 MHC Suresh Kumar, deposed that HC Sampuran Singh has brought *'rukka'* Ext. PW-2/B written by ASI Partap Singh to the Police Station. He recorded FIR Ext. PW-2/C. The file was sent to the spot. ASI-officiating SHO Partap Singh, handed over three parcels Ext. P-3 and P-6 and third sample was sent by him to FSL, Junga on 13.8.2007 vide R.C. No. 82/21 through Constable Suresh Kumar alongwith one copy of NCB form and one seal impression of seal 'P'. He has made entry in *Rapat Roznamcha* Ext. PW-8/C. The entry made is correct as per the original. The parcels of samples and bulk of charas Ext. P-5 were deposited by officiating SHO/ASI with him. He had made entry in the '*Malkhana Register*' at Sr. No. 57/07 alongwith NCB forms in triplicate and impressions of seal Ext. P-1 and P-2. The photocopy of '*Malkhana Register'* is Ext. PW-4/D.

14. According to the learned trial Court, the prosecution has not examined the independent witnesses. The forest check-post, as per the statements of PW-1 Puni Chand and PW-2 HC Sampuran Singh, was at a distance of half kilometer from the spot from where the vehicle was intercepted. PW-7 ASI Partap Singh has also deposed that Ghatta Chowki is at a distance of 1 km. from the place of occurrence. According

to PW-1 Puni Chand, the spot was deserted. *'Naka'* was laid at about 5:00 PM. No vehicle had reached on the spot nor impounded by them during *'Naka'*. Normally, the police should associate the independent witnesses at the time of arrest, seizure and when the samples are drawn. However, in the instant case, the independent witnesses were not available. The statements of official witnesses can be taken into consideration if the same are reliable and inspire confidence.

15. PW-7 ASI Partap Singh was officiating SHO, PS Baijnath. He has sealed the samples and bulk of charas on the spot. He has filled in the NCB forms in triplicate. The seal impression is 'P'. Since the SHO himself has seized the contraband, there was no requirement of re-sealing the same. He was only required to hand it over to the Police Station through MHC. PW-7 ASI Partap Singh has handed over the case property to MHC Suresh Kumar (PW-8). He has entered the same in *'Malkhana Register'*. The samples were sent to FSL Junga through Constable Suresh Kumar (PW-6). He deposited the same at FSL Junga. According to the FSL report, the contraband was found to be charas. The *'rukka'* was prepared on the spot by PW-7 ASI Partap Singh. He handed over the same to PW-2 HC Sampuran Singh. He has taken it to the Police Station on the basis of which, FIR Ext. PW-2/C was registered.

16. Mr. G.R.Palsra and Mr. N.S.Chandel, Advocates for the respective accused have vehemently argued that the prosecution has failed to prove the ownership of the vehicle. The vehicle was owned by one Smt. Dawarka Devi. In order to prove the case against the accused under Section 20 of the Act, it was not necessary to prove the ownership of the vehicle as argued by both the Advocates. PW-4 Ravinder Kumar is the son of Dawarka Devi. He has admitted that the vehicle belongs to Dawarka Devi. The accused were found in exclusive and conscious possession of the charas. It was recovered from the van. It was lying between the driver and the co-accused near the hand brake.

17. Mr. N.S.Chandel, Advocate, has also argued that the vehicle has met with an accident but no independent witness has been cited by the prosecution to establish the accident. It was not at all necessary for the prosecution to cite an independent witness to prove that the accident has taken place. PW-1 Puni Chand and PW-2 Sampuran Singh have categorically deposed that the vehicle was signaled to stop by PW-7 ASI Partap Singh, however, the driver tried to take away the vehicle and the vehicle met with an accident 50 metres ahead.

18. The learned trial Court has gravely erred in relying upon non-compliance of Sections 42 and 50 of the Act by the prosecution. Neither Section 42 nor Section 50 of the Act was attracted in the present case. It was a case of chance recovery at "*Naka*". The charas has been recovered from the vehicle and not from the person of the accused.

19. Accordingly, the judgment of the learned trial Court dated 6.12.2007 is set aside. The accused are convicted under Section 20 of

the ND & PS Act, for possessing 3.700 kg. charas. The accused be heard on quantum of sentence on **3.11.2014.**

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

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

CWP No. 658 of 2014-F
Reserved on : 18.10.2014
Decided on: 21.10. 2014

Constitution of India, 1950- Article 226- Deputy Commissioner, Mandi had sought names for training of Patwari from Director, Sainik Welfare, Himachal Pradesh- Director, Sainik Welfare, Himachal Pradesh conveyed that his office was busy in conducting the interview of various posts- no recommendation was sent by him- held, that the respondent No. 3 could not have refused to send the name of the petitioner on the pretext that he was busy in other selection process-respondents No.3 and 4 directed to sponsor the name of the petitioner for training of the patwari, if found suitable. (Para- 4 to 6)

For the Petitioner: Mr. K.S. Banyal, Advocate.

For the Respondents: Mr. M.A. Khan with Mr. Anup Rattan, Addl. A.Gs. with Mr. Vivek Singh Attri, Dy. A.G, for the respondents-State.
None for other respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Petitioner's name was registered in Regional Employment Office, Mandi vide registration No. 2834/2010 N.C.O. No. 153.10 on the basis of educational qualification diploma in J.B.T. from AEC Training College and Centre, Panchmarhi for six months and 10+2. Respondent No.2 notified 154 posts of Patwari in Mandi District, out of which 23 posts were reserved for Ex-servicemen category, wherein 14 posts were for Ex-servicemen General category. Petitioner belongs to General category. Remaining 9 posts of Ex-servicemen category were for reserved categories i.e. S.C./S.T./ O.B.C./ Ex-servicemen category. Last date of receipt of application was 2.11.2013. Written test was held on 8.12.2013.

2. According to the reply filed by respondents No. 1 and 2, Deputy Commissioner, Mandi had sought requisition of eligible candidates of Ex-servicemen for the recruitment of Patwari candidates in Mandi District from respondent No.3, i.e. Director, Sainik Welfare, Himachal Pradesh. Respondent No.3 conveyed vide letter dated 29.10.2013, which was received in the office of respondent No. 2 on 13.11.2013 that their office was busy in conducting the interview of various posts. According to them, soon after the process was over their office would be able to screen and sponsor eligible Ex-servicemen for the post of Patwar training. However, no recommendation was received till the filing of the reply.

3. According to the reply filed by respondent No. 5, name of the petitioner in fact was sponsored vide letter No. OCD/49/2013-4138 dated 23.11.2013 in the list of General Ex-servicemen at Sr. No. 22. Petitioner's code was 153.10/X01.20 and 571.30 on the basis of educational qualification. Respondents No. 3 and 4 also filed reply to the petition. They have also contended that the candidates who had applied for the post under the NCO Code X01.20 against General vacancies or for particular post of Patwari were only called for interviews for the training by the State Selection Committee.

4. Name of the petitioner, as per reply filed by respondent No. 5, was for Code NCO 153.10/X01.20 and 571.30. It was incumbent upon respondents No.3 and 4 to sponsor the name of the petitioner after holding screening. Once the requisition had been sent by respondent No. 2, it was not open to respondent No. 3 to contend that they were busy in other selection process.

5. Mr. M.A. Khan has vehemently argued that petitioner could apply directly. However, the fact of the matter is that petitioner belongs to Ex-servicemen category. He was in possession of basic qualification. His code was 153.10/X01.20 and 571.30. The mode of recruitment for Ex-servicemen is separate from the routine selection process. Petitioner's name was to be screened by respondents No.3 and 4 and if found suitable his name was to be sponsored directly. He was fully eligible for the training of Patwari. The action of the respondents in not considering the case of the petitioner for the training of Patwari is declared invalid.

6. Accordingly, the writ petition is allowed. Respondents No. 3 and 4 are directed to sponsor the name of petitioner for the training of Patwari to respondent No. 2. Respondent No.2 shall take all the necessary steps towards the training of the petitioner. Pending application(s), if any, also stands disposed of. No costs.

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

Partap Singh Mehta. ...Petitioner.
Versus
The Himachal Fruit Growers Cooperative
Marketing and Processing Society Limited. ...Respondents.

CWP No. 4874 of 2014-H
Reserved on : 18.10.2014
Decided on: 21.10. 2014

Constitution of India, 1950 - Article 226- Petitioner retired from the society and was paid a sum of ₹3,32,454/- towards gratuity- remaining amount of₹1,27,766/- was not paid- leave encashment amounting to ₹1,25,966/- was also not paid- held, that the petitioner had a right to get retiral benefits immediately on his superannuation- respondent directed to pay the balance gratuity amount and leave encashment.
(Para-2 to 4)

Case referred:
D.D. Tewari (D) through LRs vs. Uttar Haryana Bijli Vitran Nigam Limited and others, 2013 (3) S.L.J. 118

For the Petitioner: Mr. Ajit Saklani, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Service is complete. None for the respondent.

Petitioner has retired from the respondent-society on 31.1.2013. He has been paid a sum of Rs. 3,32,454/- towards gratuity. The balance amount of gratuity to the tune of Rs.1,27,766/- has not been paid to the petitioner. Respondent-society has also not paid leave encashment to the petitioner amounting to Rs.1,25,966/-.

2. Petitioner has right to get the retiral benefits immediately on his superannuation. The respondent-society could not grant the gratuity in piecemeal initially by paying a sum of Rs.2,04,454/- and thereafter Rs. 1,28,000/-. Petitioner was also entitled to get the leave encashment on the date of retirement. Respondent-society cannot be oblivious to the difficulties faced by the person, who has retired from service after attaining the age of superannuation. Petitioner is entitled to balance amount of gratuity and leave encashment to plan his retired life.

3. Their Lordships of the Hon'ble Supreme Court in ***D.D. Tewari (D) through LRs*** vs. ***Uttar Haryana Bijli Vitran Nigam***

Limited and others, 2013 (3) S.L.J. 118 have held that pension and gratuity are no longer any bounty and it is valuable rights and property in the hands of employee and the employee is entitled to interest for the wrongful detention of pension/gratuity. Their Lordships have held as under:

> **"3. The appellant was appointed to the post of Line Superintendent on 30.08.1968 with the Uttar Haryana Bijli Vitran Nigam Ltd. In the year 1990, he was promoted to the post of Junior Engineer-I. During his service, the appellant remained in charge of number of transformers after getting issued them from the stores and deposited a number of damaged transformers in the stores. While depositing the damaged transformers in the stores, some shortage in transformers oil and breakages of the parts of damaged transformers were erroneously debited to the account of the appellant and later on it was held that for the shortages and breakages there is no negligence on the part of the appellant. On attaining the age of superannuation, he retired from service on 31.10.2006. The retiral benefits of the appellant were withheld by the respondents on the alleged ground that some amount was due to the employer. The disciplinary proceedings were not pending against the appellant on the date of his retirement. Therefore, the appellant approached the High Court seeking for issuance of a direction to the respondents regarding payment of pension and release of the gratuity amount which are retiral benefits with an interest at the rate of 18% on the delayed payments. The learned single Judge has allowed the Writ Petition vide order dated 25.08.2010, after setting aside the action of the respondents in withholding the amount of gratuity and directing the respondents to release the withheld amount of gratuity within three months without awarding interest as claimed by the appellant. The High Court has adverted to the judgments of this Court particularly, in the case of State of Kerala & Ors. Vs. M. Padmanabhan Nair[1], wherein this Court reiterated its earlier view holding that the pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement, but, have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be dealt with the penalty of payment of interest at the current market rate till actual payment to the employees. The said legal principle laid down by this Court still holds good in so far as awarding the interest on the delayed payments to the appellant is concerned. This aspect of the matter was adverted to in the**

judgment of the learned single Judge without assigning any reason for not awarding the interest as claimed by the appellant. That is why that portion of the judgment of the learned single Judge was aggrieved of by the appellant and he had filed L.P.A. before Division Bench of the High Court. The Division Bench of the High Court has passed a cryptic order which is impugned in this appeal. It has adverted to the fact that there is no order passed by the learned single Judge with regard to the payment of interest and the appellant has not raised any plea which was rejected by him, therefore, the Division Bench did not find fault with the judgment of the learned single Judge in the appeal and the Letters Patent Appeal was dismissed. The correctness of the order is under challenge in this appeal before this Court urging various legal grounds."

4. The action of the respondent-society not to release the gratuity and leave encashment to the petitioner has resulted in great miscarriage of justice.

5. Accordingly, the petition is allowed. Respondent-society is directed to pay the balance gratuity amount of Rs.1,27,766/- and Rs. 1,25,966/- towards leave encashment to the petitioner with interest @ 9% per annum within a period of eight weeks from today. Pending application(s), if any, also stands disposed of. No costs.

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

Gayatri Devi & Ors. ...Appellants.

Versus

Bhawani Singh & Ors. ...Respondents.

RSA No. 303 of 2003
Date of Decision: 22.10.2014.

Code of Civil Procedure, 1908-Order 41 Rule 27- An application was filed for placing on record a judgment in the previous suit, which was not decided by the Appellate Court- held, that non adjudication of the application had prevented the plaintiff from claiming that defendants are estopped from asserting adverse possession, which has resulted in failure of justice, therefore, matter remanded to the Trial Court with the direction to decide the application filed under Order 41 Rule 27 CPC.

For the appellants : Mr.K.D.Sood, Senior Advocate with Mr.Rajnish K.Lal, Advocate.

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral):

The instant appeal is directed against the judgment and decree, rendered on 2.6.2003, in Civil Appeal No.102-B/XIII/2001, by the learned District Judge, Kangra at Dharamshala (H.P.), whereby, the learned First Appellate Court dismissed the appeal, preferred by the plaintiff/appellants.

2. Brief facts of the case are that the plaintiff is owner of the suit land entered in Khata No.11, Khatauni No.12, Khasra No. 208/2 old and 4 new measuring 0-38-46 hects. situated at Mohal Dharbaggi, Mauza and Tehsil Baijnath, District Kangra (H.P.). The suit land was Shamlat, which was vested in the Gram Panchayat Pandtehar, Tehsil Baijnath but in pursuance of Section 3 of H.P.Village Common Land (Vesting and Utilization) Act, 1974 the suit land was vested in the State of H.P. Lateron the State of H.P. allotted the suit land to the plaintiff through Patta dated 11.12.1976. The defendant Nos. 1 to 5 had filed Civil suit against the plaintiff etc. before the learned Sub Judge 1st Class, Palampur in the year 1989, claiming themselves to be the tenants in possession of the suit land with consequential relief of permanent prohibitory injunction to restrain the plaintiff from disturbing the possession. The said suit was dismissed qua claim of tenancy but the court restrained the plaintiff to oust defendant Nos. 1 to 5 forcibly from the suit land. It is claimed in the present suit by the plaintiff that during the pendency of that suit, defendants took forcible and unlawful possession of the suit land and are occupying it unauthorisedly. The plaintiff, being owner, entitled to be put in possession thereof.

3. In written statement defendant No.2 took plea that Sh.Nikka Ram, his father was inducted as a tenant by the Gram Panchayat, Pandtehar on 20.11.1971 on payment of rent of Rs.10/- per annum vide receipt No. 93 dated 20.11.1971 in the land comprising Khata No.20 min, Khatauni No.21 min, Khasra No.2 measuring 0-41-09 hects vide Jamabandi for the year 1985-86 corresponding to Khata No.3 min, Khatauni No. 27, Khasra No.2 measuring 0-41-09 hects. vide Misal Haquiat Bandobast Jadid. It has been admitted that the suit land was earlier owned by the Gram Panchayat Pandtehar and it was vested in the State of H.P. lateron. It has been submitted that the father of the defendant No.2 Nikka Ram made the suit land fit for cultivation by spending Rs.10,000/- in the year 1971 and has also laid a plinth for the construction of a house in the suit land by spending Rs.8,000/- then. The said Nikka Ram died on 4.5.1982 and he had become owner of the suit land under Section 104 of the H.P.Tenancy and Land Reforms Act. After his death, the defendant No.2 and other legal heirs of deceased Nikka Ram are owners in possession of the suit land. Earlier Nikka Ram was in possession of the suit land and after his death his legal heirs including the defendant No.2 are in continuous possession of the suit land and they have never been evicted from the

suit land. The suit land has been allotted wrongly to the plaintiff. It has been admitted that a civil suit was filed in the court which was partly decreed. It has further been submitted that if on technical defect this defendant is not held owner of the suit land by virtue of operation of the H.P.Tenancy and Land Reforms Act, then in the alternative the defendant has become owner of the suit land by way of adverse possession as the defendant No.2 is in open, continuous and hostile possession of the suit land for more than 12 years and it was well within the knowledge of the plaintiff. Therefore, dismissal of this suit is sought. No written statement on behalf of other defendants was filed, as they were proceeded against ex-parte.

4. Replication on behalf of the plaintiff was filed wherein the contents of the plaint were reaffirmed and reasserted and the allegations made in the written statement were denied and refuted.

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

1. Whether the plaintiff is entitled to decree of possession, as prayed for? OPP.
2. Whether the suit in the present form is not maintainable, as alleged? OPD.
3. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD.
4. Whether the plaintiff has no cause of action against the defendants, as allegedOPD.
5. Whether this Court has no jurisdiction to try the present suit, as alleged? OPD.
6. Whether the defendant has become owner of the suit land by the operation of H.P.Tenancy and Land Reforms Act, as alleged? OPD.
7. Whether the suit is bad for non-joinder of necessary parties, as alleged? OPD.
8. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD.
9. Whether the suit is not within limitation, as alleged?OPD.
10. Whether the plaintiff is estopped from filing the present suit, as alleged? OPD.
11. Whether the defendant No.2 has become owner of the suit land by way of adverse possession, as alleged? OPD.
12. Relief.

6. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff. In

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

7. Now the plaintiff/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings, recorded in the impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 23.3.2004, this Court, admitted the appeal instituted by the plaintiff/appellants, against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether on the proper construction of the provisions of the H.P.Village Common Land (Vesting and Utilisation) Act, whereby land in dispute vested free from encumbrances in favour of the State and the allotment thereof to the appellant, the plea of tenancy and adverse possession raised by the defendants was sustainable?
2. Whether the judgment of the Courts below are vitiated being not in accordance with the Order 20 Rule 5 CPC and the judgment of this Hon'ble Court reported in AIR 2001 HP 18, Om Parkash Vs. State of H.P. and thus not sustainable?

8. Admittedly, the plaintiff/appellants had filed a suit for possession against the defendants/respondents. Admittedly, the suit came to be dismissed by the learned trial court. In appeal, preferred before the learned first Appellate Court by the plaintiff/appellants against the judgment and decree rendered by the learned trial Court, the learned first Appellate Court affirmed the findings, recorded by the learned trial Court.

9. The limited submission addressed before this Court by the learned counsel for the appellants to render frail and feeble the judgment and decree rendered by the learned first appellate court, besides it being vitiated, is anvilled on the factum of the learned First Appellate Court having omitted to render an adjudication on an application filed before it by the plaintiff/appellants under Order 41 Rule 27 CPC for placing on record the judgment and decree of 31.7.1997 rendered in a previous suit *inter partes* the parties at *lis* herein. The plaintiff had claimed in the instant suit that he is an allottee of the suit land under a grant/patta made in his favour by the State of Himachal Pradesh. The defendants/respondents claimed to be tenants therein, besides they claimed that they have acquired title as owners to the suit land by prescription arising from efflux of time, inasmuch as they carried the requisite *animus possidendi* for the prescribed statutory period for securing vestment of title in them qua the suit land. In the instant suit, an apposite issue qua theirs having

acquired title by adverse possession qua the suit land was struck by the learned trial court. The learned trial court while considering the material available on record rendered findings in favour of the defendants on the said issue. However, the counsel for the plaintiff/appellants submits that he had concerted to repulse the factum of the defendants having acquired title to the suit property by way of adverse possession by his taking to institute an appropriate application under the provisions of Order 41 Rule 27 CPC for placing on record a judgment rendered in Civil Suit No.298/89, wherein it has been held that the defendants herein, who were the plaintiffs in the earlier suit were evictable from the suit land in accordance with law. Consequently, he hence contends that the plaintiff had a tenable right ensuing from a previous conclusive determination qua the suit land inter partes the parties at lis herein to claim possession of the suit property from the defendants. He further contends that an adjudication on his application under Order 41 Rule 27 CPC by the learned First Appellate Court would have hence facilitated the striking of an apposite issue, inasmuch as when in the previous suit, the defendants had omitted to raise the plea of theirs having acquired title qua the suit land by way of adverse possession, which is the manner in which they claim acquisition of title to the suit property in the instant suit, they for want of having raised the plea aforesaid in the earlier suit, theirs being barred/interdicted by order 2 Rule 2 CPC as well as by their acquiescence manifested by their omission to raise the said plea previously hence consequently theirs being estopped to raise the plea aforesaid in the instant suit. Only in the event of an adjudication having been rendered by the learned first appellate court on the application filed before it under Order 41 Rule 27 CPC and thereby on its adjudication in favour of the plaintiff, the plaintiff/appellants then being permitted to adduce into evidence the previous judgment aforesaid would have facilitated and equipped the learned first appellate court to take grip of the fact of the previous adjudication wherein the defendants, who were plaintiffs in the previous suit while having omitted to claim title to the suit land by way of adverse possession, being precluded by statutory estoppel to extantly claim title in the manner aforesaid to the suit property. Consequently, when as a natural corollary the learned first appellate court has been as such constrained not to strike an apposite issue ensuing from the legal bar contemplated/arising from Order 2 Rule 2 CPC as well as from their acquiescence portrayed by their omission to previously raise the said plea in their plaint, especially when its adduction would have facilitated the striking of an apposite issue and concomitant rendition of findings qua it. In sequel, thereto, the inference which fosters is that the non adjudication of the application under Order 41 Rule 27 CPC by the learned first appellate Court has besides precluded as well as prevented the plaintiff/appellants to canvass theirs now having a tenable right to claim possession of the suit property, inasmuch, as, theirs having a ripened legal right to estop the defendants from canvassing theirs having acquired title to the suit property by way of adverse possession. Sequelly, when its non-adjudication has deterred a conclusive

determination of the entire gamut of the controversy, hence, as a natural corollary miscarriage of justice has been occasioned. Therefore, for facilitating an effective adjudication of the entire gamut of controversy besetting the parties, it is deemed fit, just and expedient at this stage to hold that the omission of rendition of an adjudication by the learned first appellate court on an application under Order 41 Rule 27 CPC while precluding the plaintiffs to adduce into evidence the previous judgment *inter partes* has, hence, de-facilitated a clinching determination by the learned first Appellate Court qua the entire gamut of the controversy. Naturally then the impugned judgment and decree are set aside and the matter is remanded to the learned first appellate court to render a decision on the application filed by the plaintiff/appellants under Order 41 Rule 27 CPC. In case the learned first appellate court comes to on the application aforesaid record findings in favour of the plaintiffs, it shall proceed to strike an appropriate issue qua it against which all the parties shall be afforded an opportunity to contest and adduce evidence. On receipt of evidence on the apposite issue, the learned First Appellate Court shall record its findings thereon. The parties through counsel are directed to appear before the learned trial Court on 27.11.2014. The learned first appellate court is directed to complete the entire proceedings within six months. Records of the Courts below be sent back forthwith so as to reach there well before the said date.

10. With the aforesaid observations, the appeal is disposed of, without, at this stage, for the aforesaid reasons, answering the substantial questions of law. Pending application(s), if any, are also disposed of. No costs.

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

Hans Raj .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 51 of 2011.
Reserved on: October 21, 2014.
Decided on: October 22, 2014.

Indian Penal Code, 1860- Section 302- Accused armed with the Danda and Darat was seen running towards his house- when the witnesses went to the spot, they found that the deceased was sitting in the field with his hands on his head and there were deep wounds on his head- accused had assaulted the deceased as the deceased used to object to the beating given by the accused to his wife- held, that the Medical evidence proved that there was severe injury on the brain, leading to shock and death which could be caused by means of danda- case of the

prosecution that the deceased used to object to the beating of the wife of the accused was not established by any cogent evidence- accused had danda and Darat and he had only used Danda, which showed that he had no intention to kill the deceased, therefore, accused convicted of the commission of offence punishable under Section 304 Part-II of IPC.

(Para- 23 to 26)

For the appellant: Mr. Praneet Gupta, Advocate.
For the respondent: Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 29.11.2010 and consequent order dated 30.11.2010, of the learned Addl. Sessions Judge (I), Kangra at Dharamshala, rendered in Sessions Case No. 7-P/2009, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence under Section 302 IPC, was convicted and sentenced with rigorous imprisonment for life and to pay fine of Rs. 20,000/- and in default of payment of fine, the accused was sentenced to undergo further simple imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 18.11.2008, at around 4:00 PM, at Village Punder Dakrair, Seema Devi alongwith Anju Devi and Kirna Devi were sitting in 'varandah' and peeling the 'PAITHA'. The father-in-law of PW-2 Seema, namely Parkash Chand went to bring sheep which were grazing near the cow shed. When PW-2 Anju Devi and PW-6 Seema Devi heard three sounds of *danda* blows given to their father-in-law Parkash Chand, they screamed. PW-1 Kamla Devi, PW-2 Anju Devi and PW-6 Seema Devi, later saw the accused armed with Danda and Darat. He was running towards his house. PW-1 Kamla Devi, PW-2 Anju Devi and PW-6 Seema Devi went to the spot and found that Parkash Chand was sitting in the field with his hands on his head and there were deep wounds on his head. He was lifted by PW-2 and PW-6 and brought to the Verandah of their house. Thereafter PW-6 Seema Devi went to the clinic of Navjiwan Sharma (PW-7), the Pradhan of the Gram Panchayat. He was informed about the incident. PW-7 further informed the police. Rapat Ext. PW-11/A was entered at Police Post Bhawarna. The accused had allegedly assaulted Parkash Chand since he used to object to the beatings given by the accused to his wife. The accused has also picked up a quarrel with his wife who was working in the fields before assaulting deceased Prakash Chand. The spot was visited by the police. The police forcibly entered the room of the accused. The accused was taken to Police Post Bhawarna. The spot was photographed. The inquest reports Ext. PW-18/C and Ext. PW-18/D were prepared. The I.O. also took into possession the blood stained leaf Ext. P-4 and pair of chappal Ext. P-5 of the deceased. Darat Ext. P-1 and Danda of '*Banna*' Ext. P-2 were

recovered from the room of the accused. The shirt of the accused Ext. P-3 was also taken into possession. The I.O. prepared the spot map. The port mortem of the dead body was got conducted by ASI Braham Dass (PW-9). Dr. S.K.Sud PW-12 of C.H. Palampur conducted the post mortem. According to PW-12 Dr. S.K.Sud, the cause of death was severe injury to vital organ i.e. brain, leading to shock and death. The injuries were sufficient in the ordinary course of events to cause death. The doctor also sealed the clothes of the deceased and handed over to ASI PW-9 Braham Dass. He deposited the same with MC Trilok Raj (PW-11). The same were sent to FSL. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 18 witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has denied the case of the prosecution. According to him, he was innocent and falsely implicated in the present case. The learned Trial Court convicted and sentenced the accused, as stated hereinabove.

4. Mr. Praneet Gupta, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, (I), Kangra at Dharamshala, H.P., dated 29.11.2010 and consequent order dated 30.11.2010.

5. We have heard learned counsel for both the sides and gone through the material available on record carefully.

6. PW-1 Kamla Devi testified that she returned back to home at about 4:00 PM. When she reached home, she found her daughter-in-law Seema Devi and Anju alongwith Kirna Devi crushing '*Paitha*'. Her husband was in the ground floor. He asked her to give him jacket. She threw the same from the upper storey. After wearing the jacket, he went towards the cow shed to bring sheep which were grazing in the nearby fields. After some time, she heard three sounds of beating with *danda*. She came down alongwith her daughter-in-law and Kirna and saw from the Verandah accused running towards his house. He was armed with Danda and Darat. She went to the fields. She saw her husband sitting and putting his face in his hands. The blood was also oozing from his head. Her daughter-in-law lifted her husband to Verandah. Her younger daughter-in-law went to the house of Surinder Pal, Pradhan Punder. After some time, her husband died. Her husband was beaten by the accused because he used to object the beatings given by the accused to his wife. The accused had stopped talking with her husband near about four-five months. The wife of the accused was working in the nearby field. The accused had also picked up a quarrel with his wife before the incident. The police visited the spot. Her statement under Section 154 Cr.P.C. was registered vide statement Ext. PW-1/A. The accused had bolted the door from inside. The police had broken the door. The *darat* was kept above the Almirah and Danda was kept on the floor. When the police visited the house of the accused, wife of the accused alongwith Ruko Devi were also present. *Darat* and *Danda* were put in separate

parcels and seals were affixed upon them. These were taken into possession by the police vide memo Ext. PW-1/B. She identified the *danda* Ext. P-1 and *darat* Ext. P-2. In her cross-examination, she admitted that no quarrel had taken place between her husband and the accused. Volunteered that, prior to this incident, no such fighting had taken place. She was not aware about the cause of beatings given to the wife by the accused. The matter was never reported by her husband that accused used to beat his wife. Her husband used to advise the accused not to beat his wife. She has not seen the accused beating her husband. Volunteered that she heard the sound of beatings given by *danda* but her daughter-in-law had seen him beating the deceased with *danda.*

7. PW-2 Anju Devi, is the daughter-in-law of the deceased. According to her, she heard three sounds of the *danda* blows. She saw the accused giving *danda* blows to her father-in-law. PW-6, Seema screamed. They all went down. The accused was carrying *darat* and *danda* in his hands. He was running towards his house. Her father-in-law was sitting. He had put his head in his hands. The blood was oozing from the head and there was a deep wound. She alongwith Seema Devi lifted him to the Verandah. Then Seema went to the house of Pardhan in order to inform him about the incident. After some time, her father-in-law died. The police visited the spot. In her cross-examination, she admitted that no quarrel had taken place between her father-in-law and the accused. She did not know that any complaint was lodged by the wife of the accused against the accused regarding beating. She also admitted that when the incident took place, her face was towards the wall side. After hearing the sound of one blow given with *danda*, they saw towards that place and found that the accused had given two more blows. There are only two houses at the spot.

8. PW-3 Ram Parkash, deposed that he was associated by the police on 18.11.2008 when police came on the spot. The police took photographs of the spot and blood was found on the leaves. One of the said leaves was put in a parcel and sealed with seal “D”. This was taken into possession vide memo Ext. PW-3/A. One pair of *Chappal* Ext. P-5 was taken into possession vide memo Ext. PW-3/B.

9. PW-4 Ashwani Kumar, deposed that MHC handed over six parcels and one sample seal to him. He deposited the same at FSL Junga on 10.12.2008. As long as the case property remained in his possession, it was not tampered with. On 18.11.2008, he also went with SHO Baldev, ASI Brahm Dass and HC Gian Chand to Dakrair Punder. The accused was found inside the room and he had bolted the room from inside. The accused did not open the door. They forcibly entered into the room after breaking the door. He and Gian Chand caught the accused after entering the room. He was taken to the Police Chowki. *Danda* was in the Almirah. Volunteered that *danda* was kept above the Almirah. *Danda* and *Darat* were sealed in the parcels.

10. PW-5 HC Gian Chand, deposed that he remained posted as I.O. in Police Post Bhawarna. On 18.11.2008, he alongwith SI Baldev Singh, ASI Brahm Dass, HHC Ashwani Kumar, HHG Ravinder, HHC

Madan Kumar reached the spot at about 4:30 PM. The accused had locked himself inside the room. He was asked to open the door but he threatened to commit suicide. The door was broken with the help of the hammer. The accused was arrested. The stains of blood were found on the shirt of the accused. The shirt was the same which he wore at the time of incident.

11. PW-6 Seema Devi, deposed that on 18.11.2008, she alongwith Anju Devi and Kirna Devi were peeling the '*Paitha*' in the verandah on the upper storey. Her mother-in-law had gone to Bazar. She returned back at about 4:30 PM. Her father-in-law after wearing the jacket went to bring sheep near the cow shed. She heard sound of *danda* blow and then they saw towards the spot from where the sound came. The accused was giving *danda* blows on the head of her father-in-law. She screamed. When she reached in the Courtyard, the accused rushed towards his house. The accused was carrying *danda* in one hand and *darat* in the other. When they reached at the spot, her father-in-law had kept his face in his hands. The blood was oozing out from the head. She informed the Pardhan. The Pardhan informed the police. The police visited the spot. The spot was investigated. The accused also identified the place where the *danda* and *darat* were kept and memo to that effect Ext. PW-6/B was prepared. It was signed by her. The accused had grudge against her father-in-law because latter used to advise him not to beat his wife. On the date of the incident, the accused quarreled with his wife just before the occurrence.

12. PW-7 Navjivan Sharma, deposed that on 18.11.2008 at about 4:30 PM, Seema Devi daughter-in-law of the deceased Parkash Chand came to his clinic. She was weeping. He enquired as to why she was weeping. She told that Hans Raj had given *danda* blows to her father-in-law. He informed the police.

13. PW-8 Surjeet Singh, has taken the photographs.

14. PW-9 ASI Brahm Dass, deposed that he was posted as I.O. in Police Station Bhawarna. On 18.11.2008, he alongwith SHO Gian Chand, MHC Madan, HHG Ravinder Singh and HHC Ashwani Kumar went to Village Decrehar. They reached there at about 6:00 PM. The accused had locked himself inside the room. The door was broken. The accused was caught by them. The spot was inspected. The post mortem of the deceased was got conducted by him.

15. PW-10 HHC Madan Singh, deposed that the statement of Kamla Devi was recorded under Section 154 Cr.P.C vide memo Ext. PW-1/A, on the basis of which FIR was registered.

16. PW-11 HHC Trilok Raj, deposed that on 18.11.2008, a telephonic information was received from Pardhan Gram Panchayat Malnoo to the effect that Parkash Chand was beaten up by the accused. He made entry Ext. PW-11/A. At about 6:10 PM, HHC Gian Chand and HHC Ashwani Kumar went to the Police Chowki alongwith the accused. He was handed over to him for safe custody. At 11:00 PM, on the same

day, S.I. Baldev Singh handed over four *pulindas* sealed with seal "D" alongwith sample seal. On 19.11.2008, S.I. Baldev Singh handed over one *pulinda* which was sealed with five seals of impression "T" alongwith sample seal. He handed over all the *pulindas* except that of *chappal* to HHC Ashwani Kumar for depositing the same at FSL, Junga.

17. PW-12 Dr. S.K.Sud, has conducted the post mortem on the body of the deceased. He issued post mortem report Ext. PW-12/A. In his opinion, the cause of death was severe injury to vital organ i.e. brain, leading to shock and death. The injuries were *ante mortem* in nature. According to him, the injuries could be caused with *danda* Ext. P-1, if struck with force. The injuries were sufficient to cause the death in the ordinary course of events.

18. Statements of PW-13 Ramesh Chand, PW-14 HHC Om Parkash and PW-15 Inspector Sohan Lal Thakur, are formal in nature.

19. PW-16 Rukko Devi, deposed that she was associated by the police alongwith Ram Parkash. In her presence photographs of the spot were taken. The place was identified by Kamla Devi. Blood stained leaf was found lying on the spot. It was sealed and three impressions of seal D were affixed on it. Memo Ext. PW-3/A was prepared. The police took into possession *darat* and *danda* vide memo Ext. PW-1/B. The *chappal* is Ext. P-5. They went to the house of accused Hans Raj. The wife of Ram Parkash and Hans Raj were also present. *Darat* and *danda* were taken into possession in separate *pulindas*. There were blood stains on the *danda*.

20. PW-17 Ramesh Chand, is a formal witness.

21. PW-18 SI Baldev Singh, deposed that on the basis of information received from the Pardhan Navjiwan Sharma, rapat Ext. PW-11/A was registered. He found the accused inside the house. The door was broken. He recorded statement Ext. PW-1/A under Section 154 Cr.P.C. of Kamla Devi. It was sent to the Police Station. FIR Ext. PW-18/B was registered. He prepared inquest reports vide memo Ext. PW-18/C and PW-18/D. He got the photographs of the spot. *Danda* and darat were recovered. These were taken into possession vide memo Ext. PW-3/B. He prepared the site plan Ext. PW-18/G. The blood stained leaf was recovered and taken into possession vide memo Ext. PW-3/A. The shirt is Ext. P-3. In his cross-examination, he deposed that he reached the spot at about 4:30 PM. Later said that at 4:45 PM. The dead body was kept in the verandah by his relatives.

22. PW-1 Kamla Devi, has not seen the accused giving beatings to her husband. She has only heard three sounds of *danda* blows. Thereafter, she went down with her daughter-in-law. PW-1 Kamla Devi also saw the accused running with *danda* and *darat*. She has deposed in her cross-examination that she has not seen the accused beating her husband. She has admitted that no quarrel had taken place between her husband and the accused. PW-2 Anju Devi, deposed that she heard three sounds of *danda* blows and when she saw, the accused was giving

the blows with *danda* to her father-in-law and PW-6 Seema Devi screamed. She had seen the accused running with *danda* and *darat*. In her cross-examination, PW-2 Anju Devi admitted that when the incident took place, her face was towards the wall side. In her cross-examination, she also admitted that no quarrel had taken place between her father-in-law and the accused. She did not know the reason of giving beatings by accused to his wife. She did not know that any complaint was lodged against the accused by his wife or not. PW-6 Seema Devi, has deposed that she heard the sound of *danda* blow. She saw towards the spot from where sound came. She saw the accused giving *danda* blows on the head of her father-in-law. She informed the Pradhan PW-7 Navjiwan Sharma. According to her, the accused had grudge against her father-in-law because latter used to advise him not to beat his wife.

23. The cause of death, as per PW-12 Dr. S.K.Sud was severe injury on the vital organ i.e. brain leading to shock and death. The injuries were *ante mortem*. These were sufficient to cause death in the ordinary course of events. The injury could be inflicted with Ext. P-1 *danda*, if struck with force. According to the prosecution case, the accused was seen running away with *danda* and *darat* in his hands. He has locked himself inside the room. He refused to open the door. The door was opened and accused was taken by the police after arrest.

24. It is duly established from the statements of PW-1 Kamla Devi, PW-2 Anju Devi and PW-6 Seema Devi that the accused had given *danda* blows on the head of the deceased. It is in conformity with the post mortem report Ext. PW-12/A. The motive attributed for beating the deceased is that he used to stop the accused from beating his wife. PW-1 Kamla Devi has admitted in her cross-examination that no quarrel had taken place between her husband and the accused and volunteered that prior to this incident, no such fighting had taken place. She was not even aware of the fact that the accused used to beat his wife. The matter was never reported by her husband with the police that the accused used to beat his wife.

25. There are only two houses in the vicinity of the house of the deceased. In case, the accused had been beating his wife, all of them would have known this incident. PW-2 Anju Devi did not know the reason of beating the wife by the accused. She did not know that complaint was ever lodged by the deceased regarding the beating. According to her, no quarrel has taken place between her father-in-law and the accused. PW-6 Seema Devi, as noticed by us hereinabove, has deposed that the accused had grudge against her father-in-law because he used to ask the accused not to beat his wife.

26. The prosecution has not led any cogent evidence that the accused used to beat his wife. The motive attributed to the accused for giving beatings to the deceased is not convincing. However, on the basis of the evidence produced on record, it can not be gathered that the accused had intention to kill the accused. He was carrying *darat* and *danda*, as per the statements of PW-1 Kamla Devi, PW-2 Anju Devi, in his hands. If he had the intention to kill the deceased, he would have

given fatal blows on the body of the deceased with *darat*. The *darat* is a very dangerous weapon, vis-à-vis *danda*. However, the fact of the matter is that the accused had the knowledge that the *danda* blows given on the vital organs of the deceased would result in his death. Consequently, the prosecution has failed to prove the charge under Section 302 IPC against the accused. The charge has been proved against the accused under Section 304 Part II IPC.

27. Accordingly, the appeal is partly allowed. The judgment of conviction under Section 302 IPC is set aside. The accused is convicted under Section 304 Part II of the Indian Penal Code. He be produced before this Court on 30.10.2014 for hearing on the quantum of sentence.

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

Ram Parkash & Others .....Petitioners.
Versus
Surinder Singh & Others. ....Respondents.

Civil Revision No. 68/2012
Reserved on : 16.10.2014
Decided on : 22.10.2014

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought the eviction of the tenant on the ground that the demised premises is in dilapidated condition - door of the shop is rotten and is hanging in air, the ceiling of the shop is damaged which requires replacement, building is totally unsafe for human dwelling and can collapse at any time but the tenant denied this fact- held, that the witnesses of the petitioner had admitted that the shop was in good condition and there was no possibility of the shop collapsing- it did not require any immediate repair- further, landlord was residing in the same building, which showed that the condition of the building was not unsafe, hence, petition dismissed. (Para-11 to 15)

For the Petitioners: Mr. R.K Gautam, Sr. Advocate with Mr. Anil Kumar, Advocate.
For the Respondents: Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur (Judge)

The instant Civil Revision is directed against the impugned judgment, rendered, on, 5.5.2012, by the learned Appellate Authority, Chamba, District Chamba, in Rent Appeal No. 1/2012, whereby, the learned Appellate Authority set aside the order rendered on 21.12.2011,

by the learned Rent Controller, Chamba, District Chamba H.P, in Rent Petition Case No. 2 of 2006 and ordered the eviction of the petitioners/tenants from the demised premises.

2. The landlords are owners of one shop comprised in Khata Khatouni No. 1061/1352 khasra No. 3957 situated in Mohalla Dogra Bazar, Chamba town, District Chamba. The shop had been let out to tenant Prithi Singh in the years 1987-88. The respondents have preferred an eviction petition seeking the eviction of tenants/petitioners on the ground that the demised premises is in dilapidated condition owing to regular hammering of cobbler machine the flooring planks and wooden joints have been damaged. The door of the shop is rotten and is hanging in air and the ceiling of the shop is totally damaged and requires replacement. Besides this, the flooring of the first floor (Residential portion) has got cracks and requires immediate repairs. The residential building in which the landlords are residing is totally unsafe for human dwelling and can give way at any time. It requires reconstruction by dismantling the same. It is further pleaded that the landlords have sufficient funds to dismantle and reconstruct the demised premises. Further the eviction of tenants from the demised premises was sought on the grounds of theirs being in the arrears of rent.

3. The tenants have contested the petition and raised preliminary objections inter-alia maintability, cause of action and the landlords-respondents having not come to the Court with clean hands. They have averred that demised premises are in a good and proper condition and the landlords are living in the adjoining and by the side of the demised premises. They further averred that there is no danger to the building and it does not require any repair. The landlords are harassing the tenants on false pretext.

4. In the rejoinder the landlords controverted the allegations of the tenants and re-affirmed their case.

5. On the pleadings of the parties, the following issues were framed by the learned Rent Controller:-

> 1. Whether the respondent is in arrears of rent of demised premises since 1990 till date? OPP
>
> 2. Whether the demised premises is required for reconstruction after dismantling the same as alleged? OPP
>
> 3. Whether the petition is not maintanble in the present form? OPR
>
> 4. Whether the petitioners have not come to the Court with clean hands? OPR.
>
> 5. Relief.

6. On an appraisal of the evidence, adduced before the learned Rent Controller, the learned Rent Controller partly allowed the petition of the landlords. In appeal, preferred against the order of the learned Rent

Controller by the landlords before the learned Appellate Authority, the learned Appellate Authority allowed the appeal and set aside the findings recorded by the learned Rent Controller.

7. Now the tenants/petitioners have instituted the instant Civil Revision before this Court, assailing the findings, recorded by the learned Appellate Authority in its impugned judgment.

8. The landlords/respondents had sought eviction of the revisionists/tenants from the demised premises, on the pleadings, comprised in the relevant paragraph of the petition, which are extracted hereinafter, as their reproduction is imperative for efficaciously adjudicating the controversy besetting the parties at contest:-

> *"18 (i) That the demised premises is in dilapidated condition due to regular hammering of cobbler machine the flooring planks and wooden joints have been damaged. The door of the shop is rotten and is hanging in air and is unsafe the ceiling of the shop is totally damaged and its ceiling rafter requires replacement. Besides this the flooring of the first floor (Residential portion) has got cracks and require immediate repairs. The residential building in which the petitioners are residing is totally unsafe for human dwelling and can give way at any time. It require reconstruction by dismantling the same. It is pertinent to mention here that the petitioners have got sufficient funds to dismantle and reconstruct the demised premises."*

9. On the pleaded fact enunciated in the relevant part of the eviction petition, which fact in-extenso has been extracted hereinabove, the learned trial Court formulated an apposite issue qua it, which is extracted hereinafter:-

> 2. *Whether the demised premise is required for reconstruction after dismantling the same as alleged? OPP.*

10. The learned Rent Controller, on, appraisal or appreciation of the evidence on record, adduced by the landlords qua it, had construed it to be neither sufficient nor satisfactory, to constrain it, to, record a finding that the onus as cast upon them on the said issue had come to be discharged by them. In sequel, the learned Rent Controller rendered findings against the landlords on issue No.2.

11. The reasons which had prevailed upon and had overwhelmed the learned Rent Controller to do so are comprised in the deposition of PW-2, wherein she admitted the fact that she resides above the demised premises, besides her admission in her examination-in-chief of one shop adjacent to the demised premises being in a good condition and there being no possibility of the shops caving in, tenably sequelled an inference that the demised premises were neither in a dilapidated condition nor were unsafe for human habitation. Moreover, with PW-2 having also deposed that there is no possibility of the demised premises

collapsing and theirs not requiring any immediate repair, which deposition having remained unscathed, by an inexorable cross-examination, leads to an apt and tenable conclusion that the condition of the demised premises had not deteriorated or waned to a magnitude so as to render them unsafe for human habitation. More especially, when the factum of the landlords admittedly residing above the demised premises, dispelled the factum of it being in dire necessity of immediate repairs, in as much, as, given its purported immense deterioration and condition, it would not have facilitated the habitation of the landlords therein. Moreover, the deposition comprised in the cross-examination of PW-2, wherein there is an admission of the demised premises requiring only minor repairs, ousts an inference that the condition of the building has reached the stage of dilapidation or un-safeness and also when it had remained un-pleaded by the landlords in the relevant part of the eviction petition that reconstruction or repair work cannot be carried out without the tenants being evicted therefrom. Consequently, the ready and apt concomitant sequel is that the dilapidation or damage as has accrued to the demised premises necessitates only minor repairs, also then an inevitable inference is that the demised premises is neither in a dilapidated condition nor unfit for human habitation so as to necessitate the eviction of the tenants therefrom for the effectuation of or carrying out of any major repairs so as to render it habitable on its being rebuild.

12. Preeminently, the absence of the report of an expert pronouncing upon the fact of a severe dilapidation in the building having accrued, rendering it, extremely hazardous for human habitation, as a natural corollary prods this Court to conclude that there was dearth of or want of best and cogent evidence before the learned Rent Controller for depicting the factum of its being required for begetting its reconstruction after its dismantling having been carried out.

13. The learned counsel appearing for the respondents/landlords has argued that the deposition of RW-3 portraying the factum of the condition of the demised premises being not good and likely to fall, conveys his communicating evidence qua the factum of the deteriorated condition of the building. However the aforesaid fragmentary part of his deposition ought not to be solitarily borne in mind to conclude that, as such, his deposition comprises cogent evidence qua the factum of un-safeness of the building or its suffering from dilapidation, hence, necessitating major repairs, which cannot be carried out without the tenants residing therein being evicted therefrom.

The deposition of RW-3 of the condition of the demised premises being not good is overcome by the factum of PW-2 having deposed in her deposition that there is no possibility of the demised premises caving in or giving way, which deposition when has for the reasons, already adverted to hereinbefore, has been construed to be acquiring credibility, especially for want of its impeachment by way of an efficacious cross-examination, also then constitutes fortifying admission of the landlords qua the condition of the demised premises, hence being neither unsafe nor dilapidated nor likely to give way. Moreover, the deposition of RW-3 is also not sufficient to be constituting the deposition

of an expert, in as much, as, he has orally deposed in Court about the condition of the building. He has during the course of his deposition neither tendered into evidence any document prepared by him, as, an expert portraying the unsafeness or uninhabitable condition of the building, sequelled by its deteriorated form, as such, his oral deposition when unaccompanied by any report prepared, tendered and proved by him, in consequence to his having carried out an incisive inspection of the building thereupon his having on its in-depth analysis prepared a report with a precise depiction therein qua the condition of the building accompanied by reasons, does not constitute a credible deposition qua the condition of the building. As a natural corollary, then the best evidence comprised in the expert opinion is amiss. In sequel, the invincible conclusion which is to be formed is that especially when it is not pleaded that the reconstruction work or repair work cannot be carried out without the eviction of the tenant therefrom which absence of the apposite pleaded fact construed in conjunction with the factum of the condition of the building not having been proved to be unfit or unsafe for human habitation, fosters a conclusion that hence neither its dismantling when its condition has not been proved to be demonstrated to be necessitating dismantling, is necessary nor hence it requires reconstruction on eviction of the tenants therefrom.

14. Moreover the factum pleaded in the apposite paragraph of the petition, which paragraph is extracted hereinabove, also portraying in it, that owing to regular hammering of cobbler machine, the flooring planks and wooden joints have been damaged, has been falsified by the admission in the cross-examination of PW-2, of the flooring of the demised premises being cemented. The said fact has also been admitted by PW-3 in his cross-examination. However when his statement has remained un-eroded, it acquires truth and dispels the factum of a cemented flooring having been fixed upon wooden planks, hence owing to regular hammering of cobbler machine the flooring comprising wooden planks and wooden joints having come to be damaged and likely to give way.

15. The Appellate Authority without assigning cogent and weighty reasons for disconcurring with the findings recorded by the Rent Controller on issue No. 2, which was the apposite issue besetting the parties at contest and onus whereof was cast upon the landlords has only while reading the testimony of RW-3 in an unwholesome manner, recorded findings that given his statement that the condition of the building was not good besides when the premises were bonafide required by the landlords for making it a profitable venture, as such tenants residing therein are evictable, has hence, traversed, even beyond the scope and amplitude of the pleadings as also has travelled beyond the scope of the apposite issue cast qua it. Further more, as such, then it untenably formed an inference that the preponderant fact, which necessitated proof, was not the dilapidated condition of the building nor proof of dilapidated condition of the building was a pre condition for the landlord to seek the eviction of the tenant residing in the demised premises, rather with the landlords having proved the factum of theirs

bonafide requiring it in as much as given its location in the thicket of a commercial locality theirs rearing a bonafide requirement/desire qua it, to reconstruct it for making it on its being rebuilt a more profitable venture, hence the eviction of the petitioners/tenants was necessary. The reasons as afforded by the Appellate Authority in reversing and unsettling the tenable and well recorded findings of the learned Rent Controller are perverse as well absurd in as much as (a): A perusal of the grounds of eviction pleaded by the landlord in the apposite and relevant paragraph of the Rent Petition unequivocally bespeak the factum of it being unsafe for human habitation, hence requiring reconstruction after its dismantling being carried out. Each of the averments enunciated in it comprising the factum of the demised premises having acquired a dilapidated or deteriorated condition rendering it unsafe for human habitation, is overcome by evidence, which has been adverted to hereinabove benumbing the fact of either its dilapidated condition or its being unsafe for human habitation, more especially in the absence of adduction of the best evidence comprised in the report tendered and proved by RW-1 enunciating therein, an opinion on an incisive analysis qua the condition of the building having been carried out by him. Its non-adduction hence, sequels an inference that the condition of the building, is, neither deteriorated nor, is, unsafe for human habitation. Besides when rather evidence pronouncing its necessitating only minor repairs which were possible to be carried out, even without the eviction of the tenants, therefrom. As a corollary, the eviction of the tenants from the demised premises on score of it being rendered unfit for human habitation remained un-established or unproved by adduction of satisfactory evidence

(b) There is no iota of any fact pleaded in the relevant part of the eviction petition portraying the factum of the landlords requiring it bonafide for their personal requirement nor they have ventilated therein a desire that given the imminent fact of its being located in the thicket of a commercial hub, they intend to re-raise it or rebuild it with modern facilities, for, making it a profitable venture in as much as its then generating a handsome income for them. In absence thereof, it was insagacious for the learned Appellate Authority, to, conclude that the unsafeness or the deteriorated condition of the demised premises was overlookable rather the bonafide requirement of the landlords for rebuilding it or re-raising it for so that on its being reconstructed, it generates a profitable income to them, was the factum probandum.

16. It is trite law that any grounds of eviction are to be pleaded with exactitude and with precision. The ground of the land-lord requiring the demised premises for rebuilding it, so that on its being rebuilt, it would generate a handsome income to them remained un-pleaded either impliedly or explicitly with precision. Consequently, it was leally inappropriate for the learned Appellate Authority to introduce evidence or to import evidence qua it. Even though when under an order rendered by the learned Rent Controller, on the opposite issue qua it, formulated by it, which issue remained acquiesced to by the parties at contest. Therefore given the scope and amplitude of the apposite issue and its not

encompassing the factum of the landlords bonafide requiring the same for rebuilding it so that on its being reconstructed after its demolition, it would generate a handsome income for them, as a sequel it was both impermissible for the landlords to lead evidence qua the factum of his bonafide requiring it for rebuilding it so that on its being rebuilt it generates a handsome income to them nor also it was permissible for the learned Appellate Authority to widen/extend its scope and amplitude so as to encompass the aforesaid fact within its ambit and then proceed to untenably record a finding that its unsafe condition or dilapidated condition was over-emphasized by the Rent Controller, rather theirs bonafide requiring it for its being rebuilt, when proved necessarily entailed the eviction of the tenants therefrom. In the learned Appellate Authority traversing beyond the scope and amplitude of issue No. 2 as also it coming to read discardable/un-readable evidence, hence had committed a grave illegality and impropriety and its judgment is hence vitiated.

17. The summum bonum of the above discussion is that the learned Appellate Authority has committed a legal misdemeanor which necessitates interference by this Court. Accordingly, the judgment rendered by the learned Appellate Authority is set aside and the Order rendered by the learned Rent Controller, is maintained and affirmed. Revision Petition stands allowed. No costs. All pending applications stand disposed of accordingly.

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

Mahajan. ...Appellant.
Versus
Basanti and others. ...Respondents.

RSA No. :294 of 2001
Reserved on: 19.9.2014
Decided on: 27.10.2014

Specific Relief Act, 1963- Section 34-Plaintiff filed a Civil Suit for declaration that defendant No. 1 was not the daughter of P- mutation was wrong and illegal- held, that name of the defendant No.1 was recorded as the daughter in the Parivar register – no evidence was led to show that the false entry was made in the Parivar register- therefore, the version of the plaintiff that defendant No. 1 is not the daughter of one P was not proved. (Para-17)

For the Appellant : Mr. C.P. Sood, Advocate.
For the Respondents: Mr. J.R. Thakur, Advocate for respondent No.1 and 2.
None for other respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 20.3.2001 rendered by the learned District Judge, Chamba in Civil Appeal No.38 of 2000.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that appellant-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for declaration against the respondent-defendant (hereinafter referred to as the "defendant" for convenience sake) to the effect that defendant No.1 Smt. Basanti was not the daughter of Purshotam and mutation dated 6.4.1996 of the land detailed in the plaint situated in Mohal Dauni Pargana Tissa, District Chamba was wrong, illegal and inoperative. The relief of permanent prohibitory injunction was also claimed for restraining defendant No.1 from interfering with the possession of the plaintiff over the suit land. The suit land was recorded in the revenue record in joint ownership and possession of the plaintiff and proforma defendants together with Purshotam son of Dharam Dass, who was the real brother of the plaintiff and proforma defendants. Purshotam died issueless on 18.3.1995. Defendant Nos. 1 and 2, namely, Basanti and Gopala in connivance with the Secretary Panchayat and the revenue officials got prepared a false Pariwar register of house No.77 of village Sagloga. They also got the suit land mutated in favour of defendant No.1. Defendant No.1 was not the daughter of Purshotam. Mutation qua inheritance of Purshotam could not be attested in her favour. Plaintiff has also claimed ownership and possession of the suit land as heir of Purshotam deceased. Purshotam has left the possession of the suit land since the year 1964. The land was in possession of the plaintiff and proforma defendants. They have become owners by acquiring title by way of adverse possession.

3. Suit was contested by defendant Nos. 1 and 2. They have admitted Purshotam to be son of Dharam Dass. However, it is denied that plaintiff and proforma defendants were the only legal heirs of Purshotam. It is stated that Purshotam was father of defendant No. 1 and she being only legal heir, was entitled to succeed to the share of Purshotam in the suit land. It is denied that the suit land ever remained in adverse possession of the plaintiff. Proforma defendants No. 3 to 5 have admitted the claim of the plaintiff.

4. Issues were framed by the Sub Judge on 26.2.1998. He dismissed the suit on 28.3.2000. Plaintiff preferred an appeal before the District Judge, Chamba. He also dismissed the appeal on 20.3.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 7.12.2001:

> **1. Whether the judgment of the first appellate court is perverse being based on misreading of the pleadings and the evidence of parties and for want of non consideration of the material evidence and pleadings of the parties.**

2. Whether the copy of Parivar Register, not maintained in accordance with rule 5 of H.P. Gram Panchayat rules, is admissible in evidence or is relevant to prove the fact in issue.

5. Mr. C.P. Sood, has vehemently argued that both the Courts below have misread the pleadings and evidence. According to him, Pariwar register was not maintained in accordance with Rule 5 of the H.P. Gram Panchayati Rules.

6. Mr. J.R. Thakur has supported the judgments and decrees passed by both the Courts below.

7. I have heard the learned counsel for the parties and have perused the record and pleadings carefully.

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

9. Plaintiff Mahajan has appeared as PW-1. According to him, his father Dharam Dass had four sons, namely, Kanthu, Puran and Purshotam. Purshotam has died. He used to reside in Pargana Sei village Messa. He was married to one Rinku. No issues were born out of wedlock. Defendants No. 1 and 2 were children of Ram Ditta. Purshotam went to village Messa in the year 1964. He was in possession of his share. In the year 1987, Purshotam's wife died. He came back to Patogan. He started residing with the plaintiff. Purshotam was not in possession of the disputed land. From the year 1964 onwards he was in possession of the suit land. Purshotam was registered as member of his family after 1987. He never resided in village Sagloga. In his cross examination, he has admitted that the whole property was joint. He has denied that he was married to one Kesari and Parma and Basanti were born out of the marriage between Purshotam and Kesari.

10. PW-2 Krishna Mahajan has deposed that Purshotam was brother of plaintiff. Purshotam has died. She has never seen children of Purshotam. She has shown her ignorance that Purshotam had married. He came back to village Patogan. She has also shown her ignorance about the entries of defendant No. 1 in the Pariwar Register. She has admitted that she was residing in village Bhanjraru. She has no landed property in village Patogan. She has shown her ignorance about the marriage of Purshotam and Kesari.

11. PW-3 Asdulla has deposed that he knew Purshotam. He was brother of plaintiff. Purshotam was living in village Messa. He remained in village Messa for 34-35 years. He returned back to village Patogan after the death of Purshotam. He remained in village Patogan for 7-8 years. He has not seen defendants as Purshotam's children. Plaintiff used to cultivate the land of Purshotam in his absence. In his cross-examination he has admitted that there are 15-20 families of Hindus. He has admitted that disputed land was jointly owned by 4 brothers. He has

shown his ignorance about the marriage of Purshotam and Kesari and their children.

12. Defendant Basanti has appeared as DW-1. She has deposed that plaintiff Kesari was her mother. Purshotam was her father. Parma died at tender age. She was married at village Messa by her father Purshotam. She was in possession of the suit land. Kesari was first married to Ram Ditta but after the death of Ram Ditta, she married Purshotam. She has admitted that Purshotam was married to one Rinku and used to cultivate the land of Rinku. She was born to Kesari at village Patogan.

13. DW-2 Devi Chand has supported the version of DW-1. According to him, defendant No.1 was daughter of Purhsotam. Purhostam had married Basanti. Purshotam married of Basanti at village Sagloga. She was also given dowry by Purshotam. She was married in his presence. There was no Barat. It was a simple marriage.

14. DW-3 Lal Chand has deposed that Kesari was married to Purshotam. Purshotam had two children, namely, Basanti and Parma. Parma died at tender age. He has admitted in his cross-examination that marriage of Purshotam and Kesari took place in his presence. He was 15-16 years old at that time.

15. Plaintiff has produced Ext. P-1 and Ex.P-2 copies of Jamabandis for year 1990-91, Ext. P-3 copy of mutation, Ext. P-4, entry of Pariwar Register, Ext. P-5 certificate of pariwar register of the plaintiff, Ext. P-6 certificate of pariwar register of Purshotam, Ext. P-7, Pariwar register of defendant No.1 after marriage and Ext. P-8 certificate of pariwar register of plaintiff's family.

16. PW-2 Krishna Mahajan does not belong to village Patogan. Similarly, PW-3 Asdulla is the resident of village Patogan. Plaintiff has not examined any witness from village Messa where Purshotam resided for more than 30-35 years. DW-1 has categorically deposed that she was married by her father Purshotam. This fact has been corroborated by DW-2 Devi Chand. DW-2 Devi Chand is an independent witness. DW-3 Gulab Chand uncle of defendant No.1 has deposed that Kesari was married to Purshotam. According to him, he was present at the time of marriage of Purshotam and Kesari.

17. Now, as far as Pariwar register is concerned, PW-1 in his statement has not deposed that how entry in the pariwar register was made. Plaintiff has failed to prove that defendant in connivance with the Secretary Panchayat and revenue officers has got a false entry made in the Pariwar register. Ext. P-4 may not be strictly as per the prescribed form. However, the Court has to see the substance and not the form. Moreover, the plaintiff has not placed any independent witness to rebut the entries made in the Parivar register.

18. Now, as far as mutation dated 6.4.1996 is concerned, the plaintiff was issued notice at the time of mutation. He was not present at that time. Plaintiff though has taken a plea of adverse possession but he

has not proved the same. According to the plaintiff, suit land was shown in joint possession of plaintiff and Purshotam. In case of joint possession, adverse possession cannot be exercised unless plea of ouster is taken specifically. However, this plea has not been taken by the plaintiff. Plea of adverse possession has not been supported by any of the witness of the plaintiff. The Court has already noticed that PW-2 Krishna Mahajan and PW-3 Asdulla were not residents of village Messa. They have not stated that plaintiff was in exclusive possession of suit land. Defendant has led sufficient evidence that she was daughter of Purshotam. Plaintiff could not prove that the entries made in the Pariwar register Ex.P-4 were wrong. Plaintiff has also failed to prove his adverse possession over the suit land.

19. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties. The substantial questions of law are answered accordingly.

20. Consequently, in view of the observations and discussion made hereinabove, there is no merit in the Regular Second Appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

National Insurance Company Ltd. ..... Petitioner.

Vs.

Raman Mittal & anr. .... Respondents.

CWP No. 7171 of 2010-H.
Judgement reserved on: 8.10.2014.
Date of decision: 27.10.2014.

Constitution of India, 1950- Article 227- Claim Petition was filed by the claimant before MACT, Nahan, pleading that he had sustained injury while sitting as a pillion rider- petition was allowed- Insurance Company filed a Writ Petition challenging the Award pleading that the claim petition was filed after more than 7 years of the accident- no police report was lodged regarding the accident- Insurance Company was not afforded any opportunity to verify the veracity of the accident and the application of the Insurance Company under Section 170 of M.V. Act was wrongly dismissed- held, that Writ Petition challenging the award would be maintainable only in those cases where the award on its face is perverse or is based upon fraud and Insurance Company has no remedy under Motor Vehicle Act for challenging the award- award cannot be challenged on the ground that compensation is high, excessive or unreasonable- the mere fact that the Claim Petition was filed after 7 years is not sufficient to view the claim petition with suspicion as there is no limitation for filing the claim petition. (Para- 8 to 10)

Motor Vehicle Act, 1988- Section 166- Merely because the FIR or the police report was not filed is not sufficient to hold that no accident had taken place-held on facts that father was driving the Scooter and son was sitting as pillion rider, therefore, in these circumstances, it was not reasonable to expect the son to lodge the FIR against his father. (Para-12 to 14)

Motor Vehicle Act, 1988- Section 170- Claim petition was filed by the son against his father who was driving the scooter- held, that merely because petition was filed by the son cannot lead to an inference that the petition was collusive, when the Insurance Company had itself paid own damage to the owner thereby admitting that accident had taken place. (Para-16)

Motor Vehicle Act, 1988- Section 166- Compensation is always higher in case of disablement than in case of death- bodily injury is to be treated as a deprivation, which entitles the victim to claim damages which vary according to the gravity of the injury- some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of disability are involved while determining compensation in an accident case but these have to be considered in an objective manner. (Para-20)

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that claim of pillion rider was not covered under the policy- held, that the policy showed that an amount of ₹ 77/- was charged for legal liability to passenger and therefore, contention of the Insurance company that risk of pillion rider was not covered under the policy cannot be accepted. (Para-27)

Cases referred:

National Insurance Co. vs. Soma Devi & others Latest HLJ 2003 (HP) (FB) 982

Ravi vs. Badrinarayan & ors 2011(4) SCC 693

Raj Kumar vs. Ajay Kumar and another (2011) 1 SCC 343

Himachal Road Transport Corporation and another vs. Smt. Sangeeta 2013(2) T.A.C. 686(H.P.)

R. Venkata Ramana and another vs. United India Insurance Co.Ltd. and others 2013 (4) T.A.C. 376 (S.C.)

Syed Sadiq and others vs. Divisional Manager, United India Insurance Company Limited (2014) 2 SCC 735

United India Insurance Co. Ltd. vs. Prem Singh and others 2001 ACJ 1445

Ramesh Chand Tripathi vs. Lily Joshi 2008 ACJ 785

United India Insurance Co. Ltd. vs. Tilak Singh and others 2006 ACJ 1441 S.C.

For the petitioner : Mr. Ashwani K. Sharma, Advocate.

For the respondents : Mr. Ashok K. Tyagi, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

The petitioner is aggrieved by the award passed by the learned Motor Accident Claims Tribunal-II, Sirmour District at Nahan whereby a sum of Rs.10,74,000/- alongwith interest at the rate of 7.5% per annum from the date of filing of petition uptil final realization of the amount has been awarded to the claimant- respondent No. 1.

2. Briefly the case of the claimant-respondent No.1, as set out in the claim petition is that on 5.7.2000 at about 7.00 p.m. on way back from Nahan while riding pillion of scooter bearing registration No. HP-17-4072 owned and being driven by his father (respondent No.2) near village Sainwala in Tehsil Paonta Sahib due to sudden appearance of buffalo on the road in front of the scooter, his father who was driving the scooter in a rash and negligent manner could not control the same and he fell down and sustained injuries on his spinal cord, which was fractured resulting in his permanent disability to the extent of 100%. The claimant alleged that his entire lower part of the body below the belly had become completely useless and he could not independently attend to his daily routine. He was on wheel chair ever since the accident and had to employ an attendant for help and assistance. The injuries sustained had completely marred his future and career as he was totally crippled. That apart even his marriage prospects were totally diminished and the claimant had now become a liability on his parents. On the aforesaid allegations, he claimed compensation of Rs.50,00,000/- from the owner/ insured and or insurance company on the basis of insurance policy.

3. The claim petition was resisted and contested by the owner of the scooter, who in his reply while conceding the factum of accident contested that he was not driving the scooter in a rash and negligent manner as alleged. The respondent No. 2 opposed the grant of compensation to the claimant on the ground that he was not at fault in any manner in the accident of scooter as the same had occurred because of sudden appearance of buffalo on the road in front of the scooter which resulted in the accident.

4. The petitioner- insurance company also contested the claim petition by filing the reply, wherein it was specifically contended that there was collusion between the claimant and the owner/ driver/ insured of the scooter as they being related as son and father respectively. It was also alleged that claimant was not covered by the policy of the insurance as no premium was paid for coverage of risk of pillion rider. It was further contended that a false claim was lodged by the claimant that too after seven years of the alleged accident. It was further contended that theory of accident is totally improbable as no FIR was lodged qua the alleged accident. It was also contended that scooter was being plied by respondent No. 2 in violation of terms and conditions of the insurance policy. Once it was maintained that accident did not occur due to rash

and negligent driving by respondent No. 2, therefore, the claim petition was not maintainable and deserved to be dismissed.

5. The learned Tribunal after framing issues and recording evidence passed the aforesaid award, which has been impugned before this court on the ground that same is illegal, arbitrary and totally unjustified and cannot sustain the test of judicial scrutiny. It is further alleged that learned Tribunal has not appreciated in proper perspective important factual aspect of the case like (i) the claim petition being preferred after more than seven years of the accident; (ii) no police report or FIR have been lodged qua the alleged accident; (iii) insurance company having not been afforded an opportunity to verify mode and manner as also the veracity of the alleged accident after such a long period of time; (iv) the application of the insurance company under section 170 of the Motor Vehicles Act have been illegally rejected by the learned Tribunal below, as prima facie, there was collusion between the owner and claimant, who were closely related to each other being father and son. The claim being ex-facie appears to be fraudulent with an intention to hoodwink the insurance company in an attempt to get huge compensation.

6. It was also contended that the learned Tribunal below could have only passed the award if rashness and negligence on the part of the driver of the vehicle is established or proved on record. Once respondent No. 2 denied and in fact specifically maintained that he was not in any manner rash or negligent, there was no question of awarding any claim. It was also contended that claimant was not covered by the insurance policy and above all the compensation awarded was highly excessive and the impugned award was liable to be suitably modified as the same suffers from vice of perversity.

7. The petition has been contested by the claimant, who in his reply has raised preliminary objection as to the very maintainability of the petition on the ground that there was suppression of material facts, which had been made with malafide intention in order to deprive the respondent No.1-claimant of the award passed in his favour. It is claimed that petitioner despite having knowledge with respect to the insurance policy, which was admittedly a comprehensive policy was still denying its liability when it was amply proved that a sum of Rs.77/- had been paid as additional premium towards legal liability of the passenger/ pillion rider. The respondent has further contended that serious injuries had been sustained by him during the course of accident, which have been noticed by the learned Tribunal below and it is on this basis that a just and legal award has been passed in his favour. The respondent has also highlighted the fact that after the accident in which the respondent had sustained serious injuries, the respondent No. 2 had filed claim for damages of scooter in the aforesaid accident. The petitioner-insurance company after verifying the factum of accident had itself granted the respondent No. 2 a sum of Rs.2930/- as ODI claim Ex. PW 5/B. Once the respondents themselves had not disputed the factum of accident and

in fact had paid the aforesaid compensation, it cannot turn around and question the factum of accident.

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

8. At the very out set it may be observed that writ petition challenging the award would only be maintainable in cases where the award on the face of it is perverse or is based on fraud and the insurance company has no remedy under the Motor Vehicles Act of either challenging the award in appeal or being either to have it recalled or reviewed by the Tribunal itself and further that such exercise of extra ordinary jurisdiction under Articles 226, 227 of the Constitution of India becomes imperative in dispensing justice to the parties. It was so held by the learned Full Bench of this court in **National Insurance Co.** vs. **Soma Devi & others Latest HLJ 2003 (HP) (FB) 982** in the following terms:

> *"It, therefore, becomes abundantly clear that in all such like cases where the Award on the face of it is a perversity, or is based on fraud, and the Insurance Company has no remedy under the Motor Vehicles Act of either challenging the Award in appeal or being either to have it recalled or reviewed by the Tribunal itself, the power of judicial review by this Court in the exercise of its extra-ordinary jurisdiction under Articles 226/227 of the Constitution can always be invoked and exercised by this Court in dispensing justice to the parties."*

9. In the aforesaid judgement, it has further been clarified that the order passed by the Motor Accident Claims Tribunal cannot be challenged only on the ground of compensation being high, excessive or unreasonable in view of express provisions contained in section 173 of Motor Vehicles Act.

10. Now, I proceed to determine the point-wise contention raised by the petitioner.

(i). <u>Delay:</u>

11. No doubt, the petition has been filed after more than seven years of the alleged accident, but then taking into consideration the nature of injuries and also the fact that claimant was a minor at the time of accident, the mere fact that petition has been filed after seven years of the alleged accident cannot be viewed with suspicion particularly when the statute now does not prescribe any period of limitation.

(ii) <u>No police report or FIR:</u>

12. The learned counsel for the petitioner has vehemently argued that in absence of any police report or FIR having been lodged qua alleged accident, the petitioner could not be held entitled to any compensation, since the accident in question had not been proved. I am afraid that mere fact that an FIR or police report have not been registered cannot be taken to be a ground to hold that no accident had taken place.

13. The learned counsel for the petitioner has relied upon the following observations of the Hon'ble Supreme Court in **Ravi** vs. **Badrinarayan & ors 2011(4) SCC 693,** wherein it has been held as follows:-

> *"19. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquility of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons."*

14. The ratio of aforesaid judgement is not applicable to the facts of the present case because in that case there had been a delay in lodging the FIR and the Hon'ble Supreme Court even then had categorically held that this could not be a ground to doubt the claimant's case. While in the present case admittedly no FIR has been lodged. Would that *ipso-facto* means that the claim set up by the claimant is altogether false. Before proceeding, it has to be remembered that here was a case where the father was driving the scooter, while the son who is the claimant, was the pillion rider. Would the son lodge an FIR against his father for rash and negligent driving simply in order to claim the benefit of insurance. I think this is too far fetched. No son would risk the task of lodging an FIR and seeing the father being not only harassed by the police but even being put behind the bar. Even otherwise, it is settled law that an FIR is not a substantive piece of evidence and can only be used for the purpose of corroboration. Above all, it has to be remembered that the claimant had sustained such severe and serious injuries that it was not possible for him to have even contemplated or thought of lodging the FIR and above all it has to be remembered that the claimant was a minor at that point of time and would be presumed to have no knowledge regarding intricacies of law.

15. The learned counsel for the petitioner has strenuously argued that on account of delay in filing of the claim petition, the petitioner has been deprived of an opportunity to verify the mode and manner as also the veracity of the alleged accident. I am afraid this ground is equally untenable. Once the Motor Vehicles Act does not lay down any limitation for filing of claim petition, the petitioner cannot be heard to complain in these matters. The other reason for rejecting this contention of the petitioner is that admittedly the insurance company has granted a sum of Rs.2930/- as ODI claim vide Ext. PW 5/B to respondent No.2 and therefore, was well aware of the accident. In case there was no accident then where was the question of petitioner's paying

ODI claim. In addition to this, it may be observed that petitioner have led no evidence in this case and therefore, cannot be heard to complain in this matter.

(iii) Section 170 of Motor Vehicles Act application

16. Application under section 170 of Motor Vehicles Act rejected. The petitioner has vehemently argued that there was collusion between the owner and the claimant being father and son and therefore, the claim *ex-facie* fraudulently made with a sheer intention of grabbing compensation from the insurance company. I am afraid that such plea is not available to the petitioner particularly when as already observed earlier the petitioner itself paid ODI of Rs.2930/- to respondent No. 2 vide Ex. PW 5/B thereby admitting the accident in question or else this payment would not have been made to respondent No.2, who was the owner of the scooter. The mere fact that the claimant happened to be the son of the owner cannot be a ground to uphold the contention of collusion as raised by the petitioner. After all, a scooter is not a commercial vehicle and is a vehicle meant for a family.

(iv) Award being excessive:

17. The learned counsel for the petitioner would then contend that award of Rs.10,74,000/- alongwith interest at the rate of 7.5% was highly excessive. It is well settled law that in disablement cases compensation is always higher than even in cases of death since it is given to the living victim of the accident. It cannot be disputed that bodily injury is to be treated as a deprivation which entitles the victim to claim damages which vary according to the gravity of the injury. In this case, the claimant has proved on record that he had sustained serious injuries and was treated at PGI, Chandigarh several times and had remained admitted there for several days. As per his statement, he spent about Rs.12,00,000/- on his treatment, traveling and for expenses incurred on his relatives and friends. It has come in evidence that he could not be cured due to spinal cord fracture and had been assessed to be suffering from 100% permanent disability. His lower body below the stomach had been rendered totally useless and now he has crippled, leading his vegetative life on a wheel chair. He was unable to do his matters of daily routine and would depend upon the attendant engaged by his parents on a payment of Rs.3,000/- per month. He was unable to walk or do any work and his chances of getting married had completely come to an end and not only this, by sustaining spinal cord injury, he had to abandon his studies though he wanted to become an engineer.

18. The claimant was treated at Nahan hospital and examined by the Board of doctors, who assessed 100% permanent disability and issued certificate Ex. P-1. The certificate has not been disputed before the Tribunal by the petitioner, and, therefore, it can be safely held that petitioner had sustained permanent disability to the extent of 100%. The petitioner was born on 28.12.1983 and accident had occurred when he was hardly 17 years old. The learned tribunal below after applying the

multiplier of 18 and assessing his life long future income at Rs.3,000/- per month awarded the following compensation:-

"35. Thus, the petitioner is entitled to compensation as per details given herein below:-

i)	*Treatment charges*	=	*Rs.20,000.00*
ii)	*Attendant charges*	=	*Rs.2,16,000.00*
iii)	*Estimated future loss of income*	=	*Rs.6,48,000.00*
iv)	*Special diet*	=	*Rs.5,000.00*
v)	*Transportation charges*	=	*Rs.5,000,00*
vi)	*Future treatment charges*	=	*Rs.30,000.00*
vii)	*Pain & sufferings*	=	*Rs.50,000.00*
viii)	*Loss of amenities, Discomfort and disability*	=	*Rs.1,00,000.00*
	Total	=	*Rs.10,74,000.00*

19. Can the amount as awarded to the claimant be termed to be excessive? It has to be remembered that while determining the compensation in accident cases some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of disability are involved, but these elements are required to be considered in an objective manner. In **Raj Kumar** vs. **Ajay Kumar and another (2011) 1 SCC 343,** the Hon'ble Supreme Court after considering a large number of precedents, laid down the following principles for awarding damages and compensation in accident cases:-

"General principles relating to compensation in injury cases

5. The provision of the Motor Vehicles Act, 1988 (`Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See C. K. Subramonia Iyer vs. T. Kunhikuttan Nair - AIR 1970 SC 376, R. D. Hattangadi vs. Pest Control (India) Ltd. - 1995 (1) SCC 551 and Baker vs. Willoughby - 1970 AC 467).

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

Pecuniary damages (Special Damages)

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

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

(a) Loss of earning during the period of treatment;

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

(iii) Future medical expenses. Non-pecuniary damages (General Damages)

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

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

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

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

7. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) -- depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) -- involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case."

20. In light of the aforesaid principles, it has to be remembered that while determining the quantum of compensation payable to the victims of accidents, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injuries and treatment but also for the loss of earning and inability to lead a normal life and enjoy amenities, which he would

have enjoyed, but for the disability caused due to accident. The amount awarded under the head of "loss of earning capacity" are distinct and separate and do not overlap with the amount awarded for pains and suffering and loss of enjoyment of life or the amount awarded for medical expenses.

21. This court in **Himachal Road Transport Corporation and another** vs. **Smt. Sangeeta 2013(2) T.A.C. 686(H.P.)** was dealing with a case where the claimant had suffered injuries in an accident on 16.11.2009 and had been rendered totally crippled and the award had been challenged on the ground as being excessive. The tribunal therein had awarded a sum of Rs.15,42,000/- to the claimant, who was aged about 37 years and had become absolutely helpless and dependant on others. While upholding the order passed by the tribunal, this court held as follows:-

> *"4. The appellant challenges the award as inadequate, non award of interest which according to the appellant should and ought to have been granted from the date of institution of the claim petition paltry charges for attendant which she would require for the rest of her life, pain and suffering and loss of normal amenities in life. Parties have placed reliance on the evidence as also on the law. I first advert to the law. In Neelam Anand Vs. Manmohan Singh and others 2007 ACJ 1386 this Court awarded a sum of Rs.18,85,000/- to the claimant, who had suffered injuries on the spine as a result of which the whole body became totally paralyzed. The facts noticed by this Court were:*
>
> > *"2. The appellant suffered injury in the spine as a result of which her whole body below neck became totally paralysed. She is confined to a wheelchair. She has no sensation in the lower part of the body. She needs assistance and constant attendance. She cannot perform he r daily ablutions without the assistance of other person. She cannot stand. She cannot move. She cannot write. She can only thumb mark documents, that too with the help of somebody who lifts her hand to put/move her thumb. She is, however, mentally totally alert. She understands everything. Above neck, she is all there. Her fate is worse than that of the dead.*
>
> *5. Adverting to the principle applicable for assessment of damages and the evidence on record, this Court awarded a sum of Rs.18,85,000/- holding that there was sufficient evidence to show the nature of disability suffered by the claimant, was fatal.*
>
> *6. In National Insurance Company Ltd. Vs. Hamnawaz and others, 2011 ACJ 456, the High Court of Jammu and Kashmir awarded a sum of Rs. 18,01,484/- to the claimant, who had suffered from paraplegia due to which both his lower limbs and sphincter muscles became non-functional. The Court holds:*
>
> > *"9 . On account of paraplegia, claimant is unable to move like a normal man and is also not capable to earn anything in*

future also. The future loss of income assessed by the Tribunal at the rate of Rs.4,000/- and applied the multiplier of 18 has also been rightly done.

10. The petitioner being of 28-29 years at the time when the award was passed, the multiplier of 18 has rightly been applied in this case. In respect of medical expenses incurred, the actual bills produced and proved by the claimant/petitioner has been worked out to be Rs.3,55,484/- for which there is no dispute and the compensation has been rightly assessed".

7. On the evidence produced on record which included medical expenses, loss of income during the trial as also future income, pain and suffering, loss of amenity of her life and future income, a sum of Rs. 15,42,000/- was awarded.

8. In New India Assurance Company Ltd. Vs. Shweta Dilip Mehta and others, 2011 ACJ 489, a Division Bench of High Court of Bombay awarded a sum of Rs. 49,48,848/- to the claimant who was aged about 11 years. The facts noticed by this Court were:

"1..... The facts in brief are that one Dilip Shah was proceeding to Kohlapur along with his family and the family of his close friend, Dilip Mehta, in a Maruti 800 car bearing Registration No. MH-01-A/122. In all, 6 persons were travelling in the car. On 2.5.1993, at about 6-30 a.m., the car met with an accident near Itkari Phata when a truck, bearing Registration No. MHF-6469, which was travelling in the opposite direction, collided with it. As a result, the driver, Mr. Dilip Shah, died instantaneously, while the other passengers were severely injured. Ms. Shweta Dilip Mehta (hereinafter referred to as the "appellant"), aged 11 years at the time, was rendered paraplegic i.e. her entire body from waist - down is paralysed since the day of the accident and doctors assess her permanent disablement to an extent of 80 - 90 per cent".

9. The Court holds:

23. In the present case, the appellant was only 11 years of age at the time of the accident. However, the aforementioned table, laid down in Sarla's case, 2009 ACJ 1298 (SC), does not specify the multiplier to be applied in such a case, i.e. where the victim is below 15 years of age. We feel that this is an inadvertence rather than an intended exclusion. The Second Schedule of the Motor Vehicles Act itself specifies a multiplier of '15' to be applied for victims who are under 15 years of age. It cannot be said that victims below the age of 15 years are to be excluded from receiving compensation under the head of 'loss of future income' merely because a multiplier has not been specified for such age group. It is obvious that 'loss of future income'

as a head of compensation applies to all persons, whether earning or not at the time. A child who is rendered permanently disabled due to an accident loses the capacity to earn for himself and his family, in the same manner as a working adult, and in fact, often loses such capacity for a longer period than such adult. Courts have merely sought to interpret and clarify the Second Schedule, on account of the several errors in it, and in the interests of justice. However, no judgment of the Supreme Court explicitly suggests excluding a category or age group from receiving compensation under this head. We hence find no reason to exclude calculating compensation under this head for the victim in the present matter.

24. We note the mathematical progression of the multiplier values, in the aforementioned schedule, as explained in Sarla Verma's case, 2009 ACJ 1298:

> *"We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 - 20 and 20 - 25 years), reduced by one unit every five years, that is M - 17 for 26 to 30 years, M -16 for 31 to 35 years, M -15 for 36 to 40 years, M - 14 for 41 to 45 years and M - 13 for 46 to 50 years, then reduced by two units for every five years, that is, M - 11 for 51 to 55 years, M - 9 for 56 - 60 years, M - 7 for 61 to 65 years and M - 5 for 66 to 70 years."*

As per this progression, the multiplier in the present case, for a victim below 15 years of age ought to have been 19. However, we are also bound by the judgment in Trilok Chandra's case, 1996 ACJ 831 (SC), where the Hon'ble Apex Court held that even in cases under section 166 of the Act, the maximum multiplier to be applied is 18, which was an increase from the existing maximum value of 16 that was laid down earlier in Susamma Thomas's case, 1994 ACJ 1 (SC). The cap of '18' as the maximum multiplier that may be applied in any case has been reiterated in Sarla's case, as well. Hence we conclude that irrespective of the mathematical progression in the schedule, the maximum multiplier that may be applied is 18, even if the victim is below 15 years. Thus, in the present case, the multiplier to be applied for computing 'loss of future income' for the victim is 18.

25. To compute the compensation, we will have to assume an annual income in this case, as the appellant did not work at the time of the accident, being only 11 years old. The Second Schedule specifies Rs. 15, 000/- per annum

to be assumed as income in case of non - earning victims. However, we find this sum wholly inadequate in the present time. Moreover, the appellant was a bright student who seemed to be set for a successful future, prior to the accident. In fact, inspite of the accident, the appellant has manage d to complete her M. Com. which itself is testimony to her potential. We feel that taking all contingencies, calamities and disadvantages that may have occurred in the appellant's normal future into account, to consider an annual income of 1, 00, 000/- is reasonable. Applying the multiplier of 18 to this amount, the appellant is entitled to Rs. 18, 00, 000/- as compensation towards loss of future income, which, if deposited at standard interest rates, would accrue an interest approximately equal to the assumed annual income.

(emphasis supplied).

10. In National Insurance Company Ltd. Vs. Geeta Nagpal and others, 2012 ACJ 611, the High Court of Jammu and Kashmir awarded a sum of Rs.88,66,000/- to the claimant. The Court noticed the facts:

"45. The claimant Kewal Nagpal has been disabled 100 per cent because of the spinal cord injuries of D-2 level. He is, therefore, dependent for his daily chores on others. He has, therefore, lost his earning capacity.

46. To determine compensation for loss of his earning capacity, the Tribunal has taken into consideration the annual loss of Rs.11,96,540/- to his profits, which he would otherwise, on an average, earn from his business in partnership with others in Kashmir Walnut Trading Company and Rajan Trading Co. before the accident. Deducting 1/3rd there from as his personal expenses, Rs.7,97,694/- has been taken as annual loss of income to the claimant.

47. There does not appear any justification in treating the claimant's disability, though 100 per cent, as total loss to his income from the two firms, in that, even if the claimant was 100 per cent disabled to personally participate in the business of the two firms, yet the profit, which he would otherwise earn from his capital investments in the two firms, even as a sleeping partner, cannot be lost sight of while determining loss of income.

11. The assessment of damages is no longer res integra. In Raj Kumar Vs. Ajay Kumar and another, 2011 ACJ 1, the Supreme Court while considering this aspect in detail, holds:

"7. The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered

permanent with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60 per cent permanent disability of the right hand and 80 per cent permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140 per cent (that is 80 per cent plus 60 per cent). If different parts of the body have suffered different percentage of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100 per cent.

8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45 per cent as the permanent disability, will hold that there is 45 percent loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may, however, note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case of course, Tribunal will adopt the said percentage for determination of compensation. {See for example, the decisions of this Court in Arvind Kumar Mishra V. New India Assurance Co. Ltd., 2010 ACJ 2867: 2010 (1) T.A.C. 385 (S.C.) and Yadava Kumar V. Divisional Manager, National Insurance Co. Ltd., 2010 ACJ 2713: 2010(4) T.A.C. 10 (SC}.

9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so, the extent of such permanent disability. This means that Tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement; (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. We may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently , the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different person, depending upon the nature of profession, occupation or job, age, education and other factors."

12. This principle was later on reiterated in Govind Yadav Vs. New India Assurance Co. Ltd., 2012 ACJ 28, holding:

"10. The personal sufferings of the survivors and disabled persons are manifold. Some time they can be measured in terms of money but most of the times it is not possible to do so. If an individual is permanently disabled in an accident, the cost of his medical treatment and care is likely to be very high. In cases involving total or partial disablement, the term `compensation' used in Section 166 of the Motor Vehicles Act, 1988 (for short, `the Act') would include not only the expenses incurred for immediate treatment, but also the amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident. A very large number of people involved in motor accidents are pedestrians, children, women and illiterate persons. Majority of them cannot, due to sheer ignorance, poverty and other disabilities, engage competent lawyers for proving negligence of the wrongdoer in adequate measure. The insurance companies with whom the vehicles involved in the accident are insured usually have battery of lawyers on their panel. They contest the claim petitions by raising all possible technical objections for ensuring that their clients are either completely absolved or their liabilities minimized. This results in prolonging the proceedings before the Tribunal. Sometimes the delay and litigation expenses' make the award passed by the Tribunal and even by the High Court (in appeal) meaningless. It is, therefore, imperative that the officers, who preside over the Motor Accident Claims Tribunal adopt a proactive approach and ensure that the claims filed under Sections 166 of the Act are disposed of with required urgency and compensation is awarded to the victims of the accident and/or their legal representatives in adequate measure. The amount of compensation in such cases should invariably include pecuniary and non-pecuniary damages. In R.D. Hattangadi v. Pest Control (India) Private Limited (1995) 1 SCC 551, this Court while dealing with a case involving claim of compensation under the Motor Vehicles Act, 1939, referred to the judgment of the Court of Appeal in Ward v. James (1965) 1 All ER 563, Halsbury's Laws of England, 4th Edition, Volume 12 (page 446) and observed:

> *"(9) Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages*
>
> *are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses*

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

In the same case, the Court further observed:

"(12) In its very nature when ever a tribunal or a court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards."

13. The principles which stand settled are that the injured has to be compensated for not only the pain and suffering but also for reasonable requirement of an attendant, physiotherapy, medication for life. But what must not be lost sight of the fact that a young lady of 37 years has been totally crippled for the rest of her life. The injuries as described in Ext.PW4/A are telling. When coupled with the evidence of PW4 Dr. Manoj Thakur, there is no doubt in my mind that the injured would require assistance through out her life i.e. an attendant to look after, wheel chair and specialized bed."

22. In **R. Venkata Ramana and another** vs. **United India Insurance Co.Ltd. and others 2013 (4) T.A.C. 376 (S.C.)** the Hon'ble Supreme Court upheld the award of Rs.18,75,800/- awarded by the tribunal, which had been reduced by the High Court to Rs.12,45,800/-. Therein, the claimant was suffering from 80% permanent disability and the Neurologist had opined that there were no changes of any improvement in the health of the injured. The Hon'ble Supreme Court then held as follows:-

"10. We have considered the facts and the injuries suffered by Rajanala Ravi Krishna, who was hardly 17 years old student at the time of the accident. We need not go into the negligence part of the driver because even in the criminal proceedings it had been held that the driver of the vehicle was guilty of rash and negligent driving. Upon perusal of the evidence, we find that the condition of Rajanala Ravi Krishna, after the accident has become very pathetic. Evidence adduced by the Neurologist and other evidence also reveal

that Rajanala Ravi Krishna shall not be in a position to speak for his life and shall not be in a position to do anything except breathing for his life, unless a miracle happens. He would require care of a person every day so as to see that he is given food, bath etc. and so as to enable him even in the matter of answering natural call. It would be worth producing the reaction of the Tribunal after appreciating evidence of the doctor and the said portion of the Tribunal's order has been even reproduced by the High Court in its judgment:

> *"It is not in dispute that because of this accident the injured petitioner who appears to be an active and bright student from Exs.A.481 to A.487, he lost all the function of his all four limbs on account of the severe injuries sustained by him. I have myself questioned PW.2 to find out the graveness of the injuries that are sustained by the injured third petitioner. It has been the evidence of PW.2 that there is no possibility of the injured petitioner regaining normal power of all the four limbs inspite of any amount of treatment. The patient require physio therapy throughout his life and assistance of some person for all his activities. PW.2 has also stated that it is difficult to say even by the time he was giving evidence whether the patient could regain his voice, PW.2 further stated that the patient requires regular medication of at least Rs.500/- per day for his subsistence. PW.2 also stated the patient requires some bodies assistance even for taking food and finally PW.2 stated that the patient is medically described as in a "vegitiative state" and patient is called as "spastic quadric paresys".*

11. Looking at the aforestated facts which even the High Court had noticed, we feel that the Tribunal can not be said to have awarded more amount by way of compensation.

12. From the order of the tribunal, we find that the appellants had in fact proved that they had spent Rs.3,49,128/- towards medical expenses for treating their son. They had to purchase certain instruments worth Rs.58,642/- for making life of their son comfortable and Rs.31,000/- had been spent towards nursing and Rs.1,37,000/- had to be spent for Physiotherapist. Looking at the fact that Rajanala Ravi Krishna will have to remain dependant for his whole life on someone and looking at the observations made by the Tribunal, which have been reproduced hereinabove, in our opinion, his life is very miserable and there would be substantial financial burden on the appellants for the entire life of their injured son. At times it is not possible to award compensation strictly in accordance with the law laid down as in a particular case it may not be just also. We are hesitant to say that it is a reality of life that at times life of an injured or sick person becomes more miserable for the person and for the family members than the death. Here is one such case where the appellants, even during their retired life will

have to take care of their son like a child especially when they would have expected the son to take their care.

13. Though, the High Court has rightly followed the principle laid down in the case of Sarla Verma (supra), in our opinion, the amount of compensation awarded by the Tribunal is more just. The Tribunal awarded a lump sum of Rs.10 lacs and the amount of expenditure incurred by the appellants for treating their son. The total amount awarded by the Tribunal was Rs.18,75,800/- which, in our opinion, is not too much and in our opinion, the said amount should be awarded to the appellants."

23. It has to be borne in mind that the claimant here has suffered 100% disability. What is "disability" has been lucidly explained with impeccable erudition by the Hon'ble Supreme Court in **Raj Kumar's** case (supra), in the following terms:-

"Assessment of future loss of earnings due to permanent disability

8. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (`Disabilities Act' for short). But if any of the disabilities enumerated in section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation."

24. Now, how the disability has to be assessed has been further dealt with in the following manner:-

"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning

capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567).

12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

> *(i) whether the disablement is permanent or temporary;*
>
> *(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,*
>
> *(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.*

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of `loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

19. We may now summarise the principles discussed above :

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

25. The Hon'ble Supreme Court recently in **Syed Sadiq and others** vs. **Divisional Manager, United India Insurance Company Limited (2014) 2 SCC 735** held the claimant therein to be entitled to a compensation of Rs.21,65,100/- with interest at the rate of 9% per annum even though there was no proof of income. The claimant therein was a vegetable vendor and had suffered functional disability estimated at 85% and held as follows:-

"6. This Court in the case of Mohan Soni v. Ram Avtar Tomar & Ors. (2012) 2 SCC 267, has elaborately discussed upon the factors which determine the loss of income of the claimant more objectively. The relevant paragraph reads as under:

"11. In a more recent decision in Raj Kumar v. Ajay Kumar and another, (2011) 1 SCC 343, this Court considered in great detail the correlation between the physical disability suffered in an accident and the loss of earning capacity resulting from it. In paragraphs 10, 11 and 13 of the judgment in Raj Kumar, this Court made the following observations: (SCC pp.349-50)

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

> *11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Company Ltd. (2010) 10 SCC 254 and Yadava Kumar v. National Insurance Company Ltd. (2010) 10 SCC 341).*
>
> *13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood".*
>
> *(emphasis in original)*

7. Further, the appellant claims that he was working as a vegetable vendor. It is true that a vegetable vendor might not require mobility to the extent that he sells vegetables at one place. However, the occupation of vegetable vending is not confined to selling vegetables from a particular location. It rather involves procuring vegetables from the whole-sale market or the farmers and then selling it off in the retail market. This often involves selling vegetables in the cart which requires 100% mobility. But even by conservative approach, if we presume that the vegetable vending by the appellant/claimant involved selling vegetables from one place, the claimant would require assistance with his mobility in bringing vegetables to the market place which otherwise would be extremely difficult for him with an amputated leg. We are required to be

sensitive while dealing with manual labour cases where loss of limb is often equivalent to loss of livelihood. Yet, considering that the appellant/claimant is still capable to fend for his livelihood once he is brought in the market place, we determine the disability at 85% to determine the loss of income.

8. The appellant/claimant in his appeal further claimed that he had been earning Rs.10,000/- p.m. by doing vegetable vending work. The High Court however, considered the loss of income at Rs.3500/- p.m. considering that the claimant did not produce any document to establish his loss of income. It is difficult for us to convince ourselves as to how a labour involved in an unorganized sector doing his own business is expected to produce documents to prove his monthly income. In this regard, this Court, in the case of Ramchandrappa v. Manager, Royal Sundaram Alliance Company Limited (2011) 13 SCC 236, has held as under: (SCC pp.242-43, paras 13-15)

> *"13. In the instant case, it is not in dispute that the Appellant was aged about 35 years and was working as a Coolie and was earning Rs.4500/- per month at the time of accident. This claim is reduced by the Tribunal to a sum of Rs.3000/- only on the assumption that wages of the labourer during the relevant period viz. in the year 2004, was Rs.100/- per day. This assumption in our view has no basis. Before the Tribunal, though Insurance Company was served, it did not choose to appear before the Court nor did it repudiated the claim of the claimant. Therefore, there was no reason for the Tribunal to have reduced the claim of the claimant and determined the monthly earning a sum of Rs.3000/- p.m. Secondly, the Appellant was working as a Coolie and therefore, we cannot expect him to produce any documentary evidence to substantiate his claim. In the absence of any other evidence contrary to the claim made by the claimant, in our view, in the facts of the present case, the Tribunal should have accepted the claim of the claimant.*
>
> *14. We hasten to add that in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guess work, which may include the ground realities prevailing at the relevant point of time.*
>
> *15 In the present case, Appellant was working as a Coolie and in and around the date of the accident, the wage of the labourer was between Rs.100/- to Rs.150/- per day or Rs.4500/- per month. In our view, the claim was honest and bonafide and, therefore, there was no reason for the*

Tribunal to have reduced the monthly earning of the Appellant from Rs.4500/- to Rs.3000/- per month. We, therefore, accept his statement that his monthly earning was Rs. 4500/-."

9. There is no reason, in the instant case for the Tribunal and the High Court to ask for evidence of monthly income of the appellant/claimant. On the other hand, going by the present state of economy and the rising prices in agricultural products, we are inclined to believe that a vegetable vendor is reasonably capable of earning Rs.6,500/- per month.

10. Further, it is evident from the material evidence on record that the appellant/claimant was 24 years old at the time of occurrence of the accident. It is also established on record that he was earning his livelihood by vending vegetables. The issue regarding calculation of prospective increment of income in the future of self employed people, came up in Santosh Devi v. National Insurance Company Limited (2012) 6 SCC 421, wherein this Court has held as under: (SCC pp. 428-29, paras 14-18)

> *14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma vs. D.T.C. (2009) 6 SCC 121 case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be nave to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.*
>
> *15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families.*
>
> *16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of*

those in higher echelons of service will cross the figure of rupees one lac.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self- employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation."

Therefore, considering that the appellant/ claimant was self employed and was 24 years of age, we hold that he is entitled to 50% increment in the future prospect of income based upon the principle laid down in the Santosh Devi case.

11. Further, regarding the use of multiplier, it was held in the Sarla Verma v. DTC which was upheld in Santosh Devi case (supra), as under: (Sarla Verma case, SCC p.140, para42)

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-

9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.

Therefore, applying the principle of Sarla Verma in the present case, we hold that the High Court was correct in applying the multiplier of 18 and we uphold the same for the purpose for calculating the amount of compensation to which the appellant/ claimant is entitled to.

12. With respect to the medical expenses incurred by the appellant/claimant, he has produced medical bills and incidental charges bills marked as Exts. P-25 to P-201 and prescriptions at Exts. P-202 to P-217 on the basis of which the Tribunal awarded a compensation of Rs.60,000/- under the head. However, considering that the appellant might have to change his artificial leg from time to time, we shall allot an amount of Rs.1,00,000/- under the head of medical cost and incidental expenses to include future medical costs.

13. Thus, the total amount which is awarded under the head of "loss of future income" including the 50% increment in the future, works out to be Rs. 17,90,100/- [(Rs.65,00/- x 85/100 + 50/100 x 85/100 x Rs.6,500/-) x 12 x 18].

14. Further, along with compensation under conventional heads, the appellant/claimant is also entitled to the cost of litigation as per the legal principle laid down by this Court in the case of Balram Prasad v. Kunal Saha (2014) 1 SCC 384. Therefore, under this head, we find it just and proper to allow Rs.25,000/- .

15. Hence, the appellant/claimant is entitled to the compensation under the following heads:

Towards cost of artificial leg	*Rs.50,000/-*
Towards pain and suffering	*Rs.75,000/-*
Towards loss of marriage prospects	*Rs.50,000/-*
Towards loss of amenities	*Rs.75,000/-*
Towards medical and incidental cost	*Rs.1,00,000/-*
Towards cost of litigation	*Rs.25,000/-*

16. Also, by relying upon the principle laid down by this Court in the case of Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy (2011) 14 SCC 481, we find it just and proper to allow interest at the rate of 9% per annum.

17. Hence, the total amount of claim the appellant/claimant becomes entitled to is Rs. 21,65,100/- with interest @ 9% per annum from the date of application till the date of payment."

26. Viewed in the light of the aforesaid exposition of law, the award in no manner can be said to be excessive. The tribunal below has not awarded any litigation expenses and moreover the interest awarded is only at 7.5% per annum when compared with 9% interest awarded by the Hon'ble Supreme Court in **Syed Sadiq's** case (supra).

(v) <u>Claim of pillion rider not covered:</u>

27. The petitioner would then contend that since the claimant was admittedly a pillion rider, therefore, his claim was not covered under the insurance policy as no additional premium for the risk of pillion rider had been paid so as to cover such liability. The petitioner has relied upon the statement of PW 5 Ranjit Kumar, Clerk of National Insurance Company, who in his cross-examination has stated that an amount of R. 343/- had been paid towards own damages, Rs.15/- for accessories and Rs.77/- for act liability to cover the risk of third party. Apart from this, no other risk was covered under the policy. He also stated that the risk of pillion rider was not covered under the policy of insurance because no premium qua the same was paid. However, on being further re-examined by the learned counsel for the claimant, he has categorically stated that Rs.77/- was received as against legal liability of passengers. He volunteered to state that it was an Act liability, but further explained that under the Act liability the third party claim is covered.

28. In this backdrop, in case the policy of insurance Ext. P-14 is seen then it is clear that an amount of Rs. 77/- has in fact been paid towards the legal liability to passenger/ MRPP and thus the insurance company cannot wriggle out of its liability to pay the insurance amount.

29. That apart this court in **United India Insurance Co. Ltd.** vs. **Prem Singh and others 2001 ACJ 1445** has specifically held that even in case of Act policy, the pillion rider is covered and hence insurance company is liable to indemnify the insured. This judgement in turn has been followed by the High Court of Delhi in **Ramesh Chand Tripathi** vs. **Lily Joshi 2008 ACJ 785** wherein it has been held that irrespective of the fact that whether it is an Act policy or a comprehensive policy, the notification of Tariff Advisory Committee clearly mandates that death or bodily injury to a pillion rider would be at par with a claim of third party.

30. At this stage, the learned counsel for the petitioner would rely upon the judgement of the Hon'ble Supreme Court in **United India Insurance Co. Ltd.** vs. **Tilak Singh and others 2006 ACJ 1441 S.C.** to claim that the insurance company was not liable for the injuries sustained to the pillion rider. I have gone through the judgement in the aforesaid case and find that scooter therein was insured under the Act policy only and did not contain any endorsement of payment of additional premium. While in the present case, it has been clearly proved that an amount of Rs.77/- was charged for legal liability to passenger and therefore, the risk of pillion rider stood covered under the insurance policy.

31. The upshot of the above discussion is that there is no perversity on the face of the award passed by the learned tribunal below nor can it be said that the petition filed by the claimant is based on fraud. Accordingly, there no merit in this petition and the same is dismissed, leaving the parties to bear their own costs.

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

Sant Ram Badhan ...Appellant.

Versus

The Senior Deputy Accountant General (A & E) & others ...Respondents.

LPA No. 131 of 2014
Decided on: 27.10.2014

Constitution of India, 1950- Article 226- Petitioner was dismissed from the service for entering into second marriage during subsistence of his first marriage-his compassionate allowance was fixed with effect from 1.9.1979- initially petitioner accepted the allowance, however, he filed an application after 26 years, which was dismissed- held, that in view of Rule 41 of the Central Civil Services (Pension) Rules, 1972, a person who is dismissed from the service, forfeits his pension and gratuity but is entitled to Compassionate Allowance- Writ Petition dismissed.

(Para-4 and 5)

For the appellant: Mr. H.S. Rangra, Advocate.

For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No. 1.

Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellant-writ petitioner came to be dismissed from service on account of entering into second marriage during subsistence of his first marriage, being misconduct. His compassionate allowance was fixed with effect from 1st September, 1979, accepted the same and after lapse of 26 years, filed an Original Application before the erstwhile H.P. State Administrative Tribunal, which was transferred to this Court and came to be registered as CWP (T) No. 12637 of 2008, was dismissed vide judgment and order, dated 9th March, 2012, feeling aggrieved, questioned the same by the medium of LPA No. 569 of 2012, was partly allowed vide judgment, dated 6th August, 2013, by setting aside the judgment to the extent it has rejected prayer clause (a) of the writ petition, the writ petition was revived so far it relates to prayer clause (a) and the Writ Court was requested to reconsider the matter and pass orders afresh.

2. It is apt to reproduce para 5 of the judgment passed by this Court in LPA No. 569 of 2012, herein:

> *"5. We are, therefore, in agreement with the grievance made by the appellant in this behalf, for which reason we partly allow this appeal and set aside the impugned judgment to the extent it has rejected prayer clause (a) of the writ petition. That prayer clause will have to be reconsidered by the learned Single Judge afresh on its own merits."*

3. The Writ Court considered the matter, made discussions and dismissed the writ petition in terms of para 3 of the impugned judgment.

4. It is also apt to mention herein that Rule 41 of the Central Civil Services (Pension) Rules, 1972, governs the field, is reproduced herein:

> ***"41. Compassionate Allowance.***
>
> *(1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:*
>
> *Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a Compassionate Allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.*
>
> *....."*

5. While going through the said Rule, one comes to an inescapable conclusion that the competent authority has rightly granted the compassionate allowance in the year 1979.

6. Having said so, no case for interference is made out. Accordingly, the appeal is dismissed alongwith pending applications, if any.

****

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

Cr.MP(M) No. 1159 of 2014 along with Cr.MP(M) Nos. 1160 of 2014, 1161 of 2014 and 1175 of 2014.
Date of Decision : 28th October, 2014.

1. **Cr.MP(M) No. 1159 of 2014.**

Balbir Singh **.....Petitioner.**

Versus

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

2. Cr.MP(M) No. 1160 of 2014.

Charan Singh .....**Petitioner.**

Versus

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

3. Cr.MP(M) No. 1161 of 2014.

Ghuman Singh .....**Petitioner.**

Versus

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

4. Cr.MP(M) No. 1175 of 2014.

Prithvi Singh .....**Petitioner.**

Versus

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

Code of Criminal Procedure- Section 439- An FIR was registered against the bail applicants for the commission of offences punishable under Sections 313, 376, 354-B of the IPC and Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act- the age of the prosecutrix at the time of incident was 18 ½ years and she is alleged to have conceived a child from accused P – however, accused P and C forcibly aborted the child carried by her - matter was reported to the police belatedly- held, that the delay in reporting the matter would show that the allegations made by her were not true and she was a consenting party- prima facie, no offence is constituted against the applicants P and C- Bail granted. (Para-4)

For the Petitioner(s): Mr. B.C. Negi, Advocate.

For the Respondent(s): Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

All these petitions are being disposed of by a common order as they arise out of the same FIR No. 36 of 2014 of 24.09.2014 registered at Police Station, Shillai.

2. The present applications have been filed by the bail applicants under Section 439 of the Code of Criminal Procedure for enlarging them on bail for theirs allegedly having committed offences punishable under Sections 313, 376, 354-B of the IPC and Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, recorded in FIR No.36 of 2014 of 24.9.2014, registered at Police Station, Shillai, Distt. Sirmour, H.P.

3. On the previous dates all the bail applicants surrendered themselves to the jurisdiction of this Court and today too they have surrendered to the jurisdiction of this Court, which comprises and constitutes 'deemed custody' within the meaning and ambit of Section 439 of the Cr.P.C., so as to render the instant petitions maintainable under the aforesaid provisions of law, there being a statutory bar under The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act against the preferment of a petition under Section 438 of the Cr.P.C. Age of the prosecutrix at the time of the occurrence, as disclosed by the Investigating Officer, was 18 ½ years, hence, she at the time of occurrence had acquired the age of consent.

4. The allegations against bail applicant Prithvi Singh are of his initially in November, 2013 having perpetrated forcible sexual intercourse on the person of the prosecutrix/victim and his having continuously for five months thereafter, too done likewise. She is also alleged to have conceived a child from the loins of the bail applicant Prithvi Singh besides, both Prithvi Singh and bail applicant Charan Singh are alleged to have forcibly aborted the child carried by the prosecutrix/victim in her womb. However, the complaint/FIR at the instance of the victim/prosecutrix came to be belatedly lodged against the co-bail applicant Prithvi Singh on 24.09.2014. The delay in its lodging is inordinate. The protracted delay in the filing/lodging of the FIR against the co-bail applicant Prithvi Singh does surge forth an inference of its institution being begotten by premeditation and concoction. Obviously then the allegations comprised in the FIR against Prithvi Singh may prima facie be construable to be tainted with the vice of prevarication. Moreover, the concomitant inference of sexual intercourses, if any, of the bail applicant Prithvi Singh with the prosecutrix/victim being consensual also arises. What aggravates the inference aforesaid is comprised in the factum of hers having conceived a child from the loins of bail applicant Prithvi Singh. Even if the child carried by the prosecutrix/victim in her womb as purportedly begotten from the loins of bail applicant Prithvi Singh was allegedly forcibly aborted, yet the factum of its abortion having been sequeled by force having remained un-complained to the police or to the Gram Panchayat, leaves open an inference that she too consented to its abortion. Consequently, even if, the learned Deputy Advocate General submits that she is working as a bonded labourer in the lands of co-bail applicant Tota Ram son of Shri Tulsi Ram which factum dissuaded her from promptly lodging a complaint before the quarter concerned articulating therein the grievances which have been belatedly conveyed by her in the month of September, 2014, nonetheless, the said submission looses its force in the face of the bail applicant Tota Ram bearing the parentage of Tulsi Ram whereas with the disclosure in the status report of the victim/prosecutrix working in the fields of Tota Ram son of Shri Bhup Singh, hence, with the latter bearing a parentage contradistinct to the one born by the bail applicant Tota Ram belies not only the factum of hers working as a bonded labour in the lands of bail applicant Tota Ram but also benumbs the said factum constituting a dissuasive factor for the

victim to omit to promptly lodge a complaint with the quarter concerned. As a sequel with delay having remained unexplained, concomitantly shears the allegations in the FIR of any vestige of truth. Nonetheless, even if, she was assumingly, purportedly working as a bonded labourer in the fields of Tota Ram son of Shri Tulsi Ram, she could have complained the matter to the quarter concerned at the earliest. The inordinate prolonged reticence of the victim/prosecutrix does convey her consensuality to the acts, if any, of the bail applicants Prithvi Singh and Charan Singh. In aftermath, prima facie at this stage, it is apparent that no offence is constituted against the bail applicants Prithvi Singh and Charan Singh.

5. In so far as the other co-accused Ghuman Singh and Balbir Singh are concerned, they are alleged to have outraged her modesty on 14.09.2014. The said act was purportedly carried out by the bail applicants in a jungle. The act as alleged against the aforesaid bail applicants also remained un-complained on 14.09.2014. The reticence of the victim/prosecutrix qua the said act is also enigmatic. Even though an explanation has emanated from the learned Deputy Advocate General that given the factum of hers working as a bonded labourer in the lands of bail applicant Tota Ram dissuaded her to promptly lodge the complaint. Nonetheless when for reasons attributed hereinabove while dispelling the said contention qua bail applicants Charan Singh and Prithvi Singh, it has been held to be carrying no force, as a sequel for para materia reasons the purported reticence of the victim/prosecutrix for 10 days arising from the purported dissuasive factor gains no leverage, rather boosts an inference of the FIR being tainted with the vice of concoctions and premeditations. Consequently, the allegations comprised therein are prima facie rendered at this stage to be unfounded. It is settled law that prompt lodging of the complaint to the quarters concerned has its own virtues, inasmuch as it fosters an inference of the genesis of the occurrence being ingrained with truth. Belated lodging of the complaint affects and vitiates the truth qua the genesis of the occurrence, besides a concomitant inference of the genesis of the occurrence being concocted and conjectured gains momentum. As a natural corollary when the delay is immense and remains unexplained by cogent reasons, the vitiatory factors aforesaid infect the truth qua the genesis of the occurrence. Accordingly, the bail applications are allowed and order of 8th October, 2014 rendered in Cr.MP(M) Nos. 1159 of 2014, 1160 of 2014 and 1161 of 2014 and order of 10th October, 2014 rendered in Cr.MP(M) No.1175 of 2014 are made absolute subject to the compliance of further conditions:

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

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

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

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

However, it is made clear that the findings rendered by this Court hereinabove shall have no bearing on the merits of the case. Dasti copy.

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

Sh Ramesh son of Sh Dil Bahadur .....Petitioner.
Versus
State of HP and others. .....Respondents.

CWP No. 9203 of 2011
Order reserved on: 21.10.2014.
Date of Order: October 28, 2014

Constitution of India, 1950- Article 226- Petitioner pleaded that he had completed 8 years of service as daily wager and is entitled for regularization of his services- held, that regularization depends upon the vacancy and can be made on the recommendation of the selection committee constituted by Appointing authority- respondent specifically pleaded that no vacancy for mason was available against which petitioner could be regularized- petitioner had also not mentioned that any vacant post was available, therefore, respondent could not be directed to regularize the services of the petitioner- however, respondent directed to regularize the service of the petitioner as and when any vacancy would arise. (Para-5 & 6)

For the petitioner: Mr.P.D.Nanda, Advocate
For Respondent-1. Mr. M.L.Chauhan, Addl. Advocate General with Mr.Pushpinder Singh Jaswal, Dy Advocate General.
For respondents 2&3: Mr. Ashwani Sharma and Mr. Pranay Pratap Singh, Advocates.

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 Sh Ramesh petitioner is the Nepali citizen and is employed in HP State Forest Development Corporation on daily wages as mason on dated 1.4.1994. It is pleaded that on 31.3.2002 petitioner completed eight years of daily wage service and is legally entitled for regularization of his service. It is further pleaded that petitioner is legally entitled for work charge status in view

of the order passed by High Court of HP in CWP No. 4866 of 2010 titled Kharak Singh Vs. State of HP decided on 6.10.2010. It is further pleaded that eligibility certificate was issued on 10.06.2011 but till date petitioner is not regularized. It is further pleaded that respondents be directed to consider the case of the petitioner to regularize the services of the petitioner. It is further pleaded that even option given by the petitioner for regularization of his service as un-skilled worker but till date petitioner is not regularized. Prayer for regularization of service as mason sought from 01.04.1994 with all consequential benefits. In alternative regularization of services of petitioner as mason sought like other 1030 daily wagers in various government departments.

2. Per contra reply filed on behalf of respondents pleaded therein that present petitioner is Nepali citizen and is employed as daily wager in the HP State Forest Development Corporation. It is pleaded that dispute is covered under Industrial Disputes Act. It is further pleaded that as per Recruitment and Promotion Rules of the Government of HP as amended and conveyed vide memorandum No. PER AP-11 0 A (3) 2/80 dated 11.7.2000 only Indian citizen are entitled for employment under the Government of Himachal Pradesh. It is further pleaded that petitioner is a Nepali citizen and is not Indian and he is not legally entitled for regularization of his service. It is further pleaded that eligibility certificate was issued from the competent authority as per Recruitment and Promotion Rules. It is further pleaded that earlier Nepalese were entitled to government service on production of eligibility certificate. It is further pleaded that according to amended rules only Indian citizens are entitled for regularization of service. It is further pleaded that merely issuance of eligibility certificate did not entitle the petitioner for regularization of his service. It is further pleaded that regularization of service in public post is based upon as per terms and conditions of Recruitment and Promotion Rules and as per availability of vacancy. It is further pleaded that as of today there is no regular post of mason in the HP State Forest Development Corporation. It is further pleaded that HP State Forest Development Corporation is making efforts to adjust the petitioner as unskilled worker against the vacancy and matter has been taken with the State Government. It is further pleaded that petitioner has given offer for regularization of his service as unskilled worker. It is further pleaded that petitioner will be appointed on the post of unskilled worker after the approval received from the Government. It is further pleaded that as of today there is no regular post of mason available with the HP State Forest Development Corporation. It is further pleaded that although respondent Corporation has initiated a process of offering alternate regularization as a unskilled worker in its Rosin & Turpentine Factories at Bilaspur/Nahan against vacancy and petitioner has also opted for such regularization but petitioner did not fulfill requisite qualification for the post of unskilled worker as per Recruitment and Promotion Rules being illiterate. It is admitted that petitioner is working as mason with the respondent-Corporation w.e.f. 1.8.1998. It is denied that petitioner is working on daily wages since 01.04.1994. It is well settled law that as per ruling of

the Apex Court of India regularization of the service of daily wager is possible only when regular vacancy is available. Prayer for dismissal of writ petition sought. Petitioner also 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 appearing on behalf of the State and learned Advocate appearing on behalf of respondent-Corporation 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 his service as mason as alleged?

(2) Whether in alternative respondents are liable to regularize the service of petitioner as mason like other 1030 daily wagers in various government departments subject to availability of regular vacancy of mason as alleged?

(3) Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner be regularized as mason on completion of eight years of service with all consequential benefits is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that regularization of employee is depend upon the vacancy. Respondents have specifically pleaded in the reply that no vacancy of mason is available in the HP State Forrest Development Corporation Limited as of today. It is well settled law that regularization of employee is based upon recommendation of selection committee appointed by the appointing authority. It is proved on record that petitioner is a Nepali citizen. It is also proved on record that petitioner has obtained eligibility certificate from competent authority of law. However at this stage due to non-availability of post of mason respondents could not be directed to regularize the service of petitioner upon the regular post of mason which is not available in the HP State Forest Development Corporation. Point No.1 is decided against the petitioner.

Finding upon Point No.2

6. Submission of learned Advocate appearing on behalf of the petitioner that in the alternative respondents be directed to regularize the service of the petitioner as mason like other 1030 daily wagers in various government departments subject to availability of regular vacancy is accepted for the reason hereinafter mentioned. Respondents have admitted in their reply that some of the daily wagers of respondent-Corporation have been regularized in government department in equivalent post against the vacancies. It is held that on the concept of equality under Article 14 of the Constitution of India petitioner is legally

entitled to be regularized in government department in equivalent post subject to availability of regular vacancy of mason because petitioner has obtained eligibility certificate from the competent authority of law as of today and in view of ruling reported in 1994 Supp (2) SCC 316 titled Mool Raj Upadhyaya Vs. State of HP and others and in view of ruling reported in 2007 (12) SCC 43 titled State of HP and others Vs. Gehar Singh and in view of ruling given by Hon'ble High Court of HP in CWP No. 4866 of 2010 titled Kharak Singh Vs. State of HP and others decided on 6.10.2010.

7. Submission of learned Advocate appearing on behalf of the respondents that petitioner has himself opted for unskilled post and on this ground petitioner is not legally entitled to be adjusted as mason in the government department is rejected for the reason hereinafter mentioned. Petitioner has specifically mentioned in rejoinder that consent of the petitioner regarding adjustment upon unskilled post was obtained with coercion. It is held that any consent obtained under coercion is void ab initio. Point No.2 is decided accordingly.

Final Order

8. In view of the above stated facts it is held (1) That petitioner cannot be regularized as a mason in the HP State Forest Development Corporation due to non availability of regular post of mason as of today. (2) It is held that in alternative case of the petitioner will be considered for regularization upon the post of mason in other government department subject to availability of regular post of mason in other department similar to other 1030 daily wagers adjusted in various departments strictly in accordance with law after obtaining recommendation of the selection committee appointed by the appointing authority. It is clarified that if the vacancy of mason is available in the HP State Forest Development Corporation as of today then the case of the petitioner for regularization of his service as mason in the HP State Forest Development Corporation will be considered strictly 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 RAJIV SHARMA, JUDGE.

Thelu .....Appellant.
Vs.
Smt. Lakhanu & ors. .....Respondents.

RSA No. 190 of 2012.
Reserved on: October 20, 2014.
Decided on: October 28, 2014.

Specific Relief Act, 1963- Section 34- Plaintiff claimed to be the daughter of one B -the property of B was mutated in favour of defendants

on the ground that their predecessor-in-interest was real brother of B- held, that the version of the plaintiff that she is the daughter of B has been duly corroborated by Voter Identity Card which carried with it a presumption of correctness- hence, she was entitled to inherit the estate of her father- mutation attested in favour of the defendants is wrong.

(Para-15)

For the appellant(s): Mr. N.K.Thakur, Sr. Advocate, with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Neel Kamal Sharma, Advocate, for respondent No. 1.
None for respondents No. 2 to 12.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree passed by the learned Addl. District Judge, (Fast Track Court), Chamba, dated 30.11.2011, passed in Civil Appeal No. 18 of 2010.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake), has filed a suit for declaration, possession and permanent prohibitory injunction against the appellants-defendants as well as the proforma defendants (hereinafter referred to as the defendants for the convenience sake).

3. The plaintiff is deaf and dumb by birth. She was under the guardianship of Punnu Ram after the death of her father Bali Ram. Punu Ram after the death of Bali Ram was looking after her. He was maintaining her. The interest of the next friend was not adverse in any manner. The father of the plaintiff was owner-in-possession of the suit land, as detailed in the plaint. Sh. Bali Ram expired leaving behind plaintiff as sole legal heir, being daughter of the deceased. Gangu was real Uncle of the plaintiff, who in connivance with the revenue officials, got mutation No. 153 dated 19.10.1980, sanctioned and attested in his favour at the back of the plaintiff. The plaintiff was minor. She was never served. After the death of Gangu, mutation No. 212 dated 13.2.1990 was sanctioned and attested in favour of the contesting defendants. She being the sole legal heir of deceased Bali Ram was owner in possession of the suit land. The contesting defendants forcibly in the month of May, 2000, took the possession of the suit land except Khasra Nos. 76 & 80. She obtained the revenue papers in the month of June, 2000 only then she came to know for the first time that the suit land has been mutated in favour of the contesting defendants. She was in peaceful possession of the suit land comprised in Kh. Nos. 76 & 80 as owner being heir of deceased Bali Ram. The defendants on the basis of the revenue entry took the forcible possession of land measuring 13.4.

bighas out of the entire land of 18.18 bighas situated at Mauza Dalla and cultivated maize crop.

4. The suit was resisted by the defendants. According to them, the plaintiff was not daughter of Bali Ram. It was admitted that Bali Ram was owner-in-possession of the suit land. The contesting defendants are legal heirs of deceased Bali Ram. Gangu Ram was real brother of deceased Bali Ram and after the death of Gangu Ram, the contesting defendants are the legal heirs. Gangu Ram was in physical possession of the suit land. The plaintiff has no right, title or interest over the suit land. The mutations were legal and valid.

5. The plaintiff filed replication. The legal heirs of defendant Pan Chand were brought on record vide order dated 1.5.2010. The learned Civil Judge (Sr. Divn.) Chamba, framed the issues on 7.1.2003 and 20.8.2004. The learned Civil Judge (Sr. Divn.), Chamba, decreed the suit on 1.6.2010. Defendants No. 2, 3 & 4, as arrayed in the suit and one of the legal heirs Khem Raj of deceased Paan Chand filed an appeal before the learned Addl. District Judge, Fast Track Court, Chamba. The learned Addl. District Judge, Fast Track Court, Chamba, dismissed the same on 30.11.2011. Hence, this regular second appeal. There was no representation on behalf of respondents No. 2 to 12. They were proceeded against ex parte.

6. Mr. Naresh Thakur, learned Senior Advocate, on the basis of the substantial questions of law, has vehemently argued that both the Courts' below have misread and misconstrued the oral as well as documentary evidence. According to him, the plaintiff has miserably failed to prove that she was daughter of Bali Ram. He further contended that the suit is barred by limitation. On the other hand, Mr. Neel Kamal Sharma, Advocate appearing for defendant No. 1 has supported the judgments and decrees passed by both the Courts' below.

7. Since all the substantial questions of law are interconnected, these were taken up and decided together to avoid repetition and discussion of evidence.

8. The learned Appellate Court has framed the following issues for determination:

> "1. Whether the plaintiff is not daughter and sole legal heir of deceased Bali Ram?
>
> 2. Whether the plaintiff is not deaf and dumb and being so, Punnu Ram was not competent to file and maintain the suit on behalf of plaintiff as her next friend?
>
> 3. Whether the impugned judgment and decree dated 1-6-2010 passed by the learned Civil Judge (Senior Division) Chamba in Civil Suit No. 131/2000 titled as Lakhanu Versus Paan Chand deceased through LRs and others is legally sustainable in the eyes of law and facts?
>
> 4. Final order."

9. It was not in dispute that Bali Ram was owner of the suit land to the extent of ½ share as per Jamabandi Ext. P5, for the year 1977-78. He was shown as joint owner-in-possession over the suit land.

10. The plaintiff has appeared as PW-1. She deposed that she is the daughter of the deceased Bali Ram. She was in possession of 4 bighas of land out of the suit land and defendants have no concern with deceased Bali Ram. The plaintiff has placed on record the copy of Parivar Register Ext. P1. In Ext.P1, plaintiff is shown as daughter of deceased Bali Ram. She has also placed on record identity card issued by the Election Commission of India.

11. PW-2 Hira Lal has deposed that plaintiff was known to him. The name of the father of the plaintiff was Bali Ram. The name of the mother of plaintiff was Molku. The defendants have not placed any evidence to establish that Bali Ram had any other class-I heir.

12. According to DW-1, Lakhnu was not daughter of Bali Ram. The defendant has not examined even a single witness to rebut the copy of Parivar Register Ext. P1. A suggestion was put to PW-1 that Molku was wife of Nirmal and she has 5 children including the plaintiff. PW-1 has shown ignorance. DW-1 has clearly admitted in his cross-examination that Molku was wife of Bali Ram. He has also admitted that Molku died before Bali Ram. Bali Ram died on 31.3.1980. In his cross-examination, DW-1 has admitted that plaintiff was residing at the house of Bali Ram as his daughter. Defendants have not placed any tangible evidence on record to establish that Molku was married to Nirmal.

13. Now, as far as copy of Parivar Register Ext. P1 is concerned, the mother's name of plaintiff has not been mentioned. However, the fact of the matter is that plaintiff's mother died before the death of her father. It is for this reason that the name was not recorded in Ext. P1. In Voter Identity Card Ext. P2, Bali Ram has been shown as the father of the plaintiff, these documents have been prepared by the public servants in discharge of their lawful duties. There is presumption of truth attached to them. Nothing contrary has been placed on record by the defendants to disapprove Ext. P-1 and P-2.

14. PW-2 Hira Lal is an independent witness. He is resident of the same area. Both the Courts' below have rightly come to the conclusion that plaintiff was daughter of Bali Ram on the basis of oral as well as documentary evidence. PW-1 Punnu Ram is the next friend of the plaintiff. According to him, the plaintiff is unable to hear and speak. Even DW-1, Thelu Ram has admitted in his cross-examination that plaintiff was deaf and dumb. DW-2 Paras Ram has admitted that plaintiff only understands through signs and is hard of hearing. PW-3 Dr. S.K. Mahajan has also deposed that Medical Board was constituted to examine the plaintiff on 16.10.2004. They issued certificate Ext. PW-3/A. The disability of the plaintiff was to the extent of 80%, permanent in nature. It was a case of profound deafness and

disability was in relation to hearing and speech. PW-1 has moved an application under Order 32 Rule 4 CPC. The learned trial Court has framed two more issues on 20.8.2004, vide issue Nos. 10(a) and 10(b), including whether the plaintiff was deaf and dumb.

15. The findings that plaintiff is deaf and dumb are duly supported by evidence. The plaintiff was deaf and dumb. There is nothing on record to suggest that she was able to watch her interest. The suit was filed during her disability. She has applied for revenue papers only in the month of June, 2000, when she was forcibly evicted. She being the class-I heir, was entitled to inherit the estate of Bali Ram. Gangu Ram, being brother was not entitled to inherit the estate of Bali Ram. Mutation No.153 dated 19.10.1980 was illegal and Mutation No. 212 attested on 13.2.1990 has rightly been declared null and void by both the Courts' below. Plaintiff has been correctly declared owner of the suit land as per the decree. The Courts' below have correctly appreciated the oral as well as documentary evidence. The plaintiff has conclusively proved that she is the daughter of Bali Ram. The suit was filed within the limitation. The substantial questions of law are answered accordingly.

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

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

Gaji Ram & ors. ..... Petitioners.

Vs.

Smt. Badalu ..... Respondent

Cr. Revision No. 215 of 2014.
Date of decision: 29.10.2014.

Protection of Women from Domestic Violence Act, 2005- Sections 2(s), 17, 18, 19 and 20 - Applicant filed an application under Protection of Women from Domestic Violence Act with the allegations that she and her minor child were staying in the matrimonial home which was in her possession prior to the death of her husband- family members of the deceased/husband started harassing the applicant after the death of her husband- Learned Sessions Judge allowed the appeal and held that the applicant is entitled to a shared accommodation consisting of one room, one kitchen and one bath room- held, that a woman cannot lay claim to every household where she lives or has lived at any stage in a domestic relationship and she is entitled to claim a right of residence in a house belonging to or taken on rent by the husband or the house, which belongs to the joint family of which the husband is a member- in case house is self-acquired property of her father-in-law then it cannot be called as shared household where she has a right of residence- however,

family members of her deceased husband are liable to maintain the applicant. (Para- 11 to 15)

Cases referred:

S.R.Batra and another vs. Taruna Batra (Smt.) (2007) 3 SCC 169

Kota Varaprasada Rao and another vs. Kota China Venkaiah and others AIR 1992 AP 1

For the petitioners : Mr. Parveen Chauhan, Advocate.
For the respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

This criminal revision under sections 397, 401 of the Code of Criminal Procedure is directed against the judgement dated 30.6.2014 passed by the learned Sessions Judge, Chamba in Criminal Appeal No. 11 of 2013, whereby he set-aside the order passed by the learned Judicial Magistrate Ist Class, Chamba on an application moved by the respondent under section 12 read with sections 17, 18, 19 and 20 of Protection of Women from Domestic Violence Act, 2005 (43 of 2005) (for short, the Act) and directed the petitioners to provide accommodation to the respondent and till then to pay Rs.2,000/- to the respondent from the date of filing of the complaint.

2. The allegation set out by the respondent in the complaint was that her marriage had been solemnized with Doli Ram in the year 1988 as per Hindu rites and customs and one girl was born out of the said wedlock. Doli Ram died in the year 1993 and thereafter the respondent alongwith her minor child was staying in the matrimonial home, which was in her possession prior to the death of her husband. Further allegations were that after the death of her husband, his family members, who were petitioners herein started maltreating, misbehaving and abusing her with a view to compel her to leave the room and kitchen which were in her possession and thereafter about two years back, she had been thrown out of the house.

3. The petitioners filed their reply taking preliminary objections regarding maintainability, estoppel and that the respondent has suppressed material facts. On merits, it was averred that after the death of her husband, the respondent started residing at her parents house alongwith her daughter and did not reside in the matrimonial home.

4. The parties led evidence and the learned Magistrate vide order dated 24.8.2013 dismissed the application on the ground that it was very unlikely that respondent was residing in the same house after the death of her husband and therefore, her remedy lies before the civil court and no case of domestic violence was made out.

Against the aforesaid judgement, the respondent preferred an appeal in the court of learned Sessions Judge, who vide his order dated 30.6.2014 allowed the appeal and held the respondent to be entitled to a shared accommodation consisting of one room, one kitchen and one bath room with all ancillary facilities in the house, which was in possession of the petitioners and till such accommodation is not made available to the respondent, she was held entitled to a monthly maintenance of Rs.2,000/-.

5. The order passed by the learned Sessions Judge has been assailed before this court on the ground that the order passed by the learned Sessions Judge is based on surmises and conjectures without taking into consideration that respondent had during the life time of her husband filed a divorce petition in the year 1993 and it was during the pendency of that petition that her husband died. Therefore, it was not a case to which the provisions of the Act would apply.

6. The learned counsel for the petitioners also argued that a wife is entitled to accommodation only in the house, which is joint family property, while in the present case the house was owned by her father-in-law and was his separate property in which shared accommodation could not have been granted. It was further claimed that respondent-petitioner No. 1 is 80 years old man having no source of income and is unable to pay such huge amount of maintenance.

7. In response thereto the learned counsel for the respondent has supported the order passed by the learned Sessions Judge and has claimed that respondent is a total destitute and it is not only moral duty but a legal obligation of the family members of the petitioners to maintain and provide residence to the respondent.

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

8. The learned Sessions Judge in support of his conclusion that the respondent is entitled to a shared accommodation has accorded the following reasons:-

> *"15. After analyzing the entire matter, I find force in the contentions raised by the appellant, which are fully corroborated by the oral evidence produced by her. It may be relevant to refer to the judgement of the Hon'ble Bombay High Court reported as Karim Khan vs. State and anr. 2011 (4) Crimes 425 (Bom.), in which the Hon'ble Bombay High Court has held that 'continued deprivation of economic or financial resources and continued prohibition or denial of access for he shared household to the aggrieved person is a domestic violence and the protection under the Act of 2005 will be available to the respondent/ wife who was driven out from her husband's shared household prior to coming into effect of the Act of 2005, but the deprivation continued even after the Act came into force.' Similarly, Hon'ble Orissa High Court in Gangadhar Pradhan vs. Rashmibala Pradhan 2012(4) Crimes 580 (Ori.) has held that 'Protection of Domestic Violence Act, 2005 provides for a higher right*

in favour of the wife who not only acquires a right to be maintained but also thereunder acquires a right of residence. However, said right as per the legislation extends only to joint properties in which the husband has a share.' The Hon'ble Allahabad High Court in Nishan Sharma and Ors. Vs. State of U.P. and others 2013(1) Crimes 245 (All.) has held that 'where the husband was residing as a part of joint family in a house, which belonged to his father, it being shared household the wife aggrieved person would be entitled to claim right of residence in such house.'

16. In view of the law cited supra, which is squarely applicable to the facts of this case, I am of the view that appellant- aggrieved person being wife of Shri Doli Ram, who had a share in joint family property, which is now in the possession of the respondents, has got right to a shared accommodation consisting of one room one kitchen and one bath room with all ancillary facilities in the house, which is presently in the possession of the respondents. Till such accommodation is made available to the appellant by the respondents, the appellant is held entitled to a monthly maintenance of Rs.2000/- from the date of this judgement."

9. Section 2(s) of the Act describes shared household thus:-

"2. (s) 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;"

10. No doubt, the definition of "shared household" aforesaid is not happily worded, but then the same cannot mean that a women can lay claim at every household where she lives or has lived at any stage in a domestic relationship. The wife is only entitled to claim a right of residence in a shared household and a shared household would only mean the house belonging to or taken on rent by the husband or the house which belongs to the joint family of which the husband is a member. In case it is the self acquired property of the father-in-law as is contended in the present case, then it cannot be called as shared household.

11. A similar question came up for consideration before the Hon'ble Supreme Court in **S.R.Batra and another** vs. **Taruna Batra (Smt.) (2007) 3 SCC 169,** wherein the Hon'ble Supreme Court has held as follows:-

"24. Learned counsel for the respondent Smt Taruna Batra stated that the definition of shared household includes a household where

the person aggrieved lives or at any stage had lived in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household.

25. We cannot agree with this submission.

26. If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces, etc. If the interpretation canvassed by the learned counsel' for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.

27. It is well settled that any interpretation which leads to absurdity should not be accepted.

28. Learned counsel for the respondent Smt Taruna Batra has relied upon Section 19(1)(f) of the Act and claimed that she should be given an alternative accommodation. In our opinion, the claim for alternative accommodation can only be made against the husband and not against the husband's (sic) in-laws or other relatives.

29. As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of Appellant 2, mother of Amit Batra. Hence it cannot be called a "shared household".

30. No doubt, the definition of "shared household" in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society."

12. But would that mean that respondent cannot be held entitled to a monthly rent of Rs.2,000/- in lieu of a right to a shared accommodation? To my mind, the respondent would still be entitled to maintenance from the petitioners who are none other than the family members of her deceased husband. The petitioner No.1 is her father-in-law and petitioner No. 2 is her mother-in-law and petitioners No. 3 to 5 are her brother-in-laws. Since the factum of marriage has not been denied the petitioners owe not only a moral obligation but a legal duty to

maintain the respondent by providing her basic amenities of life i.e. food, clothing and shelter, if not anything more.

13. The law on the subject has been elaborately dealt in **Kota Varaprasada Rao and another** vs. **Kota China Venkaiah and others AIR 1992 AP 1**, it has been held as follows:-

> *"8. The oldest case decided on the subject is one in Khetramani Dasi v. Kashinath Das, (1868) 2 Bengal LR 15. There, the father-in-law was sued by a Hindu widow for maintenance. Deciding the right of the widow for maintenance, the Calcutta High Court referred to the Shastric law as under:*
>
> *"The duty of maintaining one's family is, however, clearly laid down in the Dayabhaga, Chapter II, Section XXIII, in these words:*
>
> *'The maintenance of the family is an indispensable obligation, as Manu positively declares.' Sir Thomas Strange in his work on Hindu Law Vol. I page 67, says:*
>
> *'Maintenance by a man of his dependants is, with the Hindus, a primary duty. They hold that he must be just, before he is generous, his charity beginning at home; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with the family whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends according to Manu and Yajnavalkya to the outcast, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment."*
>
> *At page 21, the learned Judges have also referred to a situation where there is nothing absolutely for the Hindu widow to maintain herself from the parents-in-law's branch by referring to the following texts from NARADA:*
>
> *"In Book IV, Chapter I Section I, Art. XIII of Celebrooke's Digest, are the following texts from NARADA:*
>
> *'After the death of her husband, the nearest kinsman on his side has authority over a woman who has no son; in regard to the expenditurte of wealth, the government of herself, and her maintenance, he has full dominion. If the husband's family be extinct, or the kinsman be unmanly, or destitute of means to support her, or if there is no Sapindas, a kinsman on the father's side shall have authority over the woman; and the comment on this passage is : "'Kinsman on the husband's side; of his father's or mother's race in the order of proximity. 'Maintenance' means subsistence. Thus, without his consent, she may not give away anything to any person, nor indulge herself in matters of shape, taste, small, or the like, and if the means of subsistence be wanting he must provide her maintenance. But if the kinsman be unmanly (defecient in manly*

capacity to discriminate right from wrong) or destitute of means to support her, if there be no such person able to provide the means of subsistence, or if there be no SAPINDAS, then any how, determining from her own judgment on the means of preserving life and duty, let her announce her affinity in this mode : 'I am the wife of such a man's uncle; 'and if that be ineffectual, let her revert to her father's kindred; or in failure of this, recourse may be had even to her mother's kindered" (Emphasis supplied.)

In Book III, Chapter II, Section II, Art. CXXII, of Colebrooke's Digest, we have the following texts and comments:

"She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from her husband's father or mother, or from her maternal uncle; else she becomes infamous."

As per the above texts and comments, a Hindu widow if the parents-in-law's branch is unmanly or destitute of means to support her is entitled to be with the father or the kinsman on the father's side.

9. In Janki v. Nand Ram, (1889) ILR 11 All 194 (FB), a Hindu widow after the death of her father-in-law sued her brother-in-law and her father-in-law's widow. The Full Bench of the Allahabad High Court held that the father-in-law was under a moral, though not legal, obligation not only to maintain his widowed daughter-in-law during his life time, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by a suit against the son and against the property in question. While so deciding, the learned Judges at page 210 made a reference to a passage from Dr. Gurudas Banerjee's Tagore Law Lectures, thus:

"We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the dependant members of his family. The following are a few of the many texts on the subject:--

MANU: 'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.'

NARADA: 'Even they who are born, or yet unborn and they who exist in the womb, require funds for subsistence; deprivation of the means of subsistence is reprehended.'

BRIHASPATI: 'A man may give what remains after the food and clothing of his family, the giver of more who leaves his family naked

and unfed, may taste honey at first, but still afterwards find it poison.' "

The text of MANU as added reads:

"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit: even what he does for the sake of his future spiritual body, to the injury of those whom he is found to maintain, shall bring him ultimate misery both in this life and in the next."

Having so quoted the texts, the Full Bench based its judgment on the proposition:

> *".....under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property."*

10. In Kamini Dassee v. Chandra Pode Handle, (1890) ILR 17 Cal 373, it is held by the Calcutta High Court that the principle that an heir succeeding to the property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School and accordingly decreed the suit for maintenance laid by a widowed brother against her husband's brothers.

11. In Devi Prasad v. Gunvati Koer, (1894) ILR 22 Cal 410, deciding an action brought for maintenance by a Hindu widow against the brothers and nephew of her deceased husband after the death of her father-in-law, the Calcutta High Court held that the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life time, enforced partition of that property, and as the Hindu law provides that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff was entitled to maintenance.

12. In Bai Mangal v. Bai Rukmini, (1899) ILR 23 Bom 291, the statement of law of MAYNE that

> *"After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but if they are unable to support her, she must be provided for by the., family of her father."*

was understood to have been one of monetary character than laying down any general legal obligation. The learned Judge, Ranede, J., after examining all the authorities has broadly laid down the law, as he understood, thus:

> *"In fact, all the text writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance from the husband's*

family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." (page 295).

13. However, the same learned Judge, Ranede, J., in a later case in Yamuna Bai v. Manubai, (1899) ILR 23 Bom 608, expressed his absolute concurrence with the law laid down by the Allahabad High Court in Janaki's case, (1889 ILR 11 All 194) (supra), as regards the right of the widow of a predeceased son to maintenance against the estate of the deceased father-in-law in the hands of his heirs.

14. The view of Ranede, J., in Bai Man-gal's case, (1899 ILR 23 Bom 291) (supra), was further conditioned by Ammer Ali, J., in Mokhoda Dassee v. Nundo Lall Haldar, (1900) ILR 27 Cal 555, by holding that the right of maintenance is again subject to the satisfaction of the fact that the widowed sonless daughter must have been at the time of her father's death maintained by him as a dependant member of the family.

15. But, both the views of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra), and Ameer Ali, J., in Mokhode Dassee's case, (1900 ILR 27 Cal 555) (supra), did not find acceptance of A. K. Sinha, J., of the Calcutta High Court in Khanta Moni v. Shyam Chand, . The learned Judge held that a widowed daughter to sustain her claim for maintenance need not be a destitute nor need be actually maintained by the father during his life time... All that she is required to prove to get such maintenance, the learned Judge held, is that at the material time she is a destitute and she could not get any maintenance from her husband's family."

"19. In Appavu Udayan v. Nallamrnal, AIR 1949 Madras 24, the Madras High Court has to deal with the rights of daughter-in-law against her father-in-law and his estate in the hands of his heirs. There it is held that the father-in-law is under a moral obligation to maintain his widowed daughter-in-law out of his self-acquired property and that on his death if his self-acquired property descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal one against his heirs.

20. A Full Bench of this High Court in T. A. Lakshmi Narasamba v. T. Sundaramma, AIR 1981 Andh Pra 88 held:

"The moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he has either bequeathed or made a gift of his property.

Under the Hindu law there is a moral obligation on the father-in-law to maintain the daughter-in-law and the heirs who inherit the property are liable to maintain the dependants. It is the

duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants pf the persons of property they succeeded. Merely because the property is transferred by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case."

21. It is rather pertinent to notice here that the view of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra) has been dissented from specifically by the Full Bench of this High Court."

14. In view of aforesaid exposition of law, the respondent being a destitute widow can definitely enforce her claim of maintenance including residence against her in-laws and her brother-in-laws. In so far as the plea regarding petitioner No. 1 being an old aged and infirm person of 80 years having no independent source of income is concerned, the same is merit less because it is not the petitioner No. 1 alone who has been fastened with the liability to pay monthly maintenance of Rs.2000/-, but it is petitioners jointly who have been fastened with the liability.

15. With these modification, the petition is disposed of, leaving the parties to bear their own costs.

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

Sh. Jitender Singh ....Petitioner
Versus
State of H.P. & others ....Respondents

CWP No. 3773 of 2014 a/w Ors.
Date of decision: 29.10.2014

Constitution of India, 1950- Article 226- **Himachal Pradesh Motor Vehicles Taxation Act, 1972**- Section 50- Petitioner filed a petition challenging the order passed by the Competent Authority under Himachal Pradesh Motor Vehicles Taxation Act, 1972- held, that Section 50 of Himachal Pradesh Motor Vehicles Taxation Act, 1972 provides remedy of appeal, therefore, Writ Petition is not maintainable.

(Para- 9 to 10)

For the petitioner(s) : Mr. Varun Thakur, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

In all these writ petitions, the petitioners have called in question the orders made by the competent authority, in terms of the Himachal Pradesh Motor Vehicles Taxation Act, 1972 read with the Revenue Recovery Act, 1980, whereby the District Collector-cum-Deputy Commissioner, Sirmour at Nahan, Himachal Pradesh, was asked to effect the recovery as land revenue.

2. We deem it proper to dispose of all these writ petitions by this common judgment for the reason that similar questions are involved.

3. The moot question is-whether these writ petitions are maintainable?

4. We had an occasion to hear and decide a batch of writ petitions, the lead case of which was CWP No. 4779/2014, titled as M/s Indian Technomac Company Ltd. versus State of Himachal Pradesh and others, decided on 4th August, 2014, whereby it was held that the writ petitions were not maintainable and came to be dismissed by providing that the writ petitioners are at liberty to seek appropriate remedy for the reason that the writ petitioners had an alternative remedy available, i.e. the remedy of appeal.

5. Feeling aggrieved by the aforesaid judgment, the petitioners filed the Special Leave to Appeal (C) No. 22626-22641/2014, before the Apex Court, was dismissed vide judgment and order, dated 22nd August, 2014 and the judgment, *supra,* passed by this Court came to be upheld.

6. It is apt to reproduce Section 15 of the Himachal Pradesh Motor Vehicles Taxation Act, 1972, herein:

> *"(1) An appeal shall lie to the appellate authority appointed by the State Government in this behalf, against any original order passed under this Act, within thirty days of the passing of such order or within such period as the appellate authority may, for sufficient cause allow:*
>
> *Provided that no appeal shall be entertained by such authority unless he is satisfied that the amount of tax assessed and penalty imposed has been paid;*
>
> *Provided further that such authority, if satisfied that an owner is unable to make such payment, may, for reasons to be recorded in writing entertain an appeal without such payment having been made"*

7. While going through the aforesaid Section, one comes to an inescapable conclusion that the petitioners have right of appeal, thus are having alternative remedy available.

8. We have taken note of the Apex Court judgments in the judgment passed in CWP No. 4779/2014, *supra.* It is apt to reproduce paras 12 to 16 of the said judgment herein:-

> 12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:
>
> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> "23. ..... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."
>
> *9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)*
>
> "11.....The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognized that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."
>
> *10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).*
>
> *11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:*
>
> *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural*

justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."

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14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/ assessee."

13. The Apex Court in **Nivedita Sharma vs. Cellular OperatorsAssociation of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has

declared that the directions given by the State Commission are without jurisdiction and

that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1 SCC 603,** has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)

"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming

jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of

Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions

of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).*
>
> > *'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"*

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by

the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequentialdemand notices issued thereon."

15. The decisions referred to by the learned counsel for the petitioners have been discussed by the Apex Court in the decisions of **Union of India and another vs. Guwahati Carbon Limited, Nivedita Sharma vs. Cellular Operators Association of India and others** and **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal**, referred to hereinabove.

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available."

9. In view of the ratio laid down by the Apex Court in the aforesaid judgments, the writ petitions are not maintainable.

10. These writ petitions are also to be dismissed on the ground that the petitioners have not questioned the main order, whereby the tax liability stands determined and the writ petitioners were held liable to pay tax.

11. With these observations, all these writ petitions are dismissed, alongwith pending applications. However, the petitioners are at liberty to seek appropriate remedy within three weeks. Till then, the interim order dated 28.05.2014 to continue.

12. It is also provided that the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation.

13. A copy of this judgment be placed on each file.

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

Ashwani Kumar ...Petitioner.

Versus

Himachal Pradesh State Electricity Board & others ...Respondents.

CWP No. 811 of 2011 a/w Ors.
Decided on: 30.10.2014

Constitution of India, 1950- Article 226- Petitioners, who were appointed against the disability quota, claimed that they should be considered for appointment on regular basis from the date of their appointment on contractual basis- held, that in view of mandate of Supreme Court of India of granting reservation to persons with disability, direction issued to the opposite party to consider the case of the petitioners and to take action within 8 weeks. (Para-5)

Case referred:
Union of India & Anr. versus National Federation of the Blind & Ors., (2013) 10 SCC 772

For the petitioner(s): Mr. Ankush Dass Sood & Ms. Shweta Joolka, Advocates.

For the respondents: Mr. Satyen Vaidya & Mr. Rajpal Thakur, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Petitioners have sought writ of mandamus commanding the respondents to consider them as having been appointed on regular basis from the date(s) of their appointment on contractual basis and to pay all

emoluments to the petitioners to which they are entitled as regular employees, on the grounds taken in the memo of respective writ petitions.

2. Learned counsel for the petitioners stated that State has already complied with the mandate of the Apex Court judgments and the Rules occupying the field as per the averments contained in the writ petitions but only the Electricity Board has wrongly made appointment of the handicapped candidates/persons on contract basis, which is not in tune with the judgments of the Apex Court and this Court.

3. Learned counsel for the petitioners has placed reliance on the judgments rendered by the Apex Court in the case tiled as **Union of India & Anr. versus National Federation of the Blind & Ors.,** reported in **(2013) 10 SCC 772; Union of India and others versus National Confederation for Development of Disabled and Anr.,** being **SLP (C) No. 13344 of 2014,** decided on 12th September, 2014; and by this Court in **CWP No. 192 of 2004,** titled as **Ankush Dass Sood versus State of H.P. and others,** decided on 22nd June, 2007.

4. On the last date of hearing, Mr. Satyen Vaidya, Advocate, was asked to seek instructions. He has sought instructions and stated that it is a fact that the respondents have not complied with the mandate of law.

5. Keeping in view the averments contained in the writ petition, the law laid down by the Apex Court and this Court read with the mandate of granting reservation to the handicapped persons/candidates, we deem it proper to direct the respondents to consider the case of the petitioners in light of the judgments (supra), make a decision and pass follow up orders within eight weeks enabling them to reap all the fruits.

6. The writ petitions are disposed of, as indicated hereinabove, alongwith all pending applications.Copy **dasti.**

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

UCO Bank .....Decree-holder/Non applicant.
Vs.
Smt. Sandhya Devi and others .... Judgement Debtors.

OMP Nos. 331 of 2014 and 520 of 2011
in Ex.P. No.2 of 2004.
Date of decision: 30.10.2014.

Code of Civil Procedure, 1908- Section 50-Properties of the applicant, legal representative of original Judgment Debtor, were ordered to be attached - he filed an application for releasing the properties from

attachment on the ground that the properties were self-acquired by him and could not have been attached- the fact that the properties were self-acquired was not disputed by the decree holder- held, that the legal representatives of the judgment debtor are liable for the debts of the deceased only to the extent of estate acquired by them- once the decree holder does not dispute that the properties are self-acquired and that the applicant is the legal representative of the original judgment debtor, properties of applicant could not be attached and put to sale.

(Para- 2 to 5)

For the decree holder : Mr. J.L. Kashyap, Advocate.
For the judgement-debtors: Mr. Anirudh Shrma, Advocate vice Mr. OC. Sharma, Advocate, for JD Nos. 1 & 2.
Mr. Neeraj Gupta, Advocate, for JD Nos.3 to 5/ JD No.2(v)-applicant.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This order shall dispose of an application preferred by the judgement-debtor No.2(v) (hereinafter referred to as the applicant) under Order 21 Rule 58 (1) & 2 read with section 151 CPC for releasing his following properties (hereinafter referred to as the properties) from attachment:-

> "(a) Immovable property comprised in Khata Khatauni No. 194min/497, Khasra No. 2301/520 measuring 88 sq. mtrs situated in Mauja Basal, Patti Khas, Tehsil and District Solan (HP) as entered in the jamabandi for the year 1999-2000.
>
> (b) Immovable property comprised in Khata Khatauni No. 194min/496, Khasra No. 2300/520 measuring 84 sq. mtrs situated in Mauja Basal, Patti Khas, Tehsil and District Solan (HP) mortgaged with the Baghat Cooperative Bank Solan for Rs.1,00,000/-. Against such property it was mentioned by the decree holder that this property be sold subject to the mortgage in which case the decree holder-non applicant bank prayed that it would be a second charge over the property."

2. Indisputedly, the applicant is not the original judgement-debtor and is only the legal-representative of original judgement-debtor No.2 Rama Nand, who expired during the pendency of the execution and his legal-representatives were ordered to be brought on record vide order dated 3.1.2005 passed in OMP No. 266 of 2004. The applicant has sought removal of the attachment on the grounds that the properties mentioned above are his self acquired property and had not been inherited from his late father Rama Nand, and therefore, in terms of

Section 50 of the Code of Civil Procedure, the same could not be attached. How the properties in question are his personal/ self acquired properties has been set out in detail in paragraphs-5 and 6 of the application, which reads thus:-

> "5. That it may be submitted that the aforesaid property attached pursuant to the orders passed by the Hon'ble Court is the personal property/self-acquired property of Shri Harinder Pal son of Late Shri Rama Nand judgment debtor No.2 (v), hence could not be attached in execution towards satisfaction of the decree. It is settled law that the legal heirs of the judgment debtors would be liable only to the extent they inherit the estate of deceased and not beyond that. It is submitted that the property mentioned at Sl. No.(a) above was purchased by the applicant vide Sale Deed No.221 dated 23.4.1996 from one Shri Sarnia for a sum of Rs.45,000/-. Pursuant to the sale made in favour of the judgment debtor-applicant Mutation No.1179 was attested in his favour on 15.6.1996 by the Assistant Collector Second Grade Solan. Copy of which is annexed as Annexure R-1.
>
> 6. That similarly in respect of property mentioned at Sr.No.(b) above, the said property was purchased by Shri Harinder Pal son of Late Shri Rama Nand judgment debtor No.2(v) on the basis of Relinquishment Deed as per Rapat No.608 dated 14.3.2003. On the basis of the aforesaid transaction Mutation No.2151 was attested in favour of the judgment debtor-applicant on 15.3.2003, copy of which is annexed herewith and marked as Annexure R-2."

3. The decree holder filed his reply to this application, wherein it has not been denied that the aforesaid properties are the self acquired properties of the applicant, but it is stated that these properties can still be attached and sold in realization of the amount of decree and there is no illegality by putting these properties to sale.

4. Section 50 of Code of Civil Procedure reads thus:-

> **"S. 50. Legal Representative.-** (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.
>
> (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit."

5. Now in case sub-section (2) of Section 50 of the Code of Civil Procedure is seen, it leaves no manner of doubt that legal representatives of judgement-debtor are liable for the debts of the deceased only to the extent of estate acquired by these legal-representatives. The liability of such legal representatives in execution

proceedings is therefore confined to the properties of the deceased which has actually come into their hands. Once the decree holder does not dispute the "properties" to be the self acquired properties of the applicant and further does not dispute that the applicant is not the original judgement debtor and is only one of the legal representatives of the original judgement debtor, then the properties of applicant No. 2 cannot be attached and put to sale.

6. From the records, it appears that though the decree holder has sought the attachment of the properties of the judgement debtor by filing OMP No. 520 of 2011, however, no orders have been passed in this application. But, then this court need not wait for the attachment orders because once it is proved on record that he is not the original judgement debtor and has come on record as one of the legal representatives of the original judgement-debtor No.2 and once it is proved on record that properties in his hand are self acquired/ individual property, therefore, these cannot be attached and put to sale.

7. Accordingly, application, being OMP No. 331 of 2014, is allowed in the aforesaid terms and consequently OMP No. 520 of 2011 seeking attachment of the properties of the judgement debtor No. 2 is dismissed.

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

H.R.T.C. ...Appellant.
Vs.
Indus Hospital and another ...Respondents.

FAO No. 408 of 2007
Decided on: 31.10.2014

Motor Vehicle Act, 1988- Section 166- Appellant contended that amount received by the claimant from the insurer should be deducted from the total compensation awarded to him- held, that the amount received by the claimant from the Insurance Company regarding the damage of his vehicle cannot be deducted from the total amount of compensation. (Para-4 to 7)

Case referred:
Oriental Insurance Co. versus K.P. Kapur & Ors., I (1997) SCC 138

For the appellant: Mr. H.S. Rawat, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate, for respondent No. 1.
Mr. H.S. Rangra, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the award, dated 4th July, 2007, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, Himachal Pradesh, (hereinafter referred to as "the Tribunal) in M.A.C. No. 116-S/2 of 2005, titled as Indus Hospital versus Himachal Road Transport Corporation and another, whereby compensation to the tune of Rs. 60,000/- came to be awarded in favour of the claimant (hereinafter referred to as "the impugned award") on the grounds taken in the memo of appeal.

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

3. Only the appellant-HRTC has questioned the same on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the claimant has received Rs. 28,198/- from the insurer of its vehicle; that amount should be deducted from the total compensation awarded and the appellant should be fastened with liability to pay the rest of the amount.

5. The Tribunal has considered this argument and the same has been replied in para 20 of the impugned award.

6. I have gone through the judgment relied upon by the Tribunal in the case titled as **Oriental Insurance Co. versus K.P. Kapur & Ors.,** reported in **I (1997) SCC 138.** I deem it proper to reproduce para 5 and relevant portion of para 6 of the judgment herein:

> *"5. As regards the contention of Mr. Kishore Rawat that even if it was a total loss, the salvage value has to be deducted. I am afraid this argument is of no substance because this issue was not raised before the Tribunal nor the claimant had been given any opportunity to rebut the same. He cannot be taken by surprise with this new argument at appellate stage.*
>
> *6. .....There is no reason or justification in setting off what the appellant being entitled to receive under his contract with his Insurance company i.e., a third party. He had bargained for the payment of a sum of money in the event of accident happening and his car being damaged. Appellant insured his car with the Insurance Company and bargained for the payment of a sum of money on the clear stipulation that in the event of accident happening to his car he would be reimbursed. He did not receive the amount of Rs. 36,000/- from his Insurance Company because of this accident but because of the contract entered into by him with his Insurance Company. The pre-condition*

was the happening of an accident. The said Insurance Company on the happening of the accident was to reimburse him for the damage of his car. Therefore, it cannot be said that by claiming damages under the Act because of the rash and negligent driving of the driver of the DTC bus and due to damage of his car he would be debarred from claiming compensation under the Act, nor claiming such a compensation under the Act would amount to unjust enrichment."

7. Applying the test to the instant case, I am of the considered view that the Tribunal has rightly considered the plea and rejected the same.

8. Viewed thus, the appeal merits to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

9. The awarded amount be released in favour of the claimant strictly in terms of the impugned award through payee's account cheque.

10. Send down the records after placing copy of the judgment on Tribunals' file.

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

National Insurance Company Ltd. ...Appellant

Vs.

Neelam and others. ...Respondents.

FAO No.448 of 2007
Decided on: October 31, 2014.

Motor Vehicle Act, 1988- Section 168- Tribunal had not given the details as to how the compensation of ₹ 3,65,000/- was awarded by it- findings recorded by the Tribunal are not based upon the correct appreciation of facts- however, the parties settled the matter at ₹ 2,50,000/- along with interest at the rate of 7% per annum from the date of filing of the claim petition till deposit. (Para- 3 to 6)

For the Appellant: M.Ashwani Sharma, Advocate.

For the Respondents: Mr.J.R. Poswal, Advocate, for respondents No.1 and 2.

Mr.Ramakant Sharma, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (oral):

This appeal is directed against the award, dated 21st May, 2007, passed by Motor Accident Claims Tribunal, Fast Track Court, Solan, Camp at Nalaharh, H.P., (hereinafter referred to as the Tribunal), in Claim Petition No.14FTN/2 of 2005, titled Neelam and another vs. Gurnam Singh and others, whereby compensation to the tune of Rs.3,65,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit of the amount, was awarded in favour of the claimants (respondents No.1 and 2 herein) and the insurer was directed to satisfy the same, (for short, the impugned award).

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

3. During the course of hearing, the learned counsel for the insurer-appellant only challenged the findings recorded by the Tribunal in paragraph 11 of the impugned award and submitted that the amount awarded by the Tribunal is excessive and that it is not known as to how the Tribunal assessed the compensation to the tune of Rs.3,65,000/-. Thus, the challenge to the impugned award is only on the ground that the same is excessive. No other point was urged by the learned counsel for the appellant during the course of hearing.

4. The only question is whether the Tribunal has rightly awarded the compensation. I have gone through the impugned award. The findings recorded by the Tribunal in paragraph 11 appears to be not based upon correct appreciation of facts for the reason that the Tribunal has not assigned any reason as to how the Tribunal assessed the compensation and awarded the amount.

5. On noticing the above, the learned counsel for the claimants stated that the claimants would be satisfied if an amount of Rs.2,50,000/-, in lump sum, with interest at the rate of 7.5% per annum, is awarded in favour of the claimants. The learned counsel for the appellant has no objection in settling the claim, in the aforesaid terms. Learned counsel for the driver and the owner also made the same statement. Their statements are taken on record.

6. In view of the above, with the consent of the learned counsel for the parties, the impugned award is modified and the claimants (respondents No.1 and 2) are held entitled to compensation to the tune of Rs.2,50,000/-, in lump sum, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit and the excess amount, in any, alongwith interest, be released in favour of the insurer-appellant through payee's account cheque.

7. The appeal stands disposed of accordingly.

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

Oriental Insurance Company ...Appellant.
Versus
Smt. Prabha Devi & others ...Respondents.

FAO No. 435 of 2007
Decided on: 31.10.2014

Motor Vehicle Act, 1988- Section 149- The owner deposed that she had checked the driving license of the driver at the time of employment- license was found fake on inquiry- held, that the owner had taken every possible steps to check the correctness of the driving license- Insurance company had not led any evidence to prove that any breach was committed by the owner- Insurance Company held liable to indemnify the insured. (Para 10-14)

Motor Vehicle Act, 1988- Section 149- Claimant had proved that the deceased had purchased steel, cement and binding wires from a shop and was travelling in the offending vehicle as owner of the goods - no evidence was led by the insurer to prove that the deceased was travelling as a gratuitous passenger- held, that the version of the insurance company that the deceased was travelling as a gratuitous passenger was not proved. (Para 16)

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

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. B.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. Shashi Sirshoo, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 4th August, 2007, made by the Motor Accident Claims Tribunal (II), Shimla, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 14-S/2 of 2003, titled as Smt. Prabha Devi and another versus Smt. Krishna Shail and another, whereby compensation to the tune of Rs. 3,00,000/- with interest @ 7.5% per annum from the date of the petition came to be

awarded in favour of the claimants (hereinafter referred to as "the impugned award), on the grounds taken in the memo of appeal.

Brief Facts:

2. The claimants have sought compensation to the tune of Rs. eleven lacs, as per the break-ups given in the claim petition, on the ground that deceased, Shri Sanjeev, became victim of motor vehicular accident caused by the driver, namely Shri Ajeet Pundeer, on 24th January, 2003, at Jhal-Nullah, while driving the truck, bearing registration No. HP-51-1556, rashly and negligently.

3. The owner and the insurer have resisted the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 7th March, 2006:

> *"1. Whether on 24.1.2003 at 10 PM at Tihana, the driver of truck No. HP-51-1556 rashly and negligently and as such caused death of Sh. Sanjeev? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether the driver of truck No. HP-51-1556 was not holding a valid and effective driving licence? OPR*
>
> *4. Whether the deceased was an unauthorized passenger in the truck? OPR*
>
> *5. Whether the vehicle was being driven without fitness certificate and route permit?OPR*
>
> *6. Relief."*

5. The claimants examined Dr. Ashok Chauhan as PW-2, Shri Sumesh Thakur as PW-3, Shri Rajinder Singh as PW-4, HC Vijay Kumar as PW-5 and one of the claimants, namely Smt. Prabha Devi, appeared in the witness box as PW-1. The owner-insured, namely Smt. Krishana Shail, herself appeared in the witness box as RW-1. The insurer has examined Shri Vikas Wig as RW-2 and Shri Naresh Kumar as RW-3.

6. The Tribunal, after scanning the evidence, oral as well as documentary, held that the driver had driven the offending vehicle rashly and negligently on 23rd January, 2004, and had caused the accident, in which Shri Sanjeev, son of the claimants, died. The findings returned by the Tribunal on issue No. 1 are not in dispute, thus, are accordingly upheld.

7. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issue No. 3:

8. The appellant-insurer had to discharge the onus to prove this issue, had led evidence to the effect that the driving licence of the driver was fake.

9. Learned counsel for the appellant-insurer argued that the driver of the offending vehicle was not having a valid and effective driving licence, thus, the appellant-insurer was not liable to pay the compensation.

10. The appellant-insurer has not proved that the owner-insured had committed any willful breach in terms of the mandate of Section 149 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") read with the terms and conditions of the insurance policy. In fact, it has not led any evidence to the effect that the owner-insured has not discharged her duty.

11. The owner-insured, namely Smt. Krishna Shail, while appearing as RW-1, has specifically stated that she has examined the driving licence before engaging Shri Ajeet Pundeer as driver. In her cross-examination, she has refuted the suggestion that she had not verified that Ajeet Pundeer was having driving licence or not. It is apt to reproduce relevant portion of the cross-examination of the owner-insured herein:

> *".....It is incorrect that I did not see and verify whether Ajeet Pundeer was having driving licence or not. It is incorrect that I did not see his driving licence. It is incorrect that I have made a wrong statement in this context."*

12. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down principles, how insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment in **Swaran Singh's case (supra):**

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) .....*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on*

the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

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

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Having said so, I am of the considered view that the insurer has failed to prove that the owner-insured has committed any willful breach. The owner-insured has discharged her duty by examining the driving licence before employing the driver. Thus, the Tribunal has rightly recorded the findings on issue No. 3 and has not committed any error in saddling the appellant-insurer with liability. Accordingly, findings returned on issue No. 3 are upheld.

Issue No. 4:

15. Learned counsel for the appellant-insurer argued that the deceased was travelling as a gratuitous passenger in the offending vehicle. The appellant-insurer has not led any evidence to this effect, thus, has failed to discharge the onus.

16. The claimants have examined Shri Sumesh Thakur as PW-3 to prove that the deceased had purchased steel, cement and binding wires from his shop and was travelling in the offending vehicle as owner of the said goods. Thus, issue No. 4 came to be rightly decided in favour of the claimants and against the appellant-insurer and the findings are accordingly upheld.

Issue No. 5:

17. The appellant-insurer has not led any evidence to prove that the offending vehicle was being driven without fitness certificate and route permit. The Tribunal has rightly decided this issue against the appellant-insurer and is accordingly upheld.

Issue No. 2:

18. The adequacy of compensation is not in dispute. The findings returned on issue No. 2 are upheld.

19. Having said so, the appeal merits to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

20. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

21. Send down the records after placing copy of the judgment on Tribunal's file.

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

Pr.Chief Conservator of Forests and Anr. ...Appellant

Vs.

Banita Kumari and Anr. ...Respondents.

FAO No.452 of 2007
Decided on: October 31, 2014.

Motor Vehicle Act, 1988- Section 166- Tribunal had awarded the compensation of ₹1,69,000/-, along with interest at the rate of 7.5% per annum from the date of filing of the claim petition - held, that the claimants had established that the driver had driven the vehicle in a rash and negligent manner and had hit the scooter on which the claimant was travelling as a pillion rider- amount awarded in favour of the claimant was inadequate but he had not questioned the award- hence award was upheld reluctantly. (Para- 7 to 11)

For the Appellants:	Mr.M.A. Khan, Addl.A.G. and Mr.J.K. Verma, Dy.A.G.
For the Respondents:	Mr.G.R. Palsara, Advocate, for respondent No.1. Mr.Vinod Gupta, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (oral):

The appellants-State has questioned the award, dated 25th July, 2007, passed by Motor Accident Claims Tribunal (II), Mandi, H.P., (hereinafter referred to as the Tribunal), in Claim Petition No.52 of 2003, titled Banita Kumari vs. The Principal Chief Conservator of Forest and others, whereby compensation to the tune of Rs.1,69,000/, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant (respondent No.1 herein) and against the respondents i.e. appellants herein, (for short, the impugned award).

Brief facts:

2. Claimant became the victim of a vehicular accident, which was caused on 2nd March, 2003, by the driver, namely, Sohan Lal, while driving Ambassador Car No.HP-03-2335, rashly and negligently and hit the scooter bearing No.HP-33-4902, at Salah in Sundernagar, on which the claimant was traveling as pillion rider, as a result of which the claimant sustained injuries. The said scooter was being driven by the husband of the claimant. The claimant sought compensation to the tune of Rs.5.00 lacs, as per the break-ups given in the claim petition.

3. Appellants and the driver of the offending Car resisted the Claim Petition.

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

> *"1. Whether the petitioner sustained injuries due to the rash and negligent driving of Car No.HP-03-2335 on 2.3.2004 at place Salah (Sundernagar) being driven by respondent No.2 as alleged? OPP*

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

3. Relief."

5. The claimant, in order to prove her claim, examined as many as five witnesses, including herself and also produced on record documents i.e. Ext.PW-3/A (discharge slip), Ext.PW-3/B (copy of MLC) and Exts.PW-5/A-1 to PW-5/A-36 (copies of medical bills).

6. The appellants and the driver of the offending vehicle examined three witnesses.

7. After scanning the entire evidence, the Tribunal held that the claimant had proved that the driver had driven the offending vehicle rashly and negligently and accordingly decided issue No.1 in favour of the claimant.

8. The findings recorded by the Tribunal under issue No.1 are not under challenge before this Court. The only dispute is that the amount of compensation awarded by the Tribunal is excessive. However, I have gone through the record of the case. The claimant has established that the driver had driven the offending vehicle rashly and negligently and hit the scooter on which the claimant was traveling as pillion rider, as a result of which the claimant sustained injuries. Therefore, the findings recorded under Issue No.1 are upheld.

Issue No.2:

9. Onus to prove this issue was upon the petitioner and in order to discharge the same, the claimant examined PW-1 Dr.Sanjeev Kapoor, who has proved the disability certificate Ext.PA and stated that the claimant had suffered 20% permanent disability, which has also affected the earning capacity of the claimant. The Claimant also examined Chander Gopal, Chief Pharmacist, Civil Hospital, Sundernagar, as PW-3, who has proved that the claimant was admitted in the Hospital on 2nd March, 2003 and was discharged on 7th March, 2003. He has also proved the discharge slip as Ext.PW-3/A and the MLC as Ext.PW-3/B.

10. The Tribunal recorded reasons in paragraphs 22 to 26 and 29 of the impugned award, while holding the claimant entitled to compensation to the tune of Rs.1,69,000/-.

11. After going through the impugned award and the record of the case, I am of the opinion that the amount awarded in favour of the claimant is inadequate. However, since the claimant has not questioned the impugned award, the same is reluctantly upheld.

12. Accordingly, the appeal is dismissed. The Registry is directed to release the amount in favour of the claimant strictly in terms of the impugned award.

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

United India Insurance Company Ltd. .....Appellant.
Versus
Sh. Jai Krishan and others ...Respondents.

FAO (MVA) No. 315 of 2007.
Date of decision: 31st October, 2014.

Motor Vehicle Act, 1988- Section 173- the insurer cannot question the award on the ground of adequacy of compensation- however, on facts it was held that the awarded compensation was just an adequate - Appeal dismissed. (Para-4 and 5)

Case referred:
Josphine James vs. United Insurance Company Ltd. and anr., 2013 AIR (SCW) 6633

For the appellant: Mr. P.S. Chandel, Advocate.
For the respondents: Mr.Aman Sood, Advocate,, for respondent No. 1.
Mr.G.R.Palsara, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

The insurer-appellant has questioned the judgment and award dated 2.3.2007, passed by the Motor Accident Claims Tribunal, Mandi, H.P., for short "The Tribunal" in Claim Petition No. 37 of 2004, titled *Jai Krishan vs. Sh. Narender Singh and others,* whereby compensation to the tune of Rs.3,54,800/-, with 6% interest per annum came to be awarded in favour of the claimant and against the respondents, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

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

3. The insurer-appellant has questioned the impugned award only on the ground of adequacy of compensation. No other ground is urged.

4. The moot question is whether the insurer can question the impugned award on the ground of quantum. The question stands replied by the apex Court in a recent judgment titled ***Josphine James vs. United Insurance Company Ltd. and anr.***, reported in **2013 AIR (SCW) 6633,** wherein it has been held that the insurer cannot

question the award on the ground of quantum of compensation. It is apt to reproduce paras 8, 17 and 18 of the said judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal No. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case (supra) and instead, placing reliance upon the Bhushan Sachdeva's case (supra). Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (supra)and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to supra though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by*

the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation instead of applying the principle laid down in Baby Radhika Gupta's case (supra) regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

5. Having said so, the appeal on this ground is not maintainable. However, I have gone through the impugned award. The impugned award appears to be just and adequate for the reason that the claimant being the victim of a vehicular accident suffered injury and the Tribunal, after examining the entire evidence on the record has given the break-ups that how the claimant is entitled to compensation in para 24 of the impugned judgment. I deem it proper to reproduce para 24 of the impugned judgment herein:

"24.Keeping in view the fact that the petitioner has to carry the disability throughout his life and he would not be able to do any kind of hard work, as such, an amount of Rs.30,000/- and an equal amount for loss of amenities of life appears to be just and reasonable. The Tribunal cannot ignore the fact that petitioner is unmarried and disability has certainly reduced

marital prospects of the petitioner. As such, the petitioner is awarded the amount of compensation under different heads as under:-

1.	*Medical expenses:*	*=Rs.52,000.00*
2.	*Attendant charges:*	*=Rs.15,000.00*
3.	*Taxi fare:*	*=Rs.23,800.00*
4.	*Loss of income:*	*=Rs.2,04,000.00*
5.	*Pain and suffering:*	*=Rs.30,000.00*
6.	*Loss of amenities of*	*=Rs.30,000.00*
	Total	*=Rs.3,54,800.00"*

6. As a corollary to the aforesaid discussion, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld. CMP No. 721 of 2007, is dismissed as not pressed.

7. Send down the record, forthwith.

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

FAO No. 325 of 2006
a/w FAO No. 24 of 2008
Reserved on : 17.10.2014
Decided on: 31.10.2014

FAO No. 325 of 2006

United India Insurance Company Limited ...Appellant.
Versus
Smt. Samitra Devi & others ...Respondents.

FAO No. 24 of 2008

Samitra Devi & others ...Appellants.
Versus
Smt. Kusum Sood & another ...Respondents.

Motor Vehicle Act, 1988- Section 149- Claimants pleaded that the deceased had embarked in the offending vehicle, loaded with cement, which met with the accident - the owner claimed that deceased was employed as a second driver/helper- held, that the deceased was not a gratuitious passenger and the Insurance policy showed that the risk of six employees besides driver was covered under the policy – hence, the Insurance Company was rightly held liable to pay the compensation.

(Para- 12 to 21)

Motor Vehicle Act, 1988- Section 168- Tribunal had held that the claimant was entitled to compensation of ₹ 6,63,600/- but awarded compensation to the extent of ₹ 5,00,000/- as compensation, which was the amount claimed in the petition- held, that there is no restriction in

granting compensation in excess of the compensation sought by the claimant. (Para-26 to 35)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

FAO No. 325 of 2006

For the appellant: Mr. Ashwani K. Sharma, Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Ravinder Thakur, Advocate, for respondents No. 1 to 5.
Mr. Suneet Goel, Advocate, for respondent No. 6.

FAO No. 24 of 2008

For the appellants: Mr. Ravinder Thakur, Advocate.

For the respondents: Mr. Suneet Goel, Advocate, for respondent No. 1.
Mr. Ashwani K. Sharma, Advocate, with Ms. Monika Shukla, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Award, dated 28th July, 2007, made by the Motor Accident Claims Tribunal-II (Fast Track), Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 106 of 2004, RBT. Cl. Pet. No. 40 of 2005, titled as Samitra Devi & others versus Smt. Kusum Sood & another, whereby compensation to the tune of Rs. 5,00,000/- with interest @ 9% per annum from the date of institution of the claim petition till realization of the same came to be awarded in favour of the claimants and against the insurer (hereinafter referred to as "the impugned award"), has given birth to both these appeals. Thus, I deem it proper to decide both these appeals by this common judgment.

2. The insurer has questioned the impugned award by the medium of FAO No. 325 of 2006 on the ground that the Tribunal has fallen in error in saddling it with liability.

3. The claimants have questioned the impugned award by the medium of FAO No. 24 of 2008 on the ground that the amount awarded is inadequate.

Brief facts:

4. The claimants, being the legal representatives of deceased Govind Ram, have claimed compensation as damages by the medium of Claim Petition No. 106 of 2004, RBT. Cl. Pet. No. 40 of 2005, titled as Samitra Devi & others versus Smt. Kusum Sood & another, on the ground that Govind Ram, their bread earner, became the victim of motor vehicular accident, which was caused by the driver, namely Sunil Kumar, while driving truck, bearing registration No. HP-34-4265, rashly and negligently, on 2nd October, 2004, at about 1.20 a.m. near village Jamli, District Bilaspur. Further contended that deceased-Govind Ram was driver by profession, was working with Saiyla Motors Serwari Bazar, Kullu, was earning Rs.5,000/- as a driver and Rs.5,000/- from agricultural and horticultural vocations. Driver-Sunil Kumar has also lost his life in the said accident.

5. The owner-insured and the insurer have resisted the claim petition on the grounds taken in the respective memo of objections.

6. Following issues came to be framed by the Tribunal on 19th April, 2005:

> *"1. Whether Govind Ram died due to rash and negligent driving of truck No. HP-34-4265 driven by Sunil Kumar, its driver, who also died in the accident? OPP*
>
> *2. If issue-1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether Sunil Kumar the driver of truck No. HP-34-4265 was not holding valid and effective driving licence at the time of accident? OPR-2*
>
> *4. Whether the petitioners are not legal representatives of deceased Govind Ram? OPR-2*
>
> *5. Whether deceased Govind Ram was a gratuitous passenger in the vehicle in question at the time of accident. If so, its effect? OPR-2*
>
> *6. Relief."*

7. The claimants have examined Dr. Savita Mehta as PW-1, Shri Mohar Singh as PW-2, ASI Mohinder Singh as PW-3, Shri Sanjay Sood as PW-5 and one of the claimants, Smt. Samitra Devi, has stepped into the witness box as PW-4. The owner-insured has examined

Shri Vidya Sagar as RW-2. The insurer has examined Shri Diler Singh, Motor Licence Clerk, as RW-1 and Shri D.S. Suangla as RW-3 in support of its case.

Issue No. 1:

8. The Tribunal, after scanning the evidence, held that the claimants have proved by leading oral as well as documentary evidence that Sunil Kumar had driven the offending vehicle on the said date rashly and negligently and caused the accident, in which deceased-Govind Ram, the bread earner of the claimants, and the said driver-Sunil Kumar lost their lives. The parties to the lis have not questioned the findings returned on issue No. 1 by the medium of both the appeals. Hence, the findings returned by the Tribunal on issue No. 1 are upheld.

9. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 and 4.

Issues No. 3 and 4:

10. The insurer had to prove both these issues, has not led any evidence to that effect and the findings returned on both these issues are also not questioned by the insurer or any other party. Accordingly, the findings returned on issues No. 3 and 4 are also upheld.

Issues No. 2 and 5:

11. Both these issues are interlinked. Thus, I deem it proper to determine both these issues together, which are also the subject matter of both the appeals.

12. The claimants have claimed in the claim petition that deceased-Govind Ram had gone to Chandigarh with his brother, who was to be admitted in hospital and after admitting him in PGI, Chandigarh, embarked in the offending vehicle, which was loaded with cement, met with the accident at Jamli, District Bilaspur, which was caused by the driver, namely Shri Sunil Kumar, who had lost control over the same.

13. The owner-insured has pleaded in the reply that deceased-Govind Ram was employed as a second driver/helper and was travelling, on the said day, as a helper in the said vehicle. It is apt to reproduce para 24 (i) of the reply filed by the owner-insured herein:

> *"24. i) that this sub-para of the claim petition is correct only to the extent that petitioner was travelling in truck no. HP-34-4265 which was loaded with cement and the truck met with an accident near Jamli in Distt. Bilaspur. Rest of the para is wrong and therefore denied. The allegations that the accident took place due to rash and negligent driving of the driver of the truck are totally false and baseless therefore specifically denied. It is also denied that the deceased Govind Ram had hired the truck from Chandigarh.*

In fact, Sh. Govind Ram deceased was employed as driver by the respondent on 30-09-2004 and was sent alongwith the truck no. HP-34-4265 on trial basis as helper to the original driver of the truck."

14. The claimants have led evidence, but they have not disputed the said fact. However, claimant No. 1, Smt. Samitra Devi, widow of deceased-Govind Ram has deposed that deceased-Govind Ram was employed with Saiyla Motors Serwari Bazar, Kullu. PW-5, Shri Sanjay Sood, proprietor of Saiyla Motors, Serwari Bazar, Kullu, has also deposed that Govind Ram was engaged as driver in the said firm but had left the job on 25.09.2004. The said fact has not been disputed in the cross-examination.

15. The owner-insured, Smt. Kusum Sood, has examined Shri Vidya Sagar Sharma as RW-2, who has deposed that Govind Ram was engaged as driver by Smt. Kusum Sood on 30th September, 2004, was sent to Chandigarh on 1st October, 2004 with the offending vehicle as a helper, was under the employment of Smt. Kusum Sood on the date of accident.

16. The insurer had not led any evidence on this count. Thus, the evidence led by the claimants and the owner-insured has remained unrebutted.

17. Claimant No. 1-Smt. Samitra Devi, who is an illiterate woman, belongs to remote area, is a rustic villager, may not be knowing whether her husband had left job from one firm/company, was employed with Smt. Kusum Sood. She has also not disputed the factum of employment of the deceased by Smt. Kusum Sood at the relevant point of time.

18. Having said so, the owner-insured has specifically pleaded and proved by leading evidence that deceased-Govind Ram was engaged as helper/second driver with the offending vehicle at the relevant point of time and risk was covered.

19. The insurer has not led any evidence to prove that deceased-Govind Ram was travelling as a gratuitous passenger in the offending vehicle at the time of accident. Thus, it can be safely held that deceased-Govind Ram was not a gratuitous passenger.

20. Learned counsel for the insurer argued that risk of the second driver is not covered. I have gone through the insurance policy, Ext. RW-3/A, which covers the risk of six employees.

21. It is worthwhile to mention herein that the schedule appended with the insurance policy do disclose that in addition to risk of the owner and driver, the risk of six employees is also covered. Thus, risk of helper/second driver is also covered. In the given circumstances, the Tribunal has rightly saddled the insurer with liability.

22. Viewed thus, the appeal filed by the insurer, i.e. FAO No. 325 of 2006, merits dismissal.

23. The second point to be determined is – whether the amount of compensation awarded is just and appropriate?

24. Admittedly, the age of the deceased was 29 years at the relevant point of time. The Tribunal has applied the multiplier of '16', which is just and proper in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

25. The claimants have pleaded that the income of the deceased was Rs.10,000/- per month, i.e. Rs. 5,000/- from the salary as a driver and Rs.5,000/- from other vocations. The claimants have proved that the salary of the deceased as driver was Rs.5,000/- per month. The Tribunal has fallen in error in deducting one third towards his personal expenses for the reason that the claimants are five in number and one fourth was to be deducted in view of the mandate of **Sarla Verma's case (supra),** upheld by the Larger Bench of the Apex Court in **Reshma Kumari's case (supra).** Accordingly, it is held that the claimants have lost source of dependency, while deducting one fourth, to the tune of Rs.3,800/- per month, instead of Rs. 3,300/- as held by the Tribunal.

26. The Tribunal has held that the claimants are entitled to compensation to the tune of Rs. 6,63,600/-, but has awarded only Rs. 5,00,000/- including no fault liability on the ground that the claimants have claimed only Rs. 5,00,000/-, as per the break-ups given in the claim petition.

27. The Tribunal has also fallen in error in making such a finding. It is beaten law of land that compensation should be just and proper and claim petition cannot be scuttled away enroute on the ground that the claimants have not claimed the amount to which they are entitled to.

28. I believe that the Tribunal has lost sight of the mandate of Section 158 (6) of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") read with Section 166 (4) of the MV Act.

29. The MV Act has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:

> ***"158. Production of certain certificates, licence and permit in certain cases. -***
>
> *.....*
>
> *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within*

> *thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*

In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.

30. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:

> *"**166. Application for compensation.** -*
>
> *.....*
>
> *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*

It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.

31. My this view is fortified by the judgment of the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

> *"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the*

> *accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.*
>
> *8. .....*
>
> *9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.*
>
> *10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."*

32. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

33. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court*

> *is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

34. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

35. This Court in **FAO No. 226 of 2006,** titled as **United India Insurance Company Limited versus Smt. Kulwant Kaur & another,** decided on 28th March, 2014, has laid down the same principle.

36. Having said so, it is held that the claimants have lost their source of dependency to the tune of Rs.3,800 x 12 = Rs. 4,56,000/- x 16 = Rs. 7,29,600/-. The claimants are also held entitled to Rs.10,000/- under the head 'funeral expenses' and Rs. 20,000/- under the heads 'loss of consortium', 'loss of love & affection' and 'loss of estate'. Hence, the claimants are entitled to total compensation to the tune of Rs. 7,59,600/- (i.e. Rs. 7,29,600/- + Rs. 10,000/- + Rs. 20,000/-), including the interim compensation, i.e. Rs. 50,000/-, with interest @ 9% per annum.

37. The insurer is directed to deposit the enhanced amount of compensation before the Registry within eight weeks. On deposition, Rs. 50,000/- be paid to claimant No. 5, i.e. father of the deceased out of the total amount of compensation. Out of the remaining amount of Rs.6,59,600/- (i.e. Rs.7,59,600/- - Rs. 50,000/- - Rs. 50,000/- {interim award amount}), one third is to be paid to claimant No. 1, i.e. widow of the deceased, after proper identification and the remaining amount is to be deposited in the name of claimants No. 2 to 4 in Fixed Deposits in equal shares till they attain the age of majority.

38. Having glance of the above discussions, the appeal filed by the insurer, i.e. FAO No. 325 of 2006, is dismissed; the appeal filed by the claimants, i.e. FAO No. 24 of 2008, is allowed and the impugned award is modified, as indicated hereinabove.

39. Send down the record after placing copy of the judgment on each of the files.

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

The United India Insurance Company Ltd. ...Appellant

Versus

Sh. Sunil Kumar & others ...Respondents

FAO (MVA) No. 349 of 2007
Decided on : 31.10.2014

Motor Vehicle Act, 1988- Section166- Insurance Company contended that the accident was a result of contributory negligence- however no such plea was taken by the Insurance Company in its reply- it was stated that accident had taken place due to the negligence of the scooterist – no evidence was led to prove the same-held that the plea of the Insurance Company is not acceptable. (Para-12 to 13)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondents : Mr. Hoshiyar Kaushal, Advocate vice Mr. Bimal Gupta, Advocate, for respondent No.1.

Mr. Lokender Thakur, Advocate, for respondent No. 2.

Mr. Vivek Thakur, Advocate vice Mr. Vikram Thakur, Advocate, for respondents No. 3 & 4.

Mr. J.S. Bagga, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By the medium of this appeal, the appellant-the United India Insurance Company Limited has questioned the award, dated 14th May, 2007, passed by the Motor Accidents Claims Tribunal (II), Fast Track Court, Solan, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 19 FTC/2 of 05/06, whereby compensation to the tune of Rs.2,45,000/- with interest at the rate of 7½% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent 1 herein, (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. Claimant Sunil Kumar filed the claim petition before the Tribunal and claimed compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

3. Only the insurer of the scooter, i.e. the United India Insurance Company Limited, has questioned the impugned award, on the ground of saddling it with liability.

4. The other respondents, i.e. the claimant, the driver-cum-owner of the scooter, the driver, the owner and the insurer of the Mahindra Jeep, have not questioned the impugned award, on any count, thus it has attained finality, so far as it relates to them.

Brief Facts:

5. Claimant Sunil Kumar filed the claim petition for grant of compensation to the tune of Rs.10,00,000/-, on the ground that he was pillion rider on the scooter bearing engine No. 030271, chassis No. 464196 (not registered), which was being driven by driver, namely, Vinay Kumar, rashly and negligently, on 20th May, 2005, at about 11.15. a.m., near Sabji Mandi, Police Line, Solan; sustained injuries and became permanently disabled.

6. The claim petition was resisted and contested by all the respondents, on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal on 21.01.2005:

> "*1. Whether the petitioner has sustained injuries on account of rash/negligent driving of scooter by respondent No. 1? .....OPP*

2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioner is entitled and from whom?...OPP*

3. *Whether the accident has taken place on account of rash/negligent driving of the jeep by respondent No. 3?..OPR-2*

4. *Whether respondent No. 2 is not liable to indemnify respondent No. 1 as alleged?...OPR-2*

5. *Whether respondent No. 3 did not possess a valid or effective driving licence? ...OPR-5*

6. *Whether the vehicle was being plied without any valid documents? ...OPR-5*

7. *Whether the petitioner has no cause of action against the respondents? ...OPR-5*

8. *Relief."*

8. Claimant examined Dr. Sandeep Jain (PW-1), H.C. Ram Nath (PW-2) and Shri Jia Lal (PW-3). Claimant Shri Sunil Kumar also appeared in the witness box as PW-4. Shri Vinay Thakur, owner-cum-driver of the scooter appeared himself in the witness box as RW-1. The National Insurance Company Limited examined Arun Aluwalia as RW-2.

9. The Tribunal, after scanning the entire evidence, held that driver Vinay Kumar was driving the offending vehicle, rashly and negligently, claimant Sunil Kumar sustained injuries and became permanently disabled.

10. Vinay Kumar, driver-cum-owner of the scooter has not questioned the findings returned by the Tribunal.

11. I have gone through the evidence and the record. I am of the considered view that the Tribunal has rightly recorded the said findings.

12. The learned Counsel for the appellant argued that the accident was outcome of contributory negligence. This argument is devoid of any force for the reason that no such plea has been taken by the United India Insurance Company in its reply and has specifically pleaded that the accident had taken place due the rash and negligent driving of the driver of the scooter and issue No. 3 was framed to this effect. It was asked to lead evidence to this effect.

13. Admittedly, the appellant-The United India Insurance Company Limited has not led any evidence, thus has failed to discharge the same.

14. The other issues are not in dispute. Accordingly, the findings returned by the Tribunal on the said issues are upheld.

15. Having said so, the appeal merits dismissal. The same is accordingly dismissed and the impugned award is upheld.

16. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

17. Send down the records after placing copy of the judgment on record.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Sh. Tulsi Ram and others ...Respondents.

FAO (MVA) No. 278 of 2007.
Date of decision: 31st October, 2014.

Motor Vehicle Act, 1988- Section 166- MACT had awarded compensation to the extent of ₹41,312/- along with interest at the rate of 9% per annum from the date of filing of the petition till realization- held, that no breach was committed by the insured and the Insurance Company was rightly held liable to pay the compensation- Appeal dismissed. (Para- 2 to 5)

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr.Vinod Chauhan, proxy counsel, for respondent No. 1.
Mr. Jagdish Thakur, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

The subject matter of this appeal is the judgment and award dated 29.5.2007, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. , for short "The Tribunal" in MAC Petition No. 7 of 2006 titled *Shri Tulsi Ram vs. Anju Thakur and others,* whereby compensation to the tune of Rs.41312/- with 9% interest came to be awarded in favour of the claimant and against respondent No.3, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Shri Tulsi Ram claimant-respondent herein had filed claim petition being the victim of a vehicular accident for the grant of compensation to the tune of Rs.7 lacs, as per the break ups given in the claim petition.

3. The claim petition was resisted and contested by the insurer, owner and driver.

4. The Tribunal awarded the compensation to the tune of Rs.41312/- with 9% interest per annum from the date of filing the petition till its realization. Feeling aggrieved, the insurer has questioned the impugned award on the ground that the offending vehicle was not being driven in terms of the route permit, the quantum of compensation and also on other grounds.

5. I have gone through the record. The route permit was valid and no breach is committed by the owner/insured. The impugned award is well reasoned. I wonder why the insurer has filed the appeal.

6. Having said so, the appeal is dismissed and the impugned award is upheld. Pending applications, if any also stand disposed of.

7. Send down the record, forthwith.

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

Amrit Lal Sharma and others ..... Appellants.

Vs.

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

LPA No. 424 of 2012
Reserved on: 27.8.2014
Date of decision: September 3, 2014

Constitution of India, 1950- Article 226- Himachal Pradesh Public Service Commission issued an advertisement for the post of Lecturer - Petitioners contended that constitution of the Selection Committee was not according to the notification issued by the UGC- three subject experts were invited- H.P. University was also not associated in the selection as per instructions issued by the UGC- one of the experts was the guide of some of the candidates- held, that petitioner had not mentioned as to how many candidates had participated and how many candidates were selected who remained under the supervision of expert- committee consisted of three members and, therefore, the allegation of favouritism could not be accepted. (Para-12)

Cases referred:

Dalpat Abasaheb Solunke and others vs. Dr. B.S. Mahajan and others (1990) 1 SCC 305

Ravi vs. The Karnataka University, (2006) 6 Kar.L.J. 192

Anil Kumar Neotia and others vs. Union of India and others (1988) 2 SCC 587

Om Prakash Verma and others vs. State of Andhra Pradesh and others (2010) 13 SCC 158

Official Liquidator vs. Dayanand and others (2008) 10 SCC 1

Dr. Satyawati Rana vs. Dr. A.P.Singh Narang and others Vol. 143 2006 (2) Punjab Law Reporter, 182

M.V.Thimmaiah and others vs. Union Public Service Commission and others (2008) 2 SCC 119

Madan Lal and others vs. State of Jammu & Kashmir and others AIR 1995 SC 1088,

Amlan Jyoti Borooah vs. State of Assam and others (2009) 3 SCC 227

Manish Kumar Shahi vs. State of Bihar and others (2010) 12 SCC 576

For the Appellants : Mr. Ashwani Sharma, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondents No. 1 and 2.
Mr. D.K. Khanna, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants, who were the writ petitioners, are aggrieved by the dismissal of the writ petition wherein they had challenged the selection of respondents No. 4 to 13 to the post of Lecturer (College Cadre) Class-I (Gazetted) which was filled up on the basis of an advertisement issued by the Himachal Pradesh Public Service Commission. The screening test was held on 16.1.2009 and thereafter the interviews were held between 16.3.2009 till 20.3.2009.

2. The learned counsel for the appellants has contested the appeal mainly on the ground that the constitution of the Selection Committee was not as per the notification issued by the University Grants Commission on Revision of Pay Scale, minimum qualification for appointments of teachers in University, College and Other measures for the Maintenance of Standards, 1998. He further contended that the Public Service Commission should have invited atleast three subject experts and associated the Himachal Pradesh University in the selection as mandated by the instructions issued by the UGC which instructions were binding upon the Public Service Commission. He also argued that the Principals and Head of the Department were necessarily required to be included in the Selection Committee. He lastly contended that

respondent No.14 should not have been called as an expert for this selection because the respondents No. 4, 5, 6, 8 and 9 had remained her students and, therefore, favouritism was writ large.

3. At the outset, we may point out that these were the very submissions and grounds taken before the learned Single Judge, who after examining these issues threadbare held that the selection was to be conducted in accordance with the Recruitment and Promotion Rules which provided that the recruiting agency i.e. Himachal Pradesh Public Service Commission would constitute a Committee for selection.

4. It was further held that in terms of the Rules of Business of the Himachal Pradesh Public Service Commission, 2007, the Interview Board was required to be constituted by the Chairman and in addition to that experts and the departmental representatives comprising of as many Members as it may be deemed fit in view of the class of post for which the interviews is to be conducted were required to be associated. The Committee in this case had been constituted by the Public Service Commission and comprised of Sh. L.S. Thakur, Member, H.P. Public Service Commission, Dr. Saroj Ghosh, subject matter expert and Mrs. Manjula Sharma, Principal, Government College, Jukhala, who was the departmental nominee. The plea of the appellants that the Selection Committee should have been constituted as per the University Grants Commission was rejected in view of the detailed procedure provided for selection and appointments in the Recruitment and Promotion Rules framed under Article 309 of the Constitution of India. It was further held that it was for the State or the University to adopt the regulations framed by the University Grants Commission and the same were not ipso facto binding on the State Government.

5. Insofar as the plea regarding favouritism is concerned, the learned Single Judge repelled the said contention by observing that the mere fact that some of the selected candidates were the students of respondent No.14 would not debar her being an expert. The learned Single Judge relied upon the judgment of the Hon'ble Supreme Court in ***Dalpat Abasaheb Solunke and others vs. Dr. B.S. Mahajan and others (1990) 1 SCC 305*** to conclude that mere fact that one of the members of the Selection Committee had been a guide to some of the candidates would not in itself vitiate the selection of such candidates. The learned Single Judge observed as follows:

> "*8. Their Lordships of the Hon'ble Supreme Court in* ***Dalpat Abasaheb Solunke and others*** *versus* ***Dr. B.S. Mahajan and others****, (1990) 1 SCC 305 have held that inclusion of a person, who was a teacher of candidate could not vitiate the selection of such candidate. Their Lordships have held as under:*
>
> > *10. The fourth and the last ground given by the High Court to set aside the appointment of the appellant in CA No. 3507/89 is that the fourth and the fifth respondents to the Writ Petition were guides of the appellant when he was doing his M.Sc. by Research. We are unable to understand as to*

how the fact that they were his guides when the appellant was doing his M.Sc. would influence their decision in selecting him, or vitiate the selection made. They must have been guides to many who had appeared for the interview. As senior teachers in the Faculty in question, it is one of their duties to guide the students. In fact, very often the experts on the selection Committees have to be drawn from the teaching faculty and most of them have to interview candidates who were at one or the other time heir students. That cannot disqualify them from being the members of the Selection Committees. In fact, as stated by the 4th respondent in his affidavit before the High Court, even the 2nd respondent, the aggrieved candidate was also his student. Curiously enough the High Court has discarded the said fact by observing that in point of time, the appellant was closer to the 4th respondent as a student since the appellant was his student at a later date. It is not necessary to comment further on this reasoning."

6. The appellants have only sought to challenge the judgment passed by the learned Single Judge on the grounds already taken and dealt with in detail by the learned Single Judge except that now reliance has been placed upon the judgment rendered by the learned Single Judge of the Karnataka High Court in ***Ravi vs. The Karnataka University, (2006) 6 Kar.L.J. 192*** to canvass that the Hon'ble Supreme Court in Dalpat's case had not laid down any law but had decided the case on the facts and circumstances of the case as it did not consider the earlier case law on this subject. He, in particular, placed reliance on paragraph 17 of the judgment which reads as under:

"17. In the case of Dalpat Abasaheb Solunke, etc.etc. vs. Dr. B.S. Mahajan etc.etc. which is a case relied upon by the counsel for the respondent No.3, the law as settled by the Supreme Court in A.K.Karaipak's case supra, which has been consistently followed, has not been considered. And therefore, it would have to be held, as dealing with the facts and circumstances, on the basis of which alone, the Supreme Court has decided the said case, as there is no reference to any of the earlier judgments of the Supreme Court, which have been referred to hereinabove. Accordingly, I hold that respondent No.2 ought to have disclosed the relationship as between himself and respondent No.3 and he ought to have recused himself from the panel during the time of the interview of respondent No.3. So also would have been the case in so far as the guide member of the petitioner is concerned, who was on the panel."

7. We are afraid that we cannot agree with the view taken by the learned Single Judge of the Karnataka High Court. Firstly by no stretch of imagination could the decision in ***Dalpat Abasaheb Solunke*** case (supra) have been held to be per incuriam because this view has

consistently been followed by not only various High Courts but even the Hon'ble Supreme Court itself particularly on the question posed before us. Moreover, judicial discipline and judicial decorum and propriety was required to be maintained while commenting on the decision of the Hon'ble Supreme Court.

8. We shall content ourselves by a quotation from the decision of the Hon'ble Supreme Court in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Limited and others (1985) 1 SCC 260*** which reads thus:

> ***"6.....We desire to add and as was said in Cassell & Co. Ltd. vs. Broome, 1972 AC 1027 we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary..... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted". The better wisdom of the court below must yield to the higher wisdom of the court above. That is the strength of the hierarchical judicial system. In Cassell & Co. Ltd. v. Broome, 1972 AC 1027, commenting on the Court of Appeal's comment that Rookes vs. Barnard 1964 AC 1129 was rendered per incuriam, Lord Diplock observed:***
>
> > ***The Court of Appeal found themselves able to disregard the decision of this House in Rookes v. Bardnard by applying to it the label per incuriam. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a Judge of the High Court to disregard a decision of the Court of Appeal.***
>
> ***It is needless to add that in India under Article 141 of the Constitution the law declared by the Supreme Court shall be binding on all courts within the territory of India and under Article 144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court."***

9. It is settled law that the binding effect of a decision of the Hon'ble Supreme Court does not depend upon whether a particular argument was considered therein or not, but whether the point under reference was actually decided. We may with advantage refer here the decision of the Hon'ble Supreme Court dealing with the similar issue in ***Anil Kumar Neotia and others vs. Union of India and others (1988) 2 SCC 587*** wherein it has been held as follows:

17. Furthermore, we are of the opinion that the law as declared by this Court in Doypack Systems Pvt. Ltd. (AIR 1988 SC 782) is binding on the petitioners and this' question is no longer res integra in view of Art. 141 of the Constitution. See the observations of this Court in M/s. Shenoy and Co. v. Commercial Tax Officer, Circle II Bangalore, (1985) 3 SCR 659: (AIR 1985 SC 621), where this Court observed that the judgment of this Court in Hansa Corporations' case reported in (1981) 1 SCR 823 : (AIR 1981 SC 463) is binding on all concerned whether they were parties to the judgment or not. This Court further observed that to contend that the conclusion therein applied only to the parties before this Court was to destroy the efficacy and integrity of the judgment and to make the mandate of Art. 141 illusory.

18. In that view of the matter this question is no longer open for agitation by the petitioners. It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the judgment cannot be collaterally challenged. See in this connection the observations of this Court in T. Govindraja Mudaliar v. State of Tamil Nadu (1973)3 SCR 222: (AIR 1973 SC 974),where this Court at pp. 229 and 230 of the report observed as follows :

> ***"The argument of the appellants is that prior to the decision in Rustom Cavasjee Cooper's case (AIR 1970 SC 564) it was not possible to challenge Chapter IV-A of the Act owing to the decision of this Court that Art. 19(1)(f) could not be invoked when a ease fell within Art. 31 and that was the reason why this Court in all the previous- decisions relating to the validity of Chapter IV-A proceeded on an examination of the argument' whether there was infringement of Art. 19(1)(g), and Cl. (f) of that Article could not possibly be invoked. We- -are unable to hold that there is much substance in this argument. Bhanji, Munji and other decisions which followed it were based mainly on an examination of the inter-relationship between Art. 19(1)(f) and Art. 31(2). There is no question of any acquisition or requisition in Chap. IV-A of the Act. The relevant decision for the purpose of these cases was only the one given in Kochuni's case (AIR 1960 SC 1080) after which no doubt was left that the authority of law seeking to deprive a person of his property otherwise than by way of acquisition or requisition was open to challenge on the ground that it constituted infringement of the fundamental rights guaranteed by Art. 19(1)(f). It was, therefore, open to those affected by the provisions of Chapter IV-A to have agitated before this Court the question which is being***

raised now based on the guarantee embodied in Art. 19(1)(f) which was never done. It is apparently too late in the day now to pursue this line of argument, in this connection we may refer to the observations of this Court in Mohd. Ayub Khan v. Commr. of Police Madras, (1965) 2 SCR 884 : (AIR 1965 SC 1623) according to which even if certain aspects of a question were not brought to the notice of the court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In Smt. Somawanti v. State of Punjab, (1963) 2 SCR 774: (AIR 1963 SC 151) a contention was raised that in none of the decisions the argument advanced in that case that a law may be protecied from an attack under Art. 31(2) but it would be still open to challenge under Art. 19(1)(f), had been examined or considered. Therefore, the decision of the Court was invited in the light of that argument. This contention, however, was repelled by the following observations at page 794 :

'The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."

10. In ***Om Prakash Verma and others vs. State of Andhra Pradesh and others (2010) 13 SCC 158*** the Hon'ble Supreme Court reiterated the principle that a judgment of the Supreme Court is binding on all and it is not open to contend that the full facts had not been placed before it. The Hon'ble Supreme Court held as follows:

"71. In Palitana Sugar Mills (P) Ltd. vs. State of Gujarat (2004) 12 SCC 645 this Court reiterated the principle that a judgment of this Court is binding on all and it is not open to contend that the full facts had not been placed before the Court. In this regard, para 62 of the judgment reads as follows: (SCC p. 665)

"62. it is well settled that the judgments of this Court are binding on all the authorities under Article 141 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the judgment of this Court in the earlier proceedings had only collaterally or incidentally decided the issues....."

11. The Hon'ble Supreme Court in ***Official Liquidator vs. Dayanand and others (2008) 10 SCC 1*** has adversely commented upon the High Courts, who are ignoring the law laid down by the Hon'ble Supreme Court without any tangible reasons and held as follows:

"78. There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the Larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system. In Mahadeolal Kanodia v. Administrator General of W.B.AIR 1960 SC 936 this Court observed: (AIR p. 941, para 19)

> ***"19....If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Courts."***

90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to

which of the judgments lay down the correct law and which one should be followed."

12. That apart the judgment in ***Ravi's*** case (supra) proceeds on the premises that the real test to adjudge favouritism is not as to whether one of the member of the Selection Board was actually biased but whether there was any likelihood of bias which is not the fact situation here. It would be seen that the appellants had not even made a mention as to how many candidates in all who had participated in the selection had remained under the supervision of respondent No.14 and how many out of them had been selected. At this stage, it may be noted that this is not the case where the selection has been made by a single member Committee but by a Committee of three members in which apart from respondent No.14, the Principal of Govt. Degree College, Jukhala was also a subject matter expert, as she was earlier a lecturer in music and was also an expert in music (instrumental). The allegation of favouritism against only one member of the Selection Committee is too far fetched as there are no allegations that said member further in turn influenced the decision of the other co-members of the Selection Committee.

13. The respondent No.14 in her reply affidavit has clearly stated that she is an expert in the subject and is holding superior post in the Department of Music in Punjab University, Chandigarh and, therefore, she is invited to be a Member of various selecting authorities to assist them in making the best selection. She has further stated that because of the selection being on all India basis, it is never known before hand as to who would be the competing candidates. The respondent No.14 has further claimed to be teaching the subject for a very long time in various capacities and during such duration of time large number of students have passed out the University/Colleges and, therefore, it is difficult for her to recollect the names of such candidates who may have been taught in the classes or she may have acted as a guide.

14. At this stage, we may refer with advantage to the learned Division Bench decision by the Punjab and Haryana High Court in ***Dr. Satyawati Rana vs. Dr. A.P.Singh Narang and others Vol. 143 2006 (2) Punjab Law Reporter, 182*** wherein like in the present case the allegations of favouritism and undue influence had been made against the expert on the ground that at one stage she had remained the teacher of the selected candidates and the learned Court repelled the argument by relying upon the observations in ***Dalpat Abasaheb Solunke*** (supra) and held as follows:

> ***"10. We also observe that the finding with regard to the participation and the alleged influence of Professor Saroj Mehta appears to be rather far fetched. Admittedly, at one stage, she was a teacher of the appellant and the appellant had given her reference in her application. We, however, find that Professor Mehta was not a Member of the Selection Committee and was only one of the experts who had been chosen to assist the Selection Committee in the evaluation of***

the inter se merit of candidates. It has been argued by Mr. Sharma that as the appellant had given Dr. Saroj Mehta, as one of the references, it should be held that the relations between them were close. To our mind, even that being so, the undue influence could not have been exercised by her. It should also be borne in mind that on the day when the applications were filed, it was not known that Professor Saroj Mehta would be one of the internal Experts. We also cannot expect that the members of the Selection Committee, three eminent experts in their fields would be prone to any undue influence. In Dalpat Abasaheb Solunke's case (supra) a similar argument had been repelled by observing (in paragraph 13) as under:

> ***"The fourth and the last ground given by the High Court to set aside the appointment of the appellant in C.A. No. 3507 of 1989 is that respondents No. 4 and 5 to the writ petition were guides of the appellant when he was doing his M.Sc. by Research. We are unable to understand as to how the fact that they were his guides when the appellant was doing his M.Sc. would influence their decision in selecting him or vitiate the selection made. They must have been guides to many who had appeared for the interview. As senior teachers in the faculty in question, it is one of their duties to guide the students. In fact, very often the experts on the Selection Committees have to be drawn from the teaching faculty and most of them have to interview candidates who were at one or the other time their students. That cannot disqualify them from being the members of the Selection Committees. In fact, as stated by respondent No.4 in his affidavit before the High Court, even respondent No.2, the aggrieved candidate was also his student. Curiously through the High Court has discarded the said fact by observing that in point of time, the appellant was closer to respondent 4 as a student since the appellant was his student at a later date. It is not necessary to comment further on this reasoning."***

11. The findings of the learned Single Judge with regard to the influence exercised by Professor Saroj Mehta must also be repelled."

15. The Hon'ble Supreme Court in ***M.V.Thimmaiah and others vs. Union Public Service Commission and others (2008) 2 SCC 119*** has clearly laid down that the people are prone to make allegations of bias and malafide, but the Courts owe a duty to scrutinise the allegations meticulously because the person who is making the allegations himself has a vested right.

16. Coming back to the challenge to the selection, it is well settled law that a candidate after remaining unsuccessful cannot challenge the selection process and the constitution of the Selection Committee. If the petitioners entertained any doubts as to the fairness of the members of the Selection Committee, they ought to have objected then. The petitioners however having proceeded with the interviews before Selection Committee to which the objections have now been taken, cannot be permitted to object after remaining unsuccessful (Refer: ***Madan Lal and others vs. State of Jammu & Kashmir and others AIR 1995 SC 1088, Amlan Jyoti Borooah vs. State of Assam and others (2009) 3 SCC 227 and Manish Kumar Shahi vs. State of Bihar and others (2010) 12 SCC 576***).

17. The upshot of the aforesaid discussion is that there is no merit in the appeal and the same is accordingly dismissed, so also the pending application(s), if any. The parties are left to bear their own costs.

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

CMP(M) Nos.1121 & 1141 of 2014.
Decided on: September 3, 2014.

CMP(M) No.1121 of 2014:

State of H.P. and others .....Applicants/appellants.
Versus
Prem Lal .....Respondent.

CMP(M) No.1141 of 2014:

State of H.P. and another .....Applicants/appellants.
Versus
Himachal Pradesh Govt. Special Certificate Awardees Junior Basic Teachers Association .....Respondent

Code of Civil Procedure - Section 96- Appeal- held, that the judgment can be questioned by way of an appeal, even if, the same had been implemented. (Para-3)

Case referred:
Union of India vs. Ram Kumar Thakur, 2008 AIR SCW 7638

For the Appellants: 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 the Respondent(s): Ms.Sunita Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of these applications, the applicants have sought condonation of delay of 360 days, which has crept-in, in filing the appeals, on the grounds taken in the memo of applications.

2. Only in CMP(M) No.1141 of 2014, the respondent has filed the reply and resisted the application. Ms.Sunita Sharma, learned counsel for the respondent, has vehemently argued that the applicants have given undertaking in contempt proceedings that they would comply with the judgment, are precluded from filing the Letters Patent Appeal.

3. The argument, though attractive, is devoid of any force for the reason that the Apex Court in **Union of India vs. Ram Kumar Thakur, 2008 AIR SCW 7638,** has held that the judgment can be questioned by way of an appeal, even if the same has been implemented and the Letters Patent Appeal cannot be dismissed on that count. It is apt to reproduce paragraphs 2 to 7 of the said decision hereunder:

> *"2. Challenge in this appeal is to the judgment of a Division Bench of the Jammu and Kashmir High Court dismissing the appeal filed by the present appellants on the ground that the respondent had been reinstated in service pursuant to the judgment of the learned single Judge which was impugned in the writ appeal filed before the Division Bench. The High court held that the appeal had therefore become infructuous.*
>
> *2. Learned counsel for the appellant submitted that the impugned order of the High Court has no legal basis. Merely because the impugned order before the High Court was implemented to avoid possible contempt proceedings that did not take away the right of the appellants to prefer an appeal and question correctness of the impugned order.*
>
> *3. Learned counsel for the respondent on the other hand supported the judgment.*
>
> *4. It has been noted by this Court that if even in cases where interim relief is not granted in favour of the applicant and the order is implemented that does not furnish a ground for not entertaining the appeal to be heard on merits (see : Nagar Mahapalika v. State of U.P. {2006(5) SCC 127}. Similar view was also taken in Nagesh Datta Shetti v. State of Karnataka { 2005 (10) SCC 383}.*
>
> *5. In Union of India v. G.R. Prabhavalkar & Ors. {1973 (4) SCC 183} it was observed at para 23 as follows:*
>
> *"Mr. Singhvi, learned counsel, then referred us to the fact that after the judgment of the High Court the State Government has passed an order on March 19, 1971, the effect of which is to equate the Sales Tax Officers of the erstwhile Madhya Pradesh State with the Sales Tax Officers, Grade III of Bombay. This order, in our opinion, has been passed by the State Government*

only to comply with the directions given by the High Court. It was made during a period when the appeal against the judgment was pending in this Court. The fact that the State Government took steps to comply with the directions of the High Court cannot lead to the inference that the appeal by the Union of India has become infructuous."

6. Above position was also noted in Union of India v. Narender Singh {2005 (6) SCC 106}.

7. Above being the position the impugned order of the High Court cannot be maintained and is set aside. The writ appeal shall be heard by the High Court on merits about which we express no opinion. The appeal is allowed to the aforesaid extent. No costs."

4. LPA Nos. 99, 65, 66, 70, 71, 76 to 83, 100, 101, 109 and 122 of 2014 arise out of the same judgment and the delay has already been condoned in the said appeals.

5. Ms. Sunita Sharma, learned counsel for the respondent, relied upon the judgment of this Court in LPA No.386 of 2012, titled as H.P. State Industrial Development Corporation vs. Rajesh Kumar Kashyap, decided on 7th April, 2014, which decision is not attracted to the facts of the present case in the given facts and circumstances of the case.

6. Having said so, the applications are allowed and the delay in filing the appeals is condoned. The applications stand disposed of accordingly.

7. The appeals are taken on Board. Registry to diarize the same.

8. Issue notice. Ms.Sunita Sharma, Advocate, waives notice for the respondent(s) in both the appeals.

9. List both the appeals for final hearing on 27th October, 2014, alongwith LPA No.99 of 2014.

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

LPA No. 480 of 2012 a/w Ex.Pet. No. 30 of 2012, LPA Nos. 281, 282 of 2012 and COPC No. 4158 of 2013.
Judgement reserved on: 19.8.2014
Date of decision: September 03, 2014.

1. <u>LPA No. 480 of 2012:</u>

State of H.P. and another ... Appellants

Vs.

Sakshi Sharma and others ..... Respondents

For the appellants : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S.Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals.

For the respondents : Ms. Ambika Kotwal, Advocate, for respondents No. 1 to 3.
Mr. B.C.Negi, Advocate, for respondent No.4.
Respondents No. 5 & 6 already ex parte.

2. Ex. Petition No. 30 of 2012:

Sakshi Sharma and others ...Petitioners
Vs.
State of H.P. and others ...Respondents.

For the petitioners : Ms. Ambika Kotwal, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S.Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondents No. 1, 2 & 5.
Nemo for respondent No.4.
Mr. B.C. Negi, Advocate, for respondent No.3.

3. LPA No. 281 of 2012

Shiv Kumar Chaudhary ... Appellant
Vs.
Sakshi Sharma and others ..... Respondents

For the appellant : Mr. B.C.Negi, Advocate.

For the respondents : Ms. Ambika Kotwal, Advocate, for respondents No. 1 to 3.
Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S.Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondents No. 4, 5 and 7.
Respondent No.6 already ex parte.

4. LPA No. 282 of 2012

Kanwar Singh and others ... Appellants
Vs.
Sakshi Sharma and others ..... Respondents

For the appellants : Mr. Sunil Mohan Goel, Advocate.

For the respondents : Ms. Ambika Kotwal, Advocate, for respondents No. 1 to 3.

Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S.Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondents No. 4, 5 and 8.
Mr. B.C.Negi, Advocate, for respondent No.6.
Respondent No.7 already ex parte.

5. <u>COPC No. 4158 of 2013</u>:

Sakshi Sharma and others .....Petitioners
Vs.
State of H.P. .....Respondent.

For the petitioners : Ms. Ambika Kotwal, Advocate.
For the respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma and Mr. V.S.Chauhan, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals.

Constitution of India, 1950- Article 226- petitioner claimed that her husband was working as a guide in a hotel- she received some message on her mobile phone that her husband was lying unconscious at police station, Sadar Shimla- she came to Shimla and found her husband unconscious in police station, Sadar- police arranged for the ambulance and put the husband of the petitioner in the same - he was taken to IGMC and thereafter to PGI - Police conducted the investigation but the petitioner was not satisfied with the same- She filed a Writ Petition which was allowed- certain directions were passed by the Hon'ble High Court - an appeal was preferred against the judgment- held, that the matter was pending investigation and it was not proper to record firm findings regarding the guilt of the police officials leaving no room for the police officials to urge to the contrary- findings so recorded would amount to taking over the reigns of the disciplinary authorities and/or the Criminal Court. (Para- 10)

Constitution of India, 1950- Article 226- Petitioner had made allegations against the police officials claiming that they had beaten her husband- held, that the petition involved the adjudication of the complicated question of facts, which could not be decided in exercise of power of judicial review. (Para- 13)

Cases referred:

Sanjay Sitaram Khemka vs. State of Maharashtra and others 2006 AIR SCW 2488

Narendra Singh v. State of Madhya Pradesh (2004) 10 SCC 699

Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294

Ganesan v. Rama Ranghuraman (2011) 2 SCC 83,

State of Uttar Pradesh v. Naresh, (2011) 4 SCC 324

Kailash Gour and others v. State of Assam (2012) 2 SCC 34
Lalita Kumari vs. Government of Uttar Pradesh and ors. (2014) 2 SCC 1

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

These appeals raise common question of law and facts and therefore the same are taken up together for disposal.

2. The facts as are necessary for determination of these appeals may be noticed. The petitioner No.2 was working as guide with Vatika Hotel. The petitioner No.1 Sakshi is the wife of petitioner No.2 Rajesh while the petitioner No.3 is their son. On 8.5.2008 a complaint was received from the petitioner No.1 inter alia alleging therein that on 22.1.2008 when she was at Chintpurni, she had received some message on her mobile phone No. 94186-00368 that her husband, petitioner No.2, who was working in Vatika Hotel, was lying unconscious at Police Station, Sadar, Shimla. These messages were received by her from phone No. 2801817 which is installed in the Vatika Hotel. The petitioner No.1 reached Shimla on 23.1.2008 in the evening and met the owner of Vatika Hotel, who took her to Police Station, Sadar, Shimla where she found petitioner No. 2 in an unconscious condition. The respondent No.4, who was then posted as SHO, Police Station, Sadar, Shimla alongwith owner of Vatika Hotel drafted an application and got her signatures over the same and handed over the petitioner No.2 to petitioner No.1. The petitioner No.1 took petitioner No.2 to hospital for quick treatment as there was no time to consult the lawyer and police officials. The police arranged the ambulance and four police personnel carried the petitioner No.2, who was stated to be unconscious, put him in the ambulance from where he was taken to IGMC and on reference of one Dr. Rahi he was taken to PGI, Chandigarh.

3. On receipt of such complaint, case FIR No. 115 of 2008 dated 8.5.2008 was registered at Police Station, Sadar, Shimla under Sections 307, 326, 201 IPC. The case was initially investigated by Sh. Madan Lal, Deputy Superintendent of Police, Shimla and subsequently by Sh. Mohinder Singh, Addl. Superintendent of Police, Shimla. However, it appears that the petitioner No.1 was not satisfied with the investigation and, therefore, the investigation was transferred to State CID in September, 2008. The petitioner No.1 claims that petitioner No. 2 had sustained injuries during day time on 22.1.2008 when he was working at Vatika Hotel because on 22.1.2008 at 12.38 p.m. she had received a phone call that her husband had been creating problems and at about 12.45 p.m. she had received another call informing her that her husband was under the influence of liquor. It is alleged that thereafter the matter was compromised. As per the forensic report prepared at 7.45 p.m. on 22.1.2008, petitioner No.2 was not found under the influence of liquor. During quarrel at about 12.30 p.m. the petitioner No.2 is stated to have sustained injuries and five additional injuries had been caused on the night of 22.1.2008 when the petitioner No.2 is stated to have been

kept at the Police Station, Sadar. On such allegations, the petitioners have claimed the following reliefs:

(i) That the respondents may kindly be directed to provide compensation of Rs.50 lakhs to Sakshi for violation of her Fundamental Right to live with liberty and move freely. For example:-

a) As mentioned above, for the last about two years or so Sakshi has been passing through toughest of the tough time. She cannot leave Rajesh even for a period of five minutes or so.

b) In the month of March, 2009 Sakshi's mother expired and she could not go even to see the face of her mother.

c) Her son has turned of the age of about six years and she could not send him to School because she cannot go to her in laws even to bring the birth certificate of her small son.

d) Three lives have been destroyed. Her husband has become permanently a blind and disabled man. She has no money to feed her small kid and blind husband.

e) Himachal Govt./Police has not bothered to save these three lives. They will, perhaps, awaken only when all or any of these hapless persons die/dies.

Hence a prayer for directions to the Respondents for the payment of a compensation of Rs.50 lakhs to the highly aggrieved Sakshi for violation of her Fundamental Right to live with liberty and move freely with no source of income to feed her blind husband and small kid.

ii) It is also prayed that a proper enquiry may kindly be got made for the lapses on the part of Himachal Police either by the Chandigarh Unit of CBI or by the Police of neighbouring State where the accused persons will not be able to make misuse of any undue political, official or financial influence. This request is also made due to the fact that it will not be possible for a physically weak, helpless and penniless Sakshi to carry blind and disabled Rajesh through the Hills of Shimla for producing him before the Courts along with a small kid. Still more Sakshi is getting threats to kill her small son and also the threats of encounters and implication of her relatives in false cases.

iii) The Police may be directed to record the statement of Rajesh when he becomes 100% fit to give his statement.

iv) Fair and honest investigation either by the Chandigarh unit of CBI or by the Police of any neighbouring State shall be in the following larger interest of the public:-

a) The undue favour shown to the accused persons by Himachal Police will be brought out which, as per the aforesaid Ruling of the Hon'ble Supreme Court, will certainly put a check on the menace of fence eating the crop.

b) The self-contradictory and brainless observations of the illegally constituted Medical Board will also be brought out. This will put strict check on delinquent Doctors. Otherwise tomorrow this type of doctors will declare alive persons as dead which will be very serious and hazardous for the general public at large.

c) Sakshi has not committed any offence for which she is being punished so harshly. She has practically been made a beggar. Her Fundamental Right to live with liberty and move freely has been violated. The lives of Sakshi, her blind husband and small kid have been spoiled. How will she feed herself, her blind husband and small kid throughout her entire life is a very serious problem. Justice given to Sakshi will ensure that this type of cruel, tough and harsh treatment is not meted out to any other helpless and innocent woman in future.

d) It is very risky to go to Shimla because the owner of Vatika Hotel, Police Officials of Shimla and Doctors of the Govt. Hospitals can create any type of problem for the helpless petitioners.

v) Suitable legal action u/s 218 and 120(B) may kindly be recommended against the concerned Police Officials, Doctors and owner of Vatika Hotel for entering into a conspiracy to save the accused persons.

4. Pursuant to the registration of FIR, report under Section 173 Cr.P.C. was presented in the competent Court of law wherein the then SHO, ASI and two other employees of the police department (hereinafter referred to as 'police officials') were arraigned as accused.

5. This writ petition was decided by the learned Single Judge vide judgment dated 18.6.2012 with the following directions:

(i) Respondent No.1 is directed to pay a sum of Rs.15,60,000/- as compensation to the petitioners within a period of one month from today. This amount shall be deposited in the Registry of this Court and thereafter the amount shall be put up in a fixed deposit

and petitioner will be entitled to receive interest accruing on the same on monthly basis.

(ii) It shall be open to the respondent No.1 to recover this amount from the erring officials i.e. respondent No.3 Shiv Kumar, SI Kanwar Singh, ASI Rattan Singh and HC Mahender Singh.

(iii) Respondent No.1 is directed to initiate disciplinary proceedings against respondent No.3 within a period of two weeks from today and conclude the same within a period of 12 weeks.

(iv) The Additional Director General of Police, CID is directed to take action against SI Kanwar Singh under Rule 8 and 9 of CCS (Pension) Rules within a period of eight weeks from today and submit the report to the disciplinary authority.

(v) The Superintendent of Police, Mandi is directed to initiate disciplinary proceedings against ASI Rattan Singh and complete the same within a period of 12 weeks and submit the report to the disciplinary authority immediately thereafter.

(vi) The Commandant 5th Indian Reserve Battalion is also directed to initiate disciplinary proceedings against HC Mahender Singh and to complete the same within a period of 12 weeks and submit the report to the disciplinary authority immediately.

(vii) The disciplinary authority in the case of respondent No.3 SI Kanwar Singh, ASI Rattan Singh and HC Mahender Singh shall take immediate action after receipt of inquiry reports.

(viii) Since the matter is of a very sensitive and grave in nature, respondent No.3 namely Shiv Kumar Chaudhary, ASI Rattan Singh and HC Mahender Singh shall be put under suspension forthwith and remain under suspension during the trial and also till the disciplinary proceedings are completed against them.

(ix) The trial Court is directed to complete the trial within a period of three months from today by holding day today proceedings.

(x) Respondent No.1 is also directed to issue directions to all the Police Stations in the State of Himachal Pradesh that no police personnel shall indulge in custodial violence and no third degree method shall be used by the police personnel against any person in the police custody in order to ensure due compliance of Article 21 of the Constitution of India. No physical or mental torture will be caused to the persons brought to the

Police Station by giving them beatings kicks, fist blows, by using *dandas* and any other method of subjugation. The police personnel should not use filthy and foul language in the Police Station and, if used, it will amount to physical and mental torture.

(xi) The Superintendent of Police/Deputy Superintendents of Police are directed to carryout the periodical inspections in the Police Stations to ensure that no person is detained in the police stations without authority of law and also to ensure that if any citizen/person is arrested without warrant, he be produced before the Illaqua Magistrate without 24 hours.

(xii) In order to ensure due compliance of directions No.(x) and (xi) the following committee of Judicial Officers/ Sub Divisional Officers is constituted:

(i) The Chief Judicial Magistrates of all the Divisions; and

(ii) The Sub Divisional Magistrates of all the Divisions.

The committee shall visit all the Police Stations weekly and report whether any person has been detained without authority of law. The committee shall also ensure that whether a person brought to the Police Station without warrant has been produced before the Illaqua Magistrate without 24 hours or not. The committee shall furnish reports to the Sessions Judges. The Sessions Judges are permitted to make recommendations for taking suitable disciplinary action against the persons who violated the constitutional and legal mandate. The recommendations made by the Sessions Judges would be binding on all the disciplinary authorities.

(xiii) The respondent No.1 is suggested to separate investigation from Law and Order Wing to make the investigation scientific by remodelling the police to increase the efficiency in the police force. The investigating agency should be properly trained and they should be taught how to uphold the Constitutional and basic human rights.

(xiv) Respondent State is directed to keep holding refresher courses to apprise the new developments and techniques in investigation.

(xv) Respondent No.1 is also directed to issue directions to the Superintendents of Police throughout the State of Himachal Pradesh that no matter of civil nature is

compromised in the Police Stations, as it amount to intimidation.

(xvi) Respondent No.1 is further directed that no police officer/ official is put on duty at a stretch beyond eight hours.

(xvii) Respondent State is directed to constitute the following committee to improve the conditions of service of the police personnel.

(a) Principal Secretary/Secretary (GAD) Government of Himachal Pradesh.

(b) The Secretary(Finance), Government of Himachal Pradesh.

The Committee shall undertake the exercise the manner in which the conditions of service of police personnel can be improved by providing time bound promotions, incentives to those police personnel who improve their educational qualification, their duty hours, housing problems and over time allowance etc. The Committee shall make its recommendations within a period of three months from today to the State Government. Thereafter, the State Government shall take necessary action within a further period of three months. It shall be open to the committee to make other recommendations concerning welfare of police personnel.

(xviii) Respondent No.1 and 2 are directed to file compliance reports separately within a period of three weeks. They are also directed to file status report(s) with regard to direction No.(viii) without 24 hours.

6. Now the State and the other respondents have filed these appeals before us. At the outset it may be observed that the position of law as quoted and relied upon by the learned Single Judge has not been disputed by any of the parties to the lis.

7. Two fold submissions have been made before us. One submission is common to all the appellants wherein challenge has been laid to the directions No. (i) to (ix) passed by the learned Single Judge and the other submission has been made only on behalf of the State challenging directions No. (x) to (xviii). We now proceed to determine the first submission.

8. The learned Advocate General alongwith the learned counsel for the other appellants have strenuously argued that in the teeth of the directions issued by the learned Single Judge, particularly directions No. (i) to (ix) supra, there is hardly any option left with either the disciplinary authority or even the Court but to punish/convict the police officials as firm findings regarding guilt of these police officials have been recorded leaving no room for the police officials to urge to the

contrary before the Courts or the disciplinary authorities. They have specially invited our attention to the following observations of the learned Single Judge made in the impugned judgment in paras 18, 19, 21, 23, 24, 27, 28, 29, 30, 38, 40, 41 and 82 as under:

> *"18. Now, the Court will examine in detail the theory of "fall", propounded by the Investigating Officer and substantiated by the Medical Board, constituted at the behest of Investigating Officer on 07.07.2008. The case projected by the respondents, is that petitioner No. 2 earlier fell near A.G. Office on 21.01.2008. There is no medical report placed on record dated 21.01.2008, disclosing any injuries on the person of petitioner No. 2. The second theory of fall tried to be proved by the respondents, is that petitioner No. 2 was found injured in the stairs of Middle Bazaar near Guptajees restaurant and he was brought to the Police Station by Constable Man Dass. He was medically examined at 7:45 p.m. The blood of petitioner No. 2 was taken to see the contents of alcohol or poison in his blood. In the report of F.S.L., neither there was any poison nor alcoholic contents in the blood of petitioner No. 2 as per the report. The final opinion was given by Dr. Payal Gupta after receiving the report from the F.S.L. This is a concocted story that the petitioner No. 2 received injuries when he fell on the stairs in Middle Bazaar. The second theory of fall has also been projected to help the accused. Petitioner No. 2 was medically examined by Dr. Rahi on 23.1.2008 at 7:15 p.m. It has again come in the M.L.C. issued by Dr. Rahi that there was no smell of alcohol. It further belies the story of frequent falls of petitioner No. 2.*
>
> *19. The fact of the matter is that petitioner No. 2 has been detained in the Police Station, Sadar Shimla from 22.01.2008 to evening of 23.01.2008 and he has received injuries due to the beatings given to him while he was unconstitutionally and illegally detained in the Police Station. The theory of fall has been further tried to be fortified by taking a tailor made opinion from the Medical Board by referring whether all the injuries could be caused due to accidental fall exclusively. This letter has been written by the Additional Superintendent of Police (City), Shimla to the Professor and Head, Department of Forensic Medicine, I.G.M.C., Shimla to help the accused and to establish that the injuries were received by petitioner No. 2 by way of a fall. It is reiterated that there was no conflict in the medical opinions rendered by two qualified doctors, i.e., Dr. Payal Gupta and Dr. Rahi. The Court deprecates the attempt made on behalf of the Officer, that too, of the rank of Additional Superintendent of Police (City), Shimla, to dilute the accusations against the persons, who were responsible for detaining the person in the Police Station unconstitutionally and illegally.*
>
> *21. There is no merit in the contention of Mr. Naresh Thakur, learned Senior Advocate that his client has tried to help the petitioner No. 2 on humanitarian ground by arranging ambulance*

etc. His client was Station House Officer and he, instead of protecting the liberty of petitioner No. 2, has compromised the same by detaining him in illegal custody at Police Station and given beatings to him. There is also no merit in the contention of Mr. Naresh Thakur, learned Senior Advocate that the police was not involved in the episode. The police was informed and ASI Tej Ram has visited Vatika Hotel on 22.01.2008 and thereafter the matter was also compromised at Police Control Room. Even as per the reply filed by respondent No. 4, it is apparent that the petitioner No. 2 was taken to Police Station where he was detained unconstitutionally and illegally and was given beatings as is duly established from the M.L.Cs. conducted on 22.01.2008 and 23.01.2008. This factum is also substantiated by the affidavits placed on record vide Annexures P-11 to P-13. The complicity of respondent No. 4, in these circumstances, can also not be overruled in the entire episode. His role ought to have been probed by the Investigating Officer.

23. It has come in the affidavits Annexures P-11 and P-13 that the police personnel and respondent No. 3 have given beatings to Rajesh Kumar. It further strengthens the case that the petitioner No. 2 was given beatings by the police personnel, including respondent No. 3. The respondents have not rebutted the contents of the affidavits. There is no reason why these persons, namely, Hari Dass, Chet Ram, Sita Ram, Kishan Bahadur would give false affidavits, that too, against the S.H.O. and other police personnel. It has also been deposed in affidavits that petitioner No. 2 was thrown in a drain. Petitioner No. 2 has spent the entire night in the drain, that too, in the month of January.

24. The duty of the police officials is to protect the life and limb of the citizen and not to put the same at peril by themselves by detaining the persons unconstitutionally and illegally and by beating a person to such an extent that he becomes 100% physically handicapped. On 20.04.2011, the Director General of Police was directed to file a fresh reply. He filed an affidavit, which is at page No. 271 of the paper-book. According to the affidavit, the investigation was complete and police report under Section 173, Cr. P.C. was filed in the Court, under Sections 341, 342, 323, 325, 218 and 120-B of the Indian Penal Code against the accused Shiv Chaudhary, Deputy Superintendent of Police (the then SHO), S.I. Kanwar Singh, ASI Rattan Singh and Constable Mahendar Singh.

27. The petitioner No. 2 has been deprived of his liberty enshrined under Article 21 of the Constitution of India. He is permanently disabled and can not make both ends meet. His wife and son are dependent on him and in these circumstances; it is the responsibility of the State to compensate the petitioners. Petitioner No. 2 was hale and hearty before this incident and was earning his livelihood as a Guide.

28. It is apparent from the facts that the petitioner No. 2 was taken to Police Station, Sadar Shimla in the afternoon on 22.01.2008. He was released from the Police Station, Sadar only when the petitioner No. 1 visited the Police Station in the evening on 23.01.2008. Petitioner No. 2 was examined by the doctor. It was the duty cast upon respondent No. 3 that the petitioner No. 2 is produced before the Magistrate within 24 hours. There is no explanation why the petitioner No. 2 was not produced by the police before the Magistrate as per the mandates of Article 22(2) of the Constitution of India.

29. According to Section 57 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Act' for the sake of brevity) no police officer shall detain in custody a person arrested without warrant for a period longer than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. In the instant case, petitioner No. 2 was required to be produced before the Illaqua Magistrate within a period of 24 hours, which the respondent No. 3 has failed to do.

30. According to Section 54 of the Act, when any person is arrested, he is to be examined by a Medical Officer in service of Central or State Governments and in case the medical officer is not available by a registered medical practitioner soon after the arrest is made and where the arrested person is a female, the examination of body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner. Under sub section (2) of Section 54 of the Act, it is the duty cast upon the medical officer or a registered medical practitioner examining the arrested person to prepare the record of examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted. A copy of the report of such examination is to be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person. In the instant case, the petitioner No. 2 has not been examined immediately after his arrest.

38. It has also come in the record that an attempt was made to get the statement of Rajesh Sharma, petitioner No. 2 recorded under Section 164 of the Cr. P.C., however, due to deterioration of health, it could not be recorded.

40. It is now duly established that petitioner No. 2 was detained by the police at Police Station, Sadar Shimla and was given beatings during his illegal custody, which led to his 100%

disablement. In these circumstances, the petitioners are to be compensated by reasonable compensation.

41. The Investigating Officer has tried to shield the delinquent officials by propounding two stories, which were contrary to the facts. He has tried to portray that injury No. 3 was present at the time when first M.L.C. was undertaken on 22.01.2008. This attempt has been made by the Investigating Officer to favour the delinquent officials. The second point formulated by the Investigating Officer that the injury has resulted due to fall, was also an attempt to shield the accused person. The theory of fall is contrary to the facts.

82. According to the disability certificate placed on record, issued by the Postgraduate Institute of Medical Education and Research, Chandigarh, the petitioner No. 2 has suffered head injury with severe left upper & lower limb weakness with very severe urinary incontinence with speech problem with inability to see. He was physically handicapped and has suffered 100% impairment in relation to his whole body. There is no direct evidence of the age of petitioner No. 2. However, at the time of filing of the petition, the age of petitioner No. 1 was 39 years in 2009. Thus, it can safely be presumed that the age of the petitioner No. 2 at the relevant time was 41/42 years. He was working as a Guide in Vatika Hotel. But, now he cannot work as a Guide, since he cannot see and he has speech problem. There is weakness in lower limb with very severe urinary incontinence. The petitioner No. 2, with this disability, cannot have any alternative employment. The Postgraduate Institute of Medical Education and Research, Chandigarh has given in the certificate 100% impairment in relation to his whole body. The Second Schedule under Section 163-A of the Motor Vehicles Act, 1988 gives a structured formula for the calculation of compensation in accident cases. Note 5 of the Schedule deals with disability in non-factal accidents and reads as follows:

> *"5. Disability in non-fatal accidents :*
>
> *The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:*
>
> *Loss of income, if any, for actual period of disablement not exceeding fifty-two weeks.*
>
> *PLUS either of the following-*
>
> *(a) In case of permanent total disablement the amount payable shall be a arrived at by multiplying the annual loss of income by the multiplier applicable to the age on the date of determining the compensation, or*
>
> *(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under Item (a) above.*

Injuries deemed to result in permanent total disablement/permanent partial disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923."

In the instant case, the petitioner No. 2 has not earned anything between the date of his admission in the hospital and his treatment in the hospital. As per the certificate issued by the Postgraduate Institute of Medical Education and Research, Chandigarh, the petitioner No.2 has suffered permanent disablement. He cannot see and he has problem with speech, coupled with lower limb weakness. Petitioner No. 2 was working as a Guide with Vatika Hotel and it can safely be presumed that he was earning about Rs.7,000/- per month. In his case, since he has suffered permanent disablement, the loss of future earning per annum would be Rs.84,000/-. Since the petitioner No. 2 was about 41 years of age, the multiplier of 11 would be appropriate. Thus, by multiplying Rs. 84,000/- by 11, the total amount comes to Rs.9,24000/-. Petitioner No. 2 is also entitled to future medical expenses. Though no document has been placed on record in this regard, but the Court can take judicial notice that since petitioner No. 2 has suffered serious injuries and is under treatment, he would at least require about Rs.2 lacs for future medical expenses. Petitioners and petitioner No. 2, more particularly, have suffered pain, sufferings and trauma as a consequence of the injuries and they are entitled to Rs.2 lacs under this head. Petitioners, over and above, the pecuniary damages and non-pecuniary damages, as assessed hereinabove, are entitled to be awarded a sum of Rs.236,000/- as exemplary compensation by the respondent No. 1 for violating their fundamental and legal rights."

9. On the other hand, the learned counsel for the writ petitioners, who are respondents in these appeals, has supported the directions issued by the learned Single Judge and would argue that taking into consideration that this was a case of custodial excesses committed by the appellants for which the State was vicariously liable, the directions issued by the learned Single Judge in the given facts and circumstances of the case were not only proper but had been issued strictly in accordance with law.

10. We have considered the rival contentions and are of the considered view that since the matter was pending investigation/ disciplinary proceedings, it was not proper or appropriate at this stage for the learned Single Judge to have recorded firm findings regarding the guilt of the police officials leaving no room for these police officials to urge the contrary. The effect of the judgment if allowed to stand would be to pre-empt the entire decision leaving nothing for the disciplinary authority or competent criminal court to decide. The findings recorded by the learned Single Judge have therefore definitely prejudiced the case of the police officials. Further, in case the findings so recorded are allowed to stand, it would be an onslaught and encroachment and would also

amount to taking over the reigns of the disciplinary authorities and/or the criminal courts.

11. It has to be remembered that while exercising the powers of a Constitutional Court a firm finding of fact in such like case can be returned only in exceptional cases. The observations made by the learned Single Judge may though be founded upon the material on record, nonetheless they remain only tentative for want of conclusive proof and at best can be termed to be prima facie views only. No doubt, in the case in hand, the allegations are serious, even the circumstances somewhat seem to support them, even the consequences are quite apparent, yet the material on record is not within the degree of conclusive proof on the basis of which firm findings of fact could have been returned. These at best may have given rise to a strong suspicion, but yet could not have been held to be conclusive. The truth must surface in the interest of those who are accusing and/or are being accused, therefore, to reach a definite conclusion, the investigation and disciplinary proceedings are inevitable whereafter alone the guilt, if any, of the police officials can be established.

12. This Court otherwise cannot be oblivious to the fact that in teeth of such firm findings as recorded by the learned Single Judge, no subordinate court or even the disciplinary authority would dare to go beyond these findings. More so when the order passed by the learned Single Judge does not even state that the findings as recorded are only tentative or prima-facie. Obviously, therefore, the findings so recorded in our considered view amounts to pre-judging the issues because the matter is pending investigation/disciplinary proceedings and it is possible that on its conclusion the Court /disciplinary authority may have sufficient material with it on the basis of which whatever has been said in the judgment could be sustained. However, it is equally possible that the material which the Court/ disciplinary authority may collect may not be enough to substantiate those allegations. When both the possibilities are there, the learned Single Judge should not have returned firm findings at this pre-mature stage.

13. It would otherwise be seen that the writ petition had questioned the high handed activities of the police against the petitioner No.2 wherein various reliefs have been claimed. The reliefs claimed were based on several causes of action for which specific remedies were provided under law. The petition also involving disputed questions of facts which could not have been decided by the Court in exercise of its power of judicial review. As held by the Hon'ble Supreme Court in ***Sanjay Sitaram Khemka vs. State of Maharashtra and others 2006 AIR SCW 2488*** wherein it has been held as follows:

> ***"9. Having regard to the allegations and counter-allegations made by the parties before us, we are of the opinion that no relief can be granted to the petitioner in this petition. The writ petition has rightly been held by the High Court to be involving disputed questions of fact. The petitioner has several causes of action wherefor he is***

required to pursue specific remedies provided therefor in law.

10. A writ petition, as has rightly been pointed out by the High Court, for grant of the said reliefs, was not the remedy. A matter involving a great deal of disputed questions of fact cannot be dealt with by the High Court in exercise of its power of judicial review. As the High Court or this Court cannot, in view of the nature of the controversy as also the disputed questions of fact, go into the merit of the matter; evidently no relief can be granted to the petitioner at this stage. We are, therefore, of the opinion that the impugned judgment of the High Court does not contain any factual or legal error warranting interference by this Court in exercise of its jurisdiction under Article 136 of the Constitution."

Therefore, even in this view of the matter, the findings recorded by the learned Single Judge would essentially have to be treated as only tentative and prima facie.

14. The findings recorded by the learned Single Judge are otherwise required to be taken only prima facie and tentative for yet another reason, because if taken to be final or conclusive, this would be contrary to the settled proposition of law that *"unless a person is convicted, he is presumed to be innocent."* The presumption of innocence is a human right. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence – be it an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent Court as held by the Hon'ble Constitution Bench of the Supreme Court in a recent decision in ***Manoj Narula vs. Union of India W.P.(C) No. 289 of 2005 decided on 27.8.2014*** wherein it has been held as follows:

"24. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence – be it in the form of an off-the-cuff allegation or an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent Court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked – a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal – that person may stand 'condemned' in the public eye, but even that does not entitle anyone to brand him or her a criminal."

Therefore, merely because a First Information Report is lodged against a person or a criminal complaint is filed against him or even a charge has been framed against a person, he cannot be presumed to be guilty because this itself would frustrate and, eventually, defeat the established concept of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty and there is indeed a long distance between the accused "*may have committed the offence*" and "*must have committed the offence*" which must be traversed by the prosecution by adducing reliable and cogent evidence. [See: ***Narendra Singh v. State of Madhya Pradesh (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294, Ganesan v. Rama Ranghuraman (2011) 2 SCC 83, State of Uttar Pradesh v. Naresh, (2011) 4 SCC 324 and Kailash Gour and others v. State of Assam (2012) 2 SCC 34***].

15. This takes us to the second submission raised by learned Advocate General whereby the State has taken exception to the directions No. (x) to (xviii).

16. The Hon'ble Constitution Bench of the Supreme Court in ***Lalita Kumari vs. Government of Uttar Pradesh and others (2014) 2 SCC 1*** has taken into consideration the historical experience regarding cases coming from both sides where the grievance of the victim/informant of non-registration of valid FIRs as well as that of the accused of being unnecessarily harassed and investigated upon false charges were found to be correct. It was also noticed that there were number of cases which exhibit that there are instances where the power of the police to register an FIR and initiate an investigation thereto were being misused where a cognizable offence was not made out from the contents of the complaint. To strike balance between the conflicting claims, Hon'ble Supreme Court proceeded to pass the following directions:

> ***"120.1. Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.***
>
> ***120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.***
>
> ***120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.***
>
> ***120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be***

taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/ family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

We are of the considered view that the directions No. (x) to (xviii) as passed by the learned Single Judge have lost efficacy in view of the recent directions of the Hon'ble Constitution Bench of the Supreme Court in ***Lalita Kumari's*** case (supra) and accordingly, the same shall stand substituted by the aforesaid directions in ***Lalita Kumari's*** case.

17. We have been informed that under the orders of the Court, a sum of Rs.15,60,000/- has been deposited in the Registry of this Court. Needless to say that this amount shall not be withdrawn till the conclusion of the departmental/criminal proceedings and shall abide by the final outcome of all these proceedings.

18. The upshot of the aforesaid discussion is that the findings recorded by the learned Single Judge with respect to the guilt of the accused police officials will only be considered to be prima facie and tentative and we further clarify and make it absolutely clear that the observations made therein shall have no binding effect whatsoever or in any manner influence the ongoing disciplinary or criminal proceedings. The directions No. (x) to (xviii) as passed by the learned Single Judge would be substituted by the directions No. 120.1 to 120.8 issued by the Hon'ble Constitution Bench of the Supreme Court in ***Lalita Kumari's*** case. Lastly the amount of Rs.15,60,000/- deposited in the Registry of this Court shall abide by the final outcome of the disciplinary/criminal proceedings.

With these observations, all appeals are disposed of, so also the pending application(s), if any. An authenticated copy of this judgment be placed in all the connected files.

Ex. Petition No. 30 of 2012 and COPC No. 4158 of 2013

19. These petitions for the time being have been rendered infructuous in view of the aforesaid orders passed in LPA Nos. 480, 281 and 282 of 2012.

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

Oriental Insurance Co. Ltd. .....Appellant

Versus

Smt. Rattani Devi & others ...Respondents

FAO No. 53 of 2007
Reserved on : 29.08.2014
Decided on : 05.09.2014

Motor Vehicle Act, 1988- Section 149- Claimant had specifically pleaded that deceased was travelling in the vehicle as owner of the goods- owner/respondent No. 1 had not denied this fact - Insurance Company had pleaded that deceased was travelling as gratuitous passenger but no evidence was led by the Insurance Company to prove this fact- claimant had led oral and documentary evidence to prove that deceased was travelling as owner of the goods- held, that it was for the insurer to plead and prove that vehicle was being driven in violation of the terms and conditions of the Insurance policy but it had failed to do so- hence, Insurance Company was rightly held liable to pay compensation. (Para- 12 to 16)

For the appellant : Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. Arun Verma, Advocate, for respondent No. 1 & 2.

Ms. Anu Tuli, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this appeal is to the award dated 28th November, 2006, made by the Motor Accidents Claims Tribunal (II), Solan, (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 8 S/2 of 2006, titled as Rattani Devi and another versus Shri Joginder Singh & others, whereby compensation to the tune of Rs.1,83,000/- with interest @ 9% per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimants-respondent 1 & 2 herein and the appellant-insurer was saddled with liability (for short, the "impugned award"), on the grounds taken in the memo of appeal.

Brief Facts:

2. The vehicle-Mahindra Pick-up bearing registration No. HP-12-A-5607, owned by Shri Joginder Singh, was being driven by driver, namely, Amar Singh, rashly and negligently, on 1st April, 2006, met with an accident at about 11.30 a.m, near Village Chalwni, Sub Tensil and P.S. Ramshehar, Tehsil Nalagarh, District Solan and Lakhwinder Singh, who was travelling in the said vehicle as owner of ration, sustained injuries and succumbed to the injuries.

3. The claimants filed claim petition for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

4. The claim petition was resisted and contested by the appellant-insurer, the owner-insured and the driver. Following issues were framed by the Tribunal on 31.07.2006:-

"1. Whether the accident and consequent death of deceased Lakhwinder Singh on 1.4.2006 is attributed to the rash and negligent driving of the offending vehicle bearing No. 12-A-5607 by respondent No. 2 Amar Singh, as alleged, if so, its effect? .....OPP

2. Whether the petitioners are entitled to compensation, if so to what extent and from whom? ....OPP

3. Whether the deceased was gratuitous passenger and as such is not entitled to compensation as per terms and conditions of insurance policy, as alleged, if so, its effect? ...OPR-3

4. Whether the respondent No. 2 was not having valid and effective driving licence to drive the offending vehicle on the date of accident, if so its effect? ...OPR-3

5. Whether the offending vehicle was being driven in contravention of the terms and conditions of insurance cover, as alleged, if so, its effect? ...OPR-3

6. Relief."

5. The claimants have examined Shri Kamal Singh as PW-2. Smt. Rattani Devi, one of the claimants, also appeared in the witness box as PW-1. Owner-insured Joginder Singh appeared in the witness box as RW-1 and the insurer-Insurance Company has examined one Shri Mahender Singh, Senior Assistant as RW-2.

6. The Tribunal, after scanning the evidence, oral as well as documentary, decided all issues in favour of the claimants and against the driver, owner-insured and the insurer-National Insurance Company and held the claimants entitled to compensation to the tune of Rs.1,83,000/- with interest @ 9% per annum from the date of the claim petition till realization of the award amount. The insurer-appellant was saddled with liability.

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

8. The insurer-Oriental Insurance Company has questioned the impugned award by the medium of this appeal on the following grounds;

(i) the deceased was travelling in the offending vehicle as a gratuitous passenger;

(ii) the Insurance Company was not liable to be saddled with the liability; and

(iii) the multiplier applied is not just and appropriate.

Issue No. 1

9. The findings returned by the Tribunal on this issue are not in dispute. However, I have gone through the impugned award, pleadings and the evidence on the record. The claimants have proved by leading oral as well as documentary evidence that the driver has driven the offending vehicle in a rash and negligent manner on the fateful day and caused the accident, in which the deceased sustained injuries and succumbed to the injuries. Thus, the findings returned by the Tribunal on this issue are upheld.

Issue No. 4.

10. The onus to prove this issue was upon the insurer-Insurance Company, but it failed to discharge the same. Thus, the findings returned by the Tribunal on this issue are also upheld.

Issues No. 2, 3 & 5.

11. All these issues are inter-linked, so I deem it proper to take all these issues together for determination.

12. The claimants have specifically pleaded in para-24 of the claim petition that the deceased was travelling in the said vehicle as owner of goods. Owner-respondent No. 1 in reply to the claim petition has not denied the same and has virtually admitted the said fact.

13. The insurer-Insurance Company in its reply has denied para-24 of the claim petition and pleaded that the deceased was travelling in the said vehicle as a gratuitous passenger.

14. The claimants have proved by leading evidence oral as well as documentary that the deceased was traveling in the said vehicle as owner of the goods. The owner and the driver have not questioned the said fact, thus has attained finality so far as it relates to them.

15. It was for the insurer to plead and prove that the deceased was traveling in the offending vehicle as a gratuitous passenger, but it failed to do so. Thus, the findings returned by the Tribunal on issue No. 3 need no interference and are accordingly upheld.

16. It was also for the insurer to plead and prove that the driver has driven the offending vehicle in contravention of the terms and conditions of the insurance policy, but failed to do so. Thus, the findings returned by the Tribunal on issue No. 5 are also upheld.

17. The claimants have not questioned the adequacy of compensation. Admittedly, the deceased was 13 years of age at the time of accident. The minimum compensation to the tune of Rs.1,83,000/- has been awarded to the claimants by the Tribunal, which cannot be said to be excessive, in any way. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

18. Having said so, the appeal merits dismissal. The same is accordingly dismissed and the impugned award is upheld.

19. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

20. Send down the records after placing copy of the judgment on record.

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

FAOs (MVA) No. 178, 248 and 249 of 2012.
Date of decision: 5th September, 2014.

FAO No.178/2012.
Kumari Diksha (minor) and others .....*Appellants.*
Versus
Himachal Pradesh Road Transport Corporation, ...*Respondent.*

FAO No.248/2012.
Smt. Krishna and others .....*Appellants.*
Versus
Himachal Pradesh Road Transport Corporation, ...*Respondent.*

FAO No.249/2012.
Kumari Anjana and others *.....Appellants.*
Versus
Himachal Pradesh Road Transport Corporation, ...Respondent.

Motor Vehicle Act, 1988- Section 171- The Tribunal had not awarded the interest on compensation amount- held, that as per the mandate of Section 171, claimants are entitled to the interest on the compensation amount from the date of claim petition- hence, interest awarded at the rate of 9% per annum from the date of filing of the petition till realization. (Para- 4 and 5)

For the appellant (s): Mr. Neeraj Gupta, Advocate.
For the respondent (s): Mr.Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

A common judgment and award dated 18.1.2012 in MAC Petition No. 11-S/2 of 2010, passed by the Motor Accidents Claims Tribunal Shimla in three claim petitions has given birth to these appeals, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeals.

2. The respondent has not questioned the impugned award on any ground.

3. The claimants in all the three claim petitions have questioned the impugned award on the ground of adequacy of compensation and also that the Tribunal has fallen in error in not awarding interest. The question in these appeals is- whether the Tribunal has rightly assessed the compensation or otherwise. Thus, I deem it proper not to discuss other issues as the findings on the said issues have attained finality.

4. I have examined the record relating to FAO No. 178 of 2012 and also the record of FAO No. 249 of 2012. The Tribunal has rightly assessed the compensation but has fallen in error in not awarding the interest in both the cases. As per the mandate of Section 171 of the Motor Vehicles Act, for short "the Act, claimants are also entitled to interest. The interest was to be granted. It is apt to reproduce Section 171 of the Act herein:

> ***"171. Award of interest where any claim is allowed.***
>
> *Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall*

also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."

5. The word "shall" has been used in this Section, thus, interest was mandatory to be granted for the simple reasons that a sum of Rs.5,76,000/- was awarded in FAO No. 178 of 2012 and Rs.1,50,000/- was awarded in FAO No. 249 of 2012 in favour of the claimants on account of death of the deceased. Therefore, I deem it proper to award interest @ Rs.9% per annum in both the claim petitions. It is held that the claimants are entitled to interest @ Rs.9% per annum from the date of filing the claim petition till the final realization of the amount. The impugned award is modified as indicated above in both these appeals.

6. Now coming to FAO No. 248 of 2012. The Tribunal has assessed the compensation while taking monthly salary of the deceased as Rs.12,008/ and after deducting 1/3rd held that the claimants have lost source of income to the tune of Rs.8,000x12= Rs.96,000/-, which is legally correct while keeping in view the mandate of Section 166 of the Act read with ***Sarla Verma*** *versus* ***Delhi Road Transport Corporation*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and anr. 2013 AIR (SCW) 3120***. However, the Tribunal has fallen in error in applying the multiplier of "10" as per the Schedule appended to the Act read with the judgments (supra). The multiplier of "13" was just and appropriate multiplier applicable. The interest @ 9 % per annum was to be awarded from the date of claim petition till its realization, as discussed herein above.

7. Mr. Neeraj Gupta, Advocate, for the appellants has argued that Tribunal has not assessed the income correctly, which is devoid of any force, in view of the discussion made herein above.

8. Thus, the claimants are held entitled to Rs.8000x12x13 total to the tune of Rs.12, 48,000/- with 9% interest from the date of filing the claim petition till its realization.

9. The impugned award is modified and the amount is enhanced in this appeal, as indicated above.

10. All the three appeals are disposed of accordingly. Send down the record, forthwith.

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

Ashok Kumar & another .....Appellants

Versus

Smt. Kamla Devi & others .....Respondents

FAO No. 7 of 2007
Reserved on :29.08.2014
Decided on : 05.09.2014

Motor Vehicle Act, 1988- Section 157- Insurance Policy was valid from 18th December, 1999 to 17th December, 2000- it was issued in the name of the Anupam Hardware Store- vehicle was transferred in the name of the Ashok Kumar on 17.6.2000 subsequent to the date of accident- held, that MACT had fallen in error in holding that Insurance Company was not liable to indemnify the insured. (Para-14 to 21)

Cases referred:

G. Govindan versus New India Assurance Company Ltd. and others, reported in AIR 1999 SC 1398

Rikhi Ram and another versus Smt. Sukhrania and others, reported in AIR 2003 SC 1446

United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, reported in (2006) 4 SCC 404

United India Insurance Company Limited Shimla versus Tilak Singh & others, reported in 2006 SCCR, 473

For the appellants : Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Virender Rathour, Advocate vice Mr. Subodh Burathoki Advocate, for respondents No. 1 & 2.
Ms. Kanta Thakur, Advocate vice Mr. Rajesh Mandhotra, Advocate, for respondent No. 3.
Mr. Sanjeev Kuthiala, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Appellants have invoked jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988, for short "the Act", whereby they have questioned the impugned award, dated 30.09.2006, passed by the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharamshala, (hereinafter referred to as "the Tribunal"), in MAC Petition No. 92-D/II/05/2000, titled as Smt. Kamla Devi & another versus Ashok Kumar & others, whereby compensation to the tune of Rs. 1,80,000/- with interest @ 9% per annum came to be awarded in favour of the claimants-respondents No. 1 & 2 herein and against respondents Ashok Kumar and Kalyan Chand-appellants herein, from the date of the claim petition till its realization, (for short "the impugned award"), on the grounds taken in the memo of appeal.

Brief Facts:

2. Claimants, Smt. Kamla Devi, wife of Shri Balak Ram and Shri Balak Ram, son of Shri Nand Lal filed the claim petition before the Tribunal, for grant of compensation to the tune of Rs.4,50,000/-, as per the breaks-up given in the claim petition on the following grounds:

(i) That driver, namely Kalyan Chand had driven the vehicle-Maruti Van bearing registration No. HP-39-2100, rashly and negligently, on 5.6.2000, at about 8.00 p.m., at Diala (near Jia) Tehsil Palampur, District Kangra and caused accident, in which deceased, namely, Raj Kumar, son of Shri Balak Ram sustained injuries and succumbed to the injuries;

(ii) The deceased was 22 years of age at the time of accident and was earning Rs.6,000/- per month. The claimants are the parents of the deceased, have lost source of dependency and help and sought compensation to the tune of Rs.4,50,000/-.

3. The respondents contested the claim petition on the grounds taken in their objections. Following issues came to be framed by the Tribunal on 25.07.2006:

"1. *Whether the petitioners are entitled for compensation on account of death of their son Raj Kumar? If so, from whom and to what amount? …OPP*

2. *Whether the Driver of erring vehicle was not holding a valid and effective driving licence? If so, its effect?…OPR4*

3. *Whether the respondent No. 4 is liable to indemnify only the respondent No. 3-A, the insured? …OPR4*

4. *Whether the vehicle was plied in contravention of terms and conditions of the Insurance Policy? OPR4*

5. *Whether the respondent No. 4 is not liable as the vehicle involved in the accident was transferred without complying with the provisions of the M.V. Act?…OPR4*

6. *Whether the respondent No. 3-A had transferred the vehicle involved in the accident in favour of the respondent No. 1 before the accident? If so what would be its effect?…OPR3A*

7. *Whether the petition is not legally and factually maintainable, as alleged by the respondent No. 3?…OPR3*

8. *Relief."*

4. Parties led their evidence. The Tribunal, after scanning the evidence, oral as well as documentary, made the impugned award; held the claimants entitled to compensation to the tune of Rs.1,80,000/- with interest @ 9% per annum and costs quantified at Rs. 5,000/- from the date of the claim petition till realization of the award amount; saddled owner Ashok Kumar and driver Kalyan Chand with liability and exonerated the insurer-United India Insurance Company.

5. The insurer-United India Insurance Company, owner-respondent No. 3-A-Anupam Hardware Store and claimants have not questioned the impugned award on any count. Thus, it has attained finality so far as it relates to them.

6. Owner Ashok Kumar and driver Kalyan Chand have questioned the impugned award by the medium of this appeal on the ground that the Tribunal has fallen in error in saddling them with liability and exonerating the insurer.

7. The only question to be determined in this appeal is - whether the insurer came to be rightly exonerated from liability?

8. Before, I determine the issue raised in this appeal, I deem it proper to record herein that the claimants have proved that driver Kalyan Chand had driven the offending vehicle rashly and negligently, on the fateful day and had caused the accident, in which Raj Kumar sustained injuries and succumbed to the injuries. Thus, the findings returned on issue No. 1 are upheld to the above extent.

9. The insurer-United India Insurance Company had to prove and plead that driver Kalyan Chand was not having valid and effective driving licence at the time of accident, but it failed to do so. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

10. Respondent No. 3-Kalyan Chand has failed to prove issue No. 7 and has not questioned the findings returned on the same. Thus, the claim petition is maintainable in terms of mandate of Section 166 of the Act. Accordingly, the findings returned by the Tribunal on the aforesaid issue are upheld.

11. Admittedly, the offending vehicle was insured with respondent No. 4-United India Insurance Company and insured was Anupam Hardware Store, respondent No. 3-A in the claim petition, at the relevant time.

12. The insured-respondent No. 4 has admitted in its reply that the offending vehicle was insured in the name of Anupam Hardware Store, i.e. respondent No. 3-A in the claim petition.

13. Insurance Policy, (Mark-B) was valid from 18th December, 1999 to 17th December, 2000 and the registered owner of the vehicle was Anupam Hardware Store, i.e. respondent No. 3-A in the claim petition.

14. The Tribunal has fallen in error in holding that the insurer has not to indemnify, which is an eye opener for the said Presiding Officer, how casually he has dealt with the case.

15. Section 157 of the Act reads as under:

"Transfer of certificate of insurance.

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter

transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.

16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellant-respondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer-Insurance Company. The vehicle was not transferred on the date of accident, thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section (*supra)*, the insurance policy shall be deemed to have been issued in favour of the transferee.

17. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India Assurance Company Ltd. and others,** reported in **AIR 1999 SC 1398.** It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.

11. .....

12. .....

13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.

14. .....

15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."

18. The Apex Court in case titled as **Rikhi Ram and another** versus **Smt. Sukhrania and others,** reported in **AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, *supra,* herein:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal

benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla** versus **Tilak Singh and others,** reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

"12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

20. Having said so, the Tribunal has fallen in error in exonerating the insurer-Insurance Company from liability and saddling owner Ashok Kumar and driver Kalyan Chand with liability.

21. The Tribunal has discussed the Apex Court judgment titled as **United India Insurance Company Limited Shimla versus Tilak Singh & others**, reported in **2006 SCCR, 473,** but has wrongly applied it. The Tribunal has also not taken note of the fact that on the date of accident, the vehicle was in the name of registered owner- Anupam

Hardware Store and was not transferred to Ashok Kumar, son of Shri Kishori Lal.

22. Having said so, it is held that the insurer-Insurance Company has to indemnify. Accordingly, issues No. 1, 3, 4, 5 & 6 are decided against the insurer and in favour of the claimants.

23. The insurer-Insurance Company is directed to deposit the award amount within eight weeks from today, before the Registry and on deposition, the Registry to release the same in favour of the claimants-respondents No. 1 & 2 herein, strictly as per the terms and conditions contained in the impugned awards.

24. The compensation amount, if deposited before the Registry by the appellants-owner and driver, be released in their favour through payees account cheque.

25. The impugned award is modified, as indicated above and the appeal is disposed of.

26. Send down the record after placing a copy of the judgment on record.

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

Giano Devi .....Appellant/plaintiff.

Versus

Bihari Lal & others ..... Respondents/defendants.

RSA No. 332 of 2000
Reserved on: 22.08.2014.
Date of decision: 05.09.2014.

Specific Relief Act, 1963- Section 34- Plaintiff sought a declaration that her mother 'L' was the owner of the property - plaintiff and her sister being legal heirs are entitled to succeed to the property- defendants asked the plaintiff to vacate the property on the basis of revenue record- defendants contended that mother of the plaintiff had transferred the property in favour of the defendants by executing a Tamliqnama and affidavit dated 31st January, 1966-mutation was also attested in favour of the defendants on 16.3.1971- Trial Court had held that documents had been duly proved that they were more than 30 years of age and a presumption could be drawn regarding their due execution- held, that plaintiff had failed to prove that documents had not been properly executed- appeal dismissed. (Para- 16 to 18)

Limitation Act, 1963- Article 58 - Suit seeking declaration regarding the invalidity of the document was filed after 28 years of age of its execution- held, that the suit is barred by limitation. (Para-19)

For the appellant: Mr.Paresh Sharma, Advocate.

For the respondents: Mr.Karan Singh Kanwar, Advocate, for respondents No.1, 2, 3(a) to 3(c), 4 to 9, 10(a) to 10(c), 11, 12 and 14.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

By the medium of this Regular Second Appeal, the appellant/plaintiff has invoked the jurisdiction of this Court as per the mandate of Section 100 of the Code of Civil Procedure (for short, CPC) and has questioned the judgment, dated 19th April, 2000, passed by the learned District Judge, Sirmaur at Nahan, in Civil Appeal No.50-CA/13 of 1999, titled Giano Devi vs. Bihari Lal and others, read with the judgment, dated 2nd August, 1999, passed by Senior Sub Judge, Sirmaur at Nahan, on the grounds taken in the memo of appeal.

2. The appeal came up for consideration before this Court on 19th July, 2000 and the same was admitted, vide order dated 7th August, 2000, on the substantial questions of law No.1, 4, 5 and 7, as formulated at page 7 of the paper book. The file remained on the docket of this Court till 8th August, 2014 and after examining the file, hearing the learned counsel for the parties, the following substantial questions of law were framed on the said date:

1. Whether the impugned judgments are perverse?

2. Whether the presumption drawn by the Courts below in terms of Section 90 of the Evidence Act is not legally tenable?

3. Whether the release/relinquishment deed is valid in terms of the provisions of the H.P. Land Records Manual?

4. Whether the suit property can be relinquished/released in terms of the release/relinquishment deed.

5. Whether the Tamliqnama (Ext.D-3), dated 31.1.1966, and the affidavit (Ext.D-4), were the outcome of forgery, fabrication and manipulation?

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

Brief Facts:

4. Appellant/plaintiff had filed a Civil Suit before the Senior Sub Judge, Sirmaur at Nahan, for grant of decree of declaration on the ground that she is owner in possession of the land and house comprised in Khewat No.52 min, Khatauni No.96 min, Khasra Nos.435, 436 and 437, measuring 69.43 square meters, situated in Mohal Mian-ka-Mandir, near Partap Bhawan, Nahan, District Sirmaur, H.P. It was prayed that the revenue entries in the name of the defendants/respondents be declared void, illegal and inoperative to the rights of the plaintiff. The plaintiff had also prayed, in the alternative, that she had become owner

by way of adverse possession and all the rights, title and interest of the defendants stood extinguished, on the grounds taken in the memo of plaint.

5. The defendants (respondents herein) resisted the plaint by filing written statement.

6. On the pleadings of the parties, the followings issues came to be settled by the trial Court:

"(i) Whether the plaintiff is owner in possession of the suit property, as alleged? OPP

(ii) Whether the revenue entries depicting the defendants as owners of the suit property are illegal, void and inoperative, as alleged? OPP

(iii) If issue No.1 is not proved in affirmative, whether the plaintiff has acquired the title to the suit property by way of adverse possession? OPP

(iv) Whether the suit is not within time? OPD

(v) Whether the plaintiff has no locus-standi to file the present suit? OPD

(vi) Whether the plaintiff is estopped to bring the suit by her own acts and admissions, as alleged? OPD

(vii) Whether the suit is bad for non-joinder of necessary parties? OPD

(viii) Whether the suit is not maintainable in the present form? OPD

(ix) Whether the suit is not properly valued for the purpose of court fees and jurisdiction. OPD

(x) Whether the defendants have acquired title to the suit land by way of a gift deed executed by Smt.Leela Devi on 31.01.1966 in their favour qua the suit property? If so, its effect? OPD

(xi) Whether the alleged gift deed as referred to in Issue No.10 above executed by Smt.Leela Devi in indisposing state of mind and under undue pressure, misrepresentation and fraud practiced by the defendants on the right, title or interest of the plaintiff, as alleged? OPP

(xii) Whether the gift deed dated 31.01.1966 is for consideration and, therefore, is also void and illegal, as alleged? OPP

(xiii) If issue No.10 is proved in affirmative, whether the defendants are entitled for the decree of possession? OPD

(xiv) Relief."

7. Parties led evidence and the Court of the Senior Sub Judge dismissed the suit vide judgment and decree, dated 2nd August, 1999,

constraining the plaintiff to file appeal before the District Judge, which was also dismissed, constraining her to file the second appeal, in hand.

8. Plaintiff had sought relief on the grounds that Smt.Leela Devi was the owner of the suit property and the plaintiff and her sister, namely, Sarna Devi, being the legal heirs of Smt. Leela Devi, succeeded her. The plaintiff and her mother Smt.Leela Devi were continuously residing in the house and were in possession of the landed property till the death of Smt.Leela Devi on 17.1.1988 and after her death, the plaintiff remained in possession. The defendants, on 15th June, 1994, asked the plaintiff to vacate the house while pressing into service the land record. It was pleaded by the plaintiff that the revenue entries were manipulated, illegal, void and have cast a cloud on her rights. Her mother remained bed ridden since 1965 and was totally incapacitated from executing any document.

9. Defendants contested the suit by filing written statement, in which they admitted that Smt.Leela Devi was owner of the suit property. It was denied by the defendants that the plaintiff and her sister Smt.Sarna Devi had succeeded to Smt.Leela Devi, as the said Smt.Leela Devi had transferred the suit property in favour of the predecessor of the defendants by way of documents i.e. Tamliqnama and affidavit, dated 31st January, 1966, and mutation No.19, dated 16th March, 1971, was made in favour of the father of the defendants on the basis of the said registered Tamliqnama, dated 31st January, 1966. The copies of mutation, Tamliqnama and affidavit were produced before the trial Court. It was further pleaded by the defendants that the plaintiff had knowledge of the execution of the said documents. It was also the case of the defendants that the plaintiff has not come to the Court with clean hands.

10. The trial Court, after examining the evidence, oral as well as documentary, led by the parties, has decided issues No.i, ii, xi and xiii against the plaintiff and issues No.x and xiii in favour of the defendants. The trial Court held that admittedly the mother of the plaintiff, namely, Leela Devi was owner in possession of the suit property, who died on 17th January, 1988.

11. It was further observed by the trial Court that the defendants examined one Sham Sunder as DW-1 in order to prove the documents Tamliqnama Ext.D-3 and affidavit Ext.D-4, since DW-1 Sham Sunder was the son of deceased Amar Nath, who was a Petition Writer and had scribed the said documents Exts.D-3 and D-4. DW-1 Sham Sunder, being the son of said Amar Nath, admitted the signature and hand writing of his father Amar Nath on these documents.

12. After making discussion of the revenue entries and of the said documents i.e. Exts.D-3 & D-4, and oral as well as documentary evidence, the trial Court held that the plaintiff had failed to prove her case and the defendants had proved that they had become owners of the suit property in terms of Tamliqnama i.e. transfer deed Ext.D-3, which is registered one and duly written on a stamp paper. Further, the trial

Court also held that the said documents (Exts.D-3 & D-4) are more than 30 years old and, therefore, has drawn presumption in terms of Section 90 of the Indian Evidence Act.

13. The trial Court also held that since the defendants have proved, by leading cogent evidence, the execution of documents Tamliqnama Ext.D-3 and affidavit Ext.D-4, therefore, they became owners of the suit property and that the possession of the plaintiff over the suit property was illegal. The counter claim set up by the defendants was decreed in their favour. It is apt to reproduce paragraph 16 of the judgment of the trial Court hereunder:

> *"The cumulative effect of the aforesaid discussions is that the plaintiff has failed to establish that she is owner of the suit property and that the revenue entries showing contrary position are illegal, null and void. On the other hand, the defendants have established by leading cogent and credible evidence that through registered document Ex.D-3 (transfer deed/tamleeknama) the suit property was transferred by deceased Smt.Leela Devi in favour of Sh.Gokal Chand, the predecessor-in-interest of the defendants, and consequently on the basis of this document the revenue entries qua the title of the suit property are also correctly mutated in favour of deceased Gokal Chand who consequently, became the owner of the same. Through document Ex.D-4 dated 31.1.1966 the suit house was given to Smt.Leela Devi for her shelter during her life time and after her death the defendants are definitely entitled to get the possession of the suit property. I, accordingly, decide issue No.1, 2, 11 and 12 against the plaintiff and Issue No.10 and 13 in favour of the defendants."*

14. Plaintiff had also taken the plea of adverse possession, in the alternative. The trial Court has held that the plaintiff has not led any evidence to prove that she has acquired the title/ownership of the suit property by way of adverse possession.

15. The Appellate Court after examining the pleadings and evidence led by the parties held that the trial Court has rightly determined all the issues and dismissed the appeal filed by the plaintiff.

16. I have examined the judgments passed by the learned trial Court as well as by the learned Appellate Court. Admittedly, the document i.e. Tamliqnama Ext.D-3 and affidavit Ext.D-4 were executed on 31st January, 1966 and the mutation Ext.D-5 was also attested in favour of the defendants on 16.3.1971. Therefore, the documents Exts.D-3 and D-4 (Tamliqnama and affidavit) were more than 30 years old at the time when they were exhibited in the Court i.e. on 22.06.1998. Therefore, both the courts below have rightly drawn the presumption in terms of Section 90 of the Indian Evidence Act.

17. On the contrary, the plaintiff has failed to prove that the documents Exts.D-3 and D-4 were not valid in terms of Himachal Pradesh Land Records Manual. The mutation Ext.D-5 was attested in

the year 1971, which was never questioned by the original owner Smt.Leela Devi, how can it lie in the mouth of the plaintiff that the documents Exts.D-3 and D-4 are bad in the eyes of law or the mutation was wrongly attested in favour of the defendants.

18. The plaintiff has failed to prove that Tamliqnama Ext.D-3 and affidavit Ext.D-4 were forged or fabricated. There is no iota of evidence on the record which could show that the said documents were not executed by Smt.Leela Devi or were executed under influence. Contrary to it, the defendants have been able to prove by leading cogent and credible evidence that the said documents are valid and were prepared by the scribe on judicial paper and the Tamliqnama Ext.D-3 was registered before the Sub Registrar. DW-1 Sham Sunder, being the son of the scribe Amar Nath, has identified the signatures of his father on these documents. Moreover, the plaintiff had not led any evidence to prove the averments contained in the plaint and failed to discharge the onus.

19. The suit, on the face of it, is time barred, which came to be filed in the year 1994 i.e. after 28 years of the execution of the documents Exts.D-3 & D-4, and after about 23 years of the attestation of mutation Ext.D-5, in the year 1971. At the best, the suit was to be filed within the time frame as per the mandate of law. Thus, both the Courts below have rightly held that the suit was time barred.

20. It is clear from the above discussion that the findings recorded by the trial Court and by the Appellate Court are based on correct appreciation of facts and the evidence, oral as well as documentary, led by the parties. Both the judgments are legal one, cannot be said to be perverse in any way.

21. The concurrent findings of fact cannot be disturbed unless it is shown that the same are perverse.

22. The plaintiff has not sought consequential relief, which was available to her at the time of filing of the suit. Thus, the suit is hit by the mandate of Section 34 of the Specific Relief Act, 1963 (for short, S. Act), which reads as under:

> *"**34. Discretion of Court as to declaration of status or right. –** Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*
>
> *Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."*

23. In view of the above discussion, I am of the considered view that no substantial question of law is involved in the present appeal.

24. Having said so, the appeal merits to be dismissed and the same is dismissed accordingly.

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

Kusum Kumari and others .....Appellants.
Versus
M.D. U.P. Roadways and others ...Respondents.

FAO (MVA) No. 174 of 2013.
Date of decision: 5th September, 2014.

Motor Vehicle Act, 1988- Section 166- MACT had dismissed the petition for grant of compensation- Respondents had not denied the allegations regarding the accident specifically and these were deemed to have been admitted- no evidence was led by the respondents to controvert the evidence led by the claimants- held, that the rules of the pleadings are not strictly applicable to the claim petition- claim of the claimants was duly proved and MACT had wrongly dismissed the claim petition. (Para- 5 to 9)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another (2013) 10 SCC 646

Sarla Verms versus Delhi Road Transport Corporation, reported in AIR 2009 SC 3104

For the appellants:	*Mr. Ajay Sharma, Advocate.*
For the respondents	*Mr.Adarsh K. Sharma, Advocate for respondents No. 1 and 2.*
	Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award dated 18.2.2013, made by the Motor Accidents Claims Tribunal, Hamirpur in MAC petition No. 20 of 2011 titled *Kusum Kumari and others vs. M.D. U.P. Roadways and others*, whereby the claim petition of the claimants came to be dismissed, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Briefly stated, the claimants had filed claim petition for the grant of compensation to the tune of Rs.25 lacs on account of death of Madan Lal in a motor vehicle accident, which took place on 29.1.2011 at about 7 p.m. at G.T. Road, Manglor, District Mujaffar Nagar

(Uttarakhand) in front of Ujala Factor Manglor, of Bus No. UP-11-T-2701 of U.P. Transport Corporation due to rash and negligent driving of its driver Sanjeev Malik, respondent No. 3 herein. In the said accident deceased Madan lal suffered injuries and succumbed to the same.

3. Respondents resisted the clam petition by filing joint reply wherein they admitted the accident.

4. The following issues came to be framed by the Tribunal on 23.2.2012.

(i) *Whether deceased Madan Lal, died on 29.1.2011 due to rash and negligent driving of vehicle in question by respondent No. 3 Sanjeev Malik, at the relevant time, as alleged? OPP*

(ii) If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, how much and from whom? OPP

(iii) Relief.

5. The respondents have not denied paras 8, 22 and 24 of the claim petition. In reply to para 8, the respondents offered no comments. As per the mandate of Order 8 of the Code of Civil Procedure, for short "the Code", the pleadings not denied specifically or denied evasively, shall be deemed to have been admitted.

6. The claimants have placed on record the photocopy of FIR No. 7/11/32 dated 29.1.2011, registered at Police Station Manglor, under Sections 279, 304-A, Indian Penal Code which do disclose that due to rash and negligent driving of the driver, the said FIR was registered against him. The claimants had also examined Gajender Singh who has deposed that he was working with the deceased as a fitter in Rana Udyog Rolling Mill, Roorkee on monthly salary of Rs.15,000/-. On 29.1.2011 when they were going together for performing their duties, deceased was hit by UP Transport Corporation Bus bearing registration No. UP-11-2701 being driven by respondent No. 3, Sanjeev Malik its driver. After the accident, he made report to the police Sation Manglor, on which FIR Ext. PW2/A came to be registered.

7. The respondents have neither denied the averments contained in the claim petition nor have led any evidence. Thus, the averments contained in the claim petition remained un-rebutted and also the evidence led by the claimants remained un-rebutted. It is beaten law of the land that the claim petitions have to be decided by preponderance of probabilities. The aim and object for granting compensation has to be achieved, strict pleadings and proof are not required in claim cases and procedural wrangles tangles and mystic maybes have no role to play.

8. The apex court in ***Dulcina Fernandes and others* vs. *Joaquim Xavier Cruz and another (2013) 10 SCC 646,*** held that rules of pleadings are not strictly applicable in the claim petitions. It is apt to reproduce relevant portion of para-8 of the aforesaid judgment herein:-

"8.In United India Insurance Company Limited V. Shila Datta & Ors. while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-judge-bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10)

"10(ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal."

** **

9. Having said so, the Tribunal has fallen in error in dismissing the claim petition and returning findings on issue No. 1. I have examined the record and am of the considered view that by leading oral as well as documentary evidence the claimants have proved that respondent No. 3 has driven the offending vehicle rashly and negligently on the date of accident. Accordingly, issue No. 1 is decided in favor of the claimants and against respondent No. 3.

10. Now coming to issue No. 2, the claimants have pleaded that deceased was earning Rs.15000/- per month. There is no documentary proof on the file. However, taking the deceased as labourer, by a guess work, it can be held he would have been earning Rs.3000/- per month and after deducting 1/3rd, the loss of source of dependency is held to be Rs.2000/- per month.

11. The claimants have pleaded and proved that the age of the deceased was 36 years at the time of accident and in terms of the Schedule appended to the Act and in view of ***Sarla Verms versus Delhi Road Transport Corporation, reported in AIR 2009 SC 3104***, multiplier of "14" is applicable.

12. Accordingly, it is held that the claimants have lost source of income to the tune of Rs.2000x12x14 total of which comes to Rs. 3, 36,000/- with interest @ 6 % per annum from the date of filing the claim petition till its realization.

13. As a corollary, the respondents are held liable to pay the compensation. The Respondents are directed to deposit the amount within six weeks from today in the Registry of this Court and on deposit, the same shall be released to the claimants in equal shares. The amount of minors be kept in fixed deposit till they attain the age of majority and FDRs be handed over to Kuskm Kumari mother of the minors.

14. The impugned award is set aside. The claim petition is allowed, as indicated above. The appeal stands accordingly, disposed of. Send down the record, forthwith.

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

FAO No.65 of 2007 a/w FAO
No.91 of 2007
Date of decision: 05.09.2014

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1. FAO No.65 of 2007

National Insurance Co. Ltd. .....Appellant

Versus

Sushma Devi & others ..... Respondents

2. FAO No.91 of 2007

Sushma Devi & another .....Appellants

Versus

Surender Kaur & others ..... Respondents

Motor Vehicle Act, 1988- Section 166- Deceased was a Government employee and was getting salary of ₹ 6,078/- per month -MACT determined the loss of dependency as ₹3,300/- per month and applied the multiplier of '16'- held, that the MACT had rightly determined the compensation. (Para-15)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, reported in AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, reported in 2013 AIR (SCW) 3120

FAO No.65 of 2007

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondents No.1 and 2.
Mr. Dinesh Thakur, Advocate, for respondent No.3.
Respondent No.4 deleted.

FAO No.91 of 2007

For the appellants: Mr. Tara Singh Chauhan, Advocate.

For the respondents: Nemo for respondents No.1 and 2.
Mr. Ashwani K. Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

These appeals are outcome of award dated 3rd January, 2007, made by the Motor Accident Claims Tribunal, Bilaspur (for short

"the Tribunal") in MAC Case No.80 of 2005, titled Sushma Devi & others vs. Surender Kaur & others, whereby compensation to the tune of Rs.6.71,100/- alongwith interest at the rate of 7.5% per annum came to be awarded in favour of the claimants from the date of filing of the claim petition till its realization (for short the "impugned award").

2. The appellant by the medium of FAO No.65 of 2007 has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling the insurer with liability.

3. The claimants have filed FAO No.91 of 2007 and sought enhancement of compensation.

Brief facts

4. The claimants have invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the M.V. Act") for grant of compensation to the tune of Rs.15,00,000/- on the grounds taken in the memo of claim petition.

5. Precisely, the case of the claimants was that their bread earner, namely, Dinesh Kumar while coming back from Bilaspur to his house after performing his duty in D.C. Office, Bilaspur on his motor cycle, which was hit by a tanker bearing registration No.HR-37-0205 on National Highway No.21 at Raghunathpura, was being driven by driver, namely, Tarsem Kumar rashly and negligently. The deceased sustained injuries and was taken to the Zonal Hospital, Bilaspur for treatment from where he was referred to PGI Chandigarh, died on the way. The claimants further pleaded in the clam petition that the salary of the deceased was Rs.6,078/- per month and was also earning Rs.1,000/- per month from agriculture vocation.

6. The insurer, owner and the driver resisted the claim petition on various grounds.

7. The following issues came to be framed in the claim petition:-

> "1. Whether the deceased Dinesh Kumar had died due to rash and negligent driving of respondent No.2 Tarsem Kumar, driver of tanker No.HR-37-A-0205 as alleged? OPP.
>
> 2. If issue No.1 supra is proved, to what amount of compensation, the petitioners are entitled to and from which of the respondents? OPP
>
> 3. Whether the petition is bad for non-joinder of necessary parties? OPR-3
>
> 4. Whether the driver of tanker No.HR-37-A-0205 did not have valid and effective driving license at the time of the accident, if so, its effect? OPR-3
>
> 5. Whether the vehicle in question was plying on the road in contrary to the provisions of M.V. Act, as alleged? OPR-3.

6. Whether the accident is result of contributory negligence of respondent No.2 and the deceased Dinesh Kumar, motorcyclist, if so its effect? OPR-3

7. Relief."

8. The claimants have led evidence and examined witnesses. The owner, insurer and the driver have not led any evidence, thus, the evidence led by the claimants remained un-rebutted. The claimants also placed on record copies of driving lincence (Ext.PW-1/A), matriculation certificate of the deceased (Ext.PW-1/B), pariwar register (Ext.PW-1/D), death certificate (Ext.PW-1/E), legal heir certificate (Ext.PW-1/F), registration certificate of motorcycle (Ext.PW-1/G), salary certificate (Ext.PW-2/A) and FIR (Ext.PW-3/A). The respondents have placed on record copies of insurance (Ext.R-1), fitness certificate (Ext.R-3), route permit (Ext.R-4), driving lincence (Ext.R-5) and insurance policy (Ext. R-A).

9. The Tribunal, after scanning the evidence, held that the claimants have proved that due to the rash and negligent driving of the driver the deceased Dinesh Kumar had lost his life, which is not in dispute. Thus, the findings returned on issue No.1 are upheld.

10. Respondent No.3-National Insurance Co. Ltd. has failed to lead any evidence in order to discharge onus on issues No.3, 4 and 6. Accordingly, the findings returned by the Tribunal on the said issues are also upheld.

11. Learned counsel for the insurer has argued that the offending vehicle was being driven in breach of route permit and the fitness certificate. He argued that the route permit was not for driving the vehicle within the territorial jurisdiction of State of Himachal Pradesh. Thus, the owner of the offending vehicle has committed breach.

12. Copy of fitness certificate (Ext.R-3) is renewed and was valid upto 16th February 2007, whereas the accident took place on 16th July, 2005. Thus, the fitness certificate was in force on the said date.

13. The route permit (Ext.R-4) was initially issued for the States of Punjab, Rajasthan and Madhya Pradesh, but it was also granted for Himachal Pradesh in terms of endorsement made on 29th November, 2006. Thus, the arguments advanced by the learned counsel for the insurer are devoid of any force.

14. Having said so, the insurer has failed to prove that the owner has committed any breach, not to speak of willful breach. Accordingly, the findings returned on issue No.2 are upheld and the appeal being FAO No.65 of 2007 filed by the insurer, merits to be dismissed.

15. In FAO No.91 of 2007, the claimants have sought enhancement of compensation on the ground that the Tribunal has not taken into consideration the income of deceased from agriculture vocation in addition to his monthly salary, as given in salary certificate

(Ext PW-2/A). The Tribunal has discussed the said issue in paras 16 to 20 & 22. Admittedly, the deceased was a Government employee and getting gross salary to the tune of Rs.6,078/- per month. After making deduction, the Tribunal rightly held that the claimants have lost source of dependency to the tune of Rs.3,300/- per month and applied the multiplier of '16' correctly, in view of the judgments made by the Apex Court in cases tilted as ***Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, reported in AIR 2009 SC 3104*** and ***Reshma Kumari & others versus Madan Mohan and another, reported in 2013 AIR (SCW) 3120***. Thus, the claimants have failed to carve out a case for enhancement of compensation.

16. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed. The Registry is directed to release the award amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned award, through payee's account cheque, after proper identification.

17. Send down the records after placing copy of the judgment on record.

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

Raksha Devi .....Appellant

Versus

United India Insurance Company Limited & others .....Respondents

FAO No. 64 of 2007
Reserved on :29.08.2014
Decided on : 05.09.2014

Motor Vehicle Act, 1988- Section 166- Claimant had sustained 30% permanent disability- she was not in a position to perform any domestic work with her left arm and bones of her left arm had also not been properly adjusted and joined- held, that while awarding compensation some guess work has to be done- claimant was a house wife and her income was less than ₹ 3,000/- per month - permanent disability had affected at least 30% of her earning capacity - her age was 31 years and the multiplier of 10 has to be applied, therefore, she is entitled for ₹ 1,12,000/- under the head loss of earning- ₹ 50,000/- under the head "pain and suffering, loss of amenities, inconvenience and mental stress and ₹ 50,000/- under the head "pain and suffering"- ₹ 1,47,934/- under the head "medical expenses" along with interest at the rate of 6% per annum. (Para- 16 to 26)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellant : Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate, for respondent No. 1.
Mr. Anup Rattan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Appellant has questioned the award, dated 22nd January, 2007, passed by the Motor Accident Claims Tribunal (II) Fast Track Court, Hamirpur, (hereinafter referred to as "the Tribunal"), in MAC Petition No. 57 of 2004, titled as Raksha Devi versus United India Insurance Company Limited and others, whereby compensation to the tune of Rs.88,031/- with interest @ 6% per annum came to be awarded in favour of the claimant-appellant and against respondent No. 1-insurer-United Insurance Company, from the date of the claim petition till its realization, (for short "the impugned award"), on the ground of adequacy.

Brief Facts:

2. In order to determine the issue, it is necessary to give a flash back of the case, the womb of which has given birth to the instant appeal.

3. Smt. Raksha Devi/claimant/injured has invoked jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, (for short "the MV Act"), being victim of the vehicular accident, for grant of compensation to the tune of Rs. 6,00,000/-, as per the breaks-up given in the claim petition.

4. The claimant/appellant has pleaded in the claim petition that driver Jagan Nath has driven vehicle-bus bearing registration No. HP-21-0725, rashly and negligently on 10th May, 2003, in which she was traveling and caused accident near Booni Tehsil Nadaul, District Hamirpur (HP), at about 3.30 p.m. FIR No. 77/2003, under Sections 279, 337 of the Indian Penal Code and 184 of the MV Act was registered in Police Station, Nadaun; she suffered multiple grievous injuries and two fractures on her left arm, rendered her permanently disabled, which has made her life miserable because she is not in a position to do any household work. She was under treatment in Zonal Hospital, Hamirpur, was referred to Christian Medical College & Hospital, Ludhiana (Punjab)

where she remained indoor patient and has spent about Rs.2,00,000/- on her medical treatment.

5. The respondents contested the claim petition on the grounds taken in their objections. Following issues came to be framed by the Tribunal on 11.05.2005:

"1. *Whether the petitioner Raksha Devi on 10.5.2003 while traveling on bus bearing No. HP-21-0725, suffered injuries when the bus met with an accident on account of rash and negligent driving of respondent No. 2, as alleged?...OPP*

2. *If issue No. 1 proved, whether petitioner is entitled for compensation, if so, to what extent and from whom?...OPP*

3. *Whether respondent No. 2 was not holding a valid and effective driving licence at the time of accident, as alleged?...OPR-1*

4. *Whether petition is bad for non-joinder of necessary parties? OPR-3*

5. *Whether petition is not maintainable? OPR-3*

6. *Relief."*

6. The claimant examined Dr. Dinesh Thakur, (PW-1), Dr. Anil Kumar Dhiman (PW-3), MHC Kuldeep Chand (PW-4) and Shri Gorakh Ram (PW-5). Claimant Raksha Devi also appeared in the witness box as PW-2. The insurer-Insurance Company examined Shri Hari Chand (RW-1), Shri Shashi Pal (RW-2) and Shri Om Parkash Gupta (RW-4). Insured-owner also appeared in the witness box as RW-3.

7. The Tribunal, after scanning the evidence, oral as well as documentary, made the impugned award and awarded compensation to the tune of Rs.88,031/- with interest @ 6% per annum to the claimant from the date of the claim petition till its realization.

8. The insured-owner, the driver and the insurer-Insurance Company have not questioned the impugned award on any count. Thus, it has attained finality so far as it relates to them.

9. The only question, which arises for determination in this appeal is – whether the amount awarded is just or inadequate?

Issue No. 1

10. I have gone through the impugned award, pleadings and the evidence available on the record. The claimant has proved by leading evidence that the driver has driven the offending vehicle rashly or negligently, on the fateful day, caused the accident, in which she sustained injuries which rendered her permanently disabled. Thus, the findings returned by the Tribunal on this issue are upheld.

Issue No. 3

11. Onus to prove this issue was upon the insurer-Insurance Company, but it failed to discharge the same. The findings returned by the Tribunal on this issue are upheld.

Issues No. 4 & 5

12. The owner-insured had to prove these issues, but he failed to lead any evidence to prove the same. Accordingly, the findings returned by the Tribunal on these issues are upheld.

Issue No. 2.

13. The claimant while appearing in the witness box as PW-2 has deposed that she was injured in the accident; was admitted in the hospital; had spent about Rs.2,50,000/- on her treatment and is not in a position to perform domestic works.

14. PW-1 Dinesh Thakur, who was a member of the Medical Board, has issued Permanent Disability Certificate Ex. PW-1/A in favour of the claimant; has suffered 30% permanent disability; is not in a position to perform any domestic work with her left arm and the bones of her left arm have also not been properly adjusted and joined.

15. The Tribunal has awarded a meager amount while ignoring the injuries suffered by the claimant/victim and affect of the said injuries, which has made her life miserable. She has undergone pain and suffering and has to undergo it forever.

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

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

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on*

account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

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

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

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

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

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

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

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

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

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

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

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

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

> "*8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

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

> "16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*
>
> *"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the*

physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

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

"Pecuniary damages (Special damages)

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

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

(a) Loss of earning during the period of treatment;

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

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

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

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

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

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

17. .....

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

the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

21. The Tribunal has awarded Rs.25,000/- to the claimant under the head of loss of earning, prospective medical expenses, traveling expenses etc., which is too meager.

22. The claimant was a housewife and was also performing other vocations. By guess work, it can be said that the monthly income of the petitioner would not be less than Rs.3,000/- per month. The permanent disability has affected at least 30% of her earning capacity. Her age was 31 years at the time of accident and the multiplier to be applied would not have been less than '10'. Thus, she is entitled to Rs.1,000/- x 12 = Rs.12,000 x 10 = Rs.1,12,000/- under the head of loss of earning.

23. The Tribunal has awarded Rs.50,000/- under the head "pain and suffering, loss of amenities, inconvenience, mental stress etc.", which is also too meager, while taking the physical frame of the claimant and other factors in consideration in view of the judgments of the Apex Court, referred to hereinabove.

24. Keeping in view the ratio and guidelines laid down in the judgments of the Apex Court, (*supra)* read with the facts of this case, I deem it proper to award Rs.50,000/- under the head "loss of amenities, inconvenience etc." and Rs.50,000/- under the head "pain and suffering".

25. The petitioner has placed on record medical bills and other documents, which do disclose that the petitioner has spent Rs.1,47,934/- on her treatment, is held entitled to the said amount under the head "medical expenses".

26. Having glance on the aforesaid discussion, the claimant is entitled to Rs.1,12,000/- under the head "loss of earning; Rs.50,000/- under the head "pain and suffering"; Rs.50,000/- under the head "loss of amenities, inconvenience etc.", and Rs.1,47,934/- under the head "medical expenses, total amounting to Rs.3,59,934/- and the amount of compensation is enhanced to Rs.3,59,934/- with interest at the rate of 6% per annum from the date of the claim petition till its realization.

27. The enhanced amount be deposited within eight weeks before the Registry of this Court.

28 . The impugned award is modified, as indicated above, and the appeal is disposed of.

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

Rekha & others .....Appellants

Versus

Himachal Pradesh Road Transport Corporation & another

..... Respondents

FAO No.36 of 2007

Date of decision: 05.09.2014

Motor Vehicle Act, 1988- Section 166- Deceased was 31 years of age at the time of accident- held, that multiplier of 15 would be applicable and the claimants would be entitled to ₹ 2,600 X 12 X 15 = ₹ 4,68,000/- + 10,000/- under the head of loss of love, affection and cremation charges etc. and ₹ 5,000/- under the head loss of consortium. (Para-5)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellants: Mr. Dalip K. Sharma, Advocate.

For the respondents: Mr. H.S. Rawat, Advocate, for respondent No.1.

Mr. Surender Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 27th October, 2006, passed by the Motor Accident Claims Tribunal II, Solan (for short, "the Tribunal") in MAC Petition No.6 S/2 of 2006, titled Rekha & others vs. Himachal Pradesh Road Transport Corporation & another, whereby a sum of Rs.3,27,000/- alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants and against respondent No.1 (for short the "impugned award").

2. The claimants have questioned the impugned award only on the ground of adequacy of compensation.

3. The respondents have not questioned the impugned award on any ground. Thus, the same has attained finality so far it relates to them.

4. Admittedly, the age of the deceased was 31 years at the time of the accident.

5. Keeping in view the purpose of granting compensation read with Schedule appended to the Motor Vehicles Act, 1988 and applying the ratio laid down by the Apex Court in case tilted as ***Sarla Verma***

(Smt.) and others versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104*** and upheld by a larger Bench of the Apex Court in case titled as ***Reshma Kumari & others*** versus ***Madan Mohan and another, reported in 2013 AIR (SCW) 3120,*** multiplier applicable is '15'. The Tribunal has fallen in error in applying the multiplier of '10'. Thus, I deem it proper to apply multiplier '15'. Thus, the claimants are entitled to Rs.2,600 X 12 X 15 = 4,68,000/- plus Rs.10,000/- under the head of 'loss of love, affection and cremation charges etc.' and Rs.5,000/- under the head of 'consortium', as awarded.

6. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.4,83,000/- alongwith interest at the rate of 9% from the date of presentation of the claim petition till its final realization. Respondent No.1 is directed to deposit the enhanced amount in the Registry of this Court within six weeks from today. On deposition of the same, it shall be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

7. The impugned award is modified, as indicated above. The appeal stands disposed of alongwith all miscellaneous applications accordingly.

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

M/s Mukut Hotels and Resorts Private Limited ...Appellant.

Versus

M/s Khullar Resorts Private Limited & others ...Respondents.

LPA No. 693 of 2011 a/w ors.
Reserved on: 25.08.2014
Date of order:06.09.2014

Code of Civil Procedure, 1908- Section 100-A - Letters Patent Appeal is not barred against the order passed by the Single Judge before the High Court. (Para-5 to 7)

For the appellant: Mr. Bhupender Gupta, Senior Advocate, with Mr. Karan Singh Kanwar, Advocate.

For the respondents: Mr. R.L. Sood, Senior Advocate, with Mr. Surinder Prakash Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The moot question for consideration is – whether these appeals are maintainable?

2. Learned counsel for the parties stated that Section 100-A of the Code of Civil Procedure (hereinafter referred to as "the CPC") came up for consideration before the Apex Court in a case titled as **P.S. Sathappan (dead) by LRs versus Andhra Bank Ltd. and others,** reported in **(2004) 11 Supreme Court Cases 672,** wherein it has been held that Letters Patent Appeal is not barred, in terms of Section 100-A, from a judgment/order made by a learned Single Judge in original proceedings, thus, argued that the Letters Patent Appeal filed against the judgment or against the order, which has trappings of the judgment, is maintainable.

3. Mr. Bhupender Gupta, learned Senior Counsel, also argued that this issue was discussed by the Full Bench of this Court in a case titled as **Jaswant Singh Saraff & Ors. versus State of Himachal Pradesh & Ors.,** reported in **Latest HLJ 2007 (HP) 465.**

4. We deem it proper to reproduce Section 100-A of the CPC herein:

> *"**100-A. No further appeal in certain cases.**- Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."*

5. While going through the said provision of law, it is crystal clear that an appeal from judgment/order made by a learned Single Judge in original proceedings is not barred in terms of the mandate of Section 100-A of the CPC.

6. It is apt to reproduce paras 15, 19, 22 and 29 of the judgment in **P.S. Sathappan's case (supra)** herein:

> *"15. Faced with the situation it was submitted that the above observations have been made only in the context of Sections 47 and 48 of the Guardians and Wards Act. It was submitted that therefore these observations cannot be applied to a case where an appeal is under Section 104 itself. This argument overlooks sub-clause (1) of Section 104 CPC which now categorically saves appeals under any law for the time being in force. Thus if any other law for the time being in force permits an appeal the same would be maintainable irrespective of Section 104(2) CPC. As stated above, this would include a letters patent appeal. Also, the observations quoted above are not in the context of Sections 47 and 48 of the Guardians and Wards Act, but in the context of whether a letters patent appeal can be barred. That was the question before the Court.*

The Constitution Bench was considering whether a letters patent appeal was maintainable. It was then submitted that this authority does not take into consideration and does not refer to sub-clause (2) of Section 104. It was submitted that as sub-clause (2) of Section 104 was not considered a fresh look is required. Once it is noted that Section 104(1) saves such appeals there is no need to refer to or mention Section 104(2). Section 104(2) cannot lay down anything contrary to Section 104(1). To be remembered that legislature had now put in the saving clause in order to give effect to the Bombay, Madras and Calcutta views. If an interpretation, as sought to be given by Mr. Vaidyanathan, is accepted then there would be a conflict between sub-clause (1) and sub-clause (2) of Section 104. Sub-clause (1) would save/permit a letters patent appeal whereas sub-clause (2), on this interpretation, would bar it. In our view, there is no such conflict. As seen above, Section 104(1) specifically saves a letters patent appeal. Sub-clause (2) can thus only apply to such appeals as are not saved by sub-clause (1). In other words sub-clause (2) of Section 104 can have no application to appeals saved by Section 104(1). Also it is well established rule of interpretation that if one interpretation leads to a conflict whereas another interpretation leads to a harmonious reading of the section, then an interpretation which leads to a harmonious reading must be adopted. In the guise of giving a purposive interpretation one cannot interpret a section in a manner which would lead to a conflict between two sub-sections of the same section. We clarify that, as stated above, there is no conflict, but if the interpretation, suggested by Mr. Vaidyanathan, were to be accepted then there would clearly be a conflict. The only way a conflict can be avoided is to hold that sub-clause (2) only bars such appeals as are not saved by sub-clause (1) of Section 104.

16 to 18 .....

19. Much emphasis is sought to be put on the sentence, i.e. "once Section 104 applies and there is nothing in the Letters Patent to restrict the application of Section 104 to the effect that even if one appeal will lie to the Single Judge, no further appeal will lie to the Division Bench" and it is submitted that the Court was laying down that a further appeal will not lie even if Letters Patent permitted. The sentence cannot be read in isolation. It must be read in the context of all that is stated before it. It is already held that Section 104 read

with Order 43 Rule 1 CPC confers additional powers of appeal to a larger Bench within the High Court. When read in context the sentence only means that in case of orders not covered by Letters Patent a further appeal will not lie. This is also clear from the subsequent sentence that there is nothing else in Letters Patent which permits a further appeal barred by Section 104(2) CPC. As set out above, Section 104(2) only bars appeals against order passed in appeal under the section. Thus Section 104(2) does not bar appeals permitted by any law in force. It is also to be noted that principle in Ram Sarup v. Kaniz Ummehani, AIR 1937 All 165 : ILR 1937 All 386, that Section 104 did not bar a letters patent appeal was specifically accepted. It Is also accepted that Letters Patent is a special law. However, on the wordings of the concerned Letters Patent as noticed, it was held that the Letters Patent did not permit a second appeal. Had the Letters Patent permitted a second appeal, on the ratio laid down earlier, a letters patent appeal would have been held to be maintainable. In our case it is an admitted position that the concerned Letters Patent permits an appeal.

20. .....

21. .....

22. Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words "Letters Patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.

22 to 28 .....

29. Thus, the consensus of judicial opinion has been that Section 104(1) Civil Procedure Code expressly saves a letters patent appeal. At this stage it would be appropriate to analyze Section 104 CPC. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force.

Sub-section (1) therefore contemplates three types of orders from which appeals are provided, namely,

1) orders enumerated in sub-section (1),

2) appeals otherwise expressly provided in the body of the Code, and

3) appeals provided by any law for the time being in force. It is not disputed that an appeal provided under the Letters Patent of the High Court is an appeal provided by a law for the time being in force."

7. Keeping in view the judgment (supra) read with the judgment made by the Full Bench of this Court in **Jaswant Singh's case (supra),** the right of Letters Patent Appeal is not taken away. However, the appeal(s) is/are to be determined on merits including as to whether the order(s) impugned in the said appeal(s) is/are appealable in view of the ratio and mandate of the said judgments.

8. Accordingly, the Registry is directed to list LPA No. 693 of 2011 on 15th September, 2014; OSA No. 12 of 2006 on 16th September, 2014; LPA No. 17 of 2006 on 17th September, 2014, LPAs No. 130 & 131 of 2008 on 22nd September, 2014; LPAs No. 34 & 180 of 2013 on 23rd September, 2014; and LPAs No. 85 & 139 of 2014 on 24th September, 2014, for hearing.

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

Shri Sohan Pal Singh ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWP No. 4319 of 2014-B
Reserved on: 20.08.2014
Decided on: 06.09.2014

Constitution of India, 1950- Article 226- Petitioner was allotted 9 jobs of channelization of Bata River - respondent issued a notice inviting e-tender for restoration of rain damages to channelization of Bata River - respondent asserted that some work was allotted to the petitioner-petitioner had completed some of the work but had not completed remaining work- some damage was caused to the work executed by the petitioner for which the tender was issued- held, that petitioner has no right to restrain the State from issuing the tender for the damages caused in the year 2013. (Para- 11)

For the petitioner: Mr. Ramakant Sharma, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has questioned the notice inviting e-tender, dated 4th June, 2014 (Annexure P-14) issued by respondent No. 4, whereby online bids on Item Rate basis have been invited for restoration of rain damages to channelization of Bata River at various Reduced Distances (RDs) from RD 14060 to 16900 meters in Tehsil Paonta Sahib, District Sirmour, H.P., on the grounds taken in the memo of writ petition.

2. Precisely, the case of the petitioner is that the petitioner was allotted the said work in terms of letters, dated 26th November, 2010, (Annexures P-1 to P-5), which comprises of nine jobs of channelization of Bata River at RD 10230 to 19700 meters. The execution of the said work is in progress for all jobs, but despite that, the respondents have issued Annexure P-14, thus, has questioned the same being illegal, arbitrary and against the interest of the petitioner.

3. The respondents have filed reply. It has been admitted in the reply that after scrutinizing the various tenders, respondent No. 4 allotted the work of the nine jobs in favour of the petitioner vide letters, dated 26th November, 2010. It has been averred that the petitioner has already completed the work of jobs No. 1, 5 and 6, awarded in terms of letters No. 23274-81, 23306-13 and 26314-21, respectively, dated 26th November, 2010 and has not completed the work of other jobs. The work of jobs No. 2, 3 and 7 is still in progress and the petitioner has not yet started the work of jobs No. 4, 8 and 9.

4. Further, that the amount allocated for job No. 1 was Rs. 89,81,024/- for job No. 5 was Rs.79,17,131/- and for job No. 6 was Rs. 86,15,700/-, however, amount of Rs.1,00,40,414/-, Rs. 85,01,074/- and Rs.95,42,755/- has been paid to the petitioner for each job, respectively. It has also been contended that during the rainy season in the year 2013, some damage has been caused to the works of jobs No. 1, 5 and 6, which has already been completed by the petitioner and the tender, dated 4th June, 2014, (Annexure P-14) has been issued for restoration of the rain damage to the channelization of Bata River from RD 14060 to 16900 meters, thus, the petitioner has no right to seek restraint order and cannot plead that he has not completed the work and is entitled to execute the fresh work also. He has completed the work and has been paid for the same; under the garb of the contract of 2010, he is trying to carve out a case for virtually carrying out the work which stands already executed and even the life of the said contract has come to an end.

5. It is apt to reproduce the relevant portion of the e-tender notice, Annexure P-14, herein:

"HIMACHAL PRADESH
IRRIGATION CUM PUBLIC HEALTH DEPARTMENT
NOTICE INVITING E-TENDER

Online bids on Item Rte basis are invited by the Executive Engineer, I&PH Division, Paonta Sahib on behalf of Governor of Himachal Pradesh, in electronic tendering system in two covers for the under mentioned work from the contractors/firms of appropriate class enlisted with Himachal Pradesh I&PH Department.

Sr. No.	*Name of work.*	*Estimated cost.*	*Earnest money.*	*Time*	*Cost of form*
1	*Restoration of Rain Damages to Channelization of Bata River at various RD's from RD 14060 to 16900 mtrs in Tehsil Paonta Sahib District Sirmour (HP)*	*68,19,431 /-*	*1,09,800 /-*	*Three Months*	*800/-*

....."

6. Admittedly, the allotment of work was made for channelization of Bata River at RD 10230 to 19700 meters in Tehsil Paonta Sahib, District Sirmour at various RD's on RHS at different places, in terms of Annexures P-1 to P-5, dated 26th November, 2010, which comprises of nine jobs. The time frame for completing the work was six months in all the said letters. Admittedly, the petitioner had to complete the work within six months and virtually that contract has lost its efficacy by efflux of time.

7. However, the respondents have specifically pleaded that the petitioner has completed the work of jobs No. 1, 5 and 6 and more than the contract amount/sanctioned amount has been released in favour of the petitioner after completion of the work and he cannot now seek an order from the Court to restrain the respondents from carrying out the repair works, which has been caused due to the heavy rains in the year 2013.

8. There is nothing on the file, which can be made basis for holding that the petitioner has not completed the work of jobs No. 1, 5 and 6.

9. The State-respondents have filed supplementary affidavit and has indicated as to how much amount was sanctioned for all the nine jobs and how much amount has been paid to the petitioner on the completion of the work of jobs No. 1, 5 and 6.

10. The petitioner has filed response to the supplementary affidavit but has not been able to establish that he has not received the amount, more than which was sanctioned/allocated, on the completion of the said work.

11. The question is – whether the petitioner has any right to seek remedy at this stage in order to restrain the respondents-State from issuing the tender for the damages, which has been caused in the year 2013, in view of the allotment of the contract of 2010? The answer is in the negative for the reasons discussed hereinabove.

12. It is also apt to record herein that the petitioner has to carve out a case for judicial interference in view of the judgments made by the Apex Court, which have been discussed by this Court in **CWP No. 4112 of 2014,** titled as **Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on **15th July, 2014,** and **CWP No. 9337 of 2013-D,** titled as **Shri Ashok Thakur versus State of Himachal Pradesh & others,** decided on **6th May, 2014,** has failed to do so, thus, has no right to question the tender impugned, as discussed hereinabove.

13. Having said so, the writ petition merits to be dismissed. Accordingly, the writ petition is dismissed alongwith all pending applications.

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

State of Himachal Pradesh & another ...Appellants.

Versus

Shri Vidya Sagar & others ...Respondents.

LPA No. 321 of 2012
Reserved on: 01.09.2014
Decided on: 06.09.2014

Constitution of India, 1950- Article 226- Petitioners were appointed as Agriculture Inspectors and were re-designated as Assistant Development Officers (Agriculture)- the benefit of Proficiency Step Up was granted to them but it was modified and the petitioners were held entitled to the notional benefit from the date of the completion of 8 years and to the monetary benefit with effect from the date of the passing of the departmental examination- held, that the Proficiency Step Up is not to be released to an officer unless he has passed the departmental examination. (Para-6 to 10)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan,

Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Ms. Seema Guleria, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The subject matter of this appeal is the judgment and order, dated 12th December, 2011, made by the Writ Court in CWP No. 4231 of 2010, titled as Vidya Sagar & others versus State of H.P. & another, whereby Annexure P-9 annexed with the writ petition came to be quashed with a command to the respondents to follow Annexure P-4 to the writ petition (hereinafter referred to as "the impugned judgment").

2. The writ petitioners-respondents herein were appointed as Agriculture Inspectors in Agriculture Department. The said posts were re-designated as Assistant Development Officers (Agriculture) vide notification, dated 10th May, 1980 (Annexure P-1 to the writ petition) in terms of the Rules occupying the field at the relevant point of time. The benefit of Proficiency Step Up was granted to the writ petitioners in terms of Annexure P-4 annexed with the writ petition, dated 5th September, 1991, was withdrawn by the appellants-writ respondents, in terms of Annexure P-5, in January, 2001, but with a modification that the writ petitioners were entitled to the said benefit notionally from the date of completion of eight years and monetary/financial benefit with effect from the date of passing the departmental examination, constraining them to file representations, were rejected, they filed Original Application before the erstwhile H.P. State Administrative Tribunal seeking quashment of Annexure P-5, was transferred to this Court in view of the abolition of the Tribunal, came to be diarized as CWP (T) No. 7809 of 2008, titled as Vidya Sagar and others versus State of Himachal Pradesh and another, before this Court and this Court, vide order, dated 19th June, 2009, quashed Annexure P-5 with liberty to the writ respondents to proceed with the matter in accordance with law after hearing the writ petitioners. Thereafter, the writ respondents made order, dated 18th February, 2010 (Annexure P-9) on the basis of column 2 of the clarificatory letter, dated 18th July, 1992 (Annexure P-2) and benefit granted to the writ petitioners right from the due date, in terms of Annexure P-4, was withdrawn and were held entitled to monetary benefit from the date of passing their departmental examination.

3. Feeling aggrieved, the writ petitioners filed the writ petition seeking quashment of Annexure P-9. The Writ Court, after examining the pleadings, held, in terms of the impugned judgment, which is subject matter of this appeal, that Annexure P-9 is bad in law, not in accordance with the Rules occupying the field and quashed the same, restored the efficacy of Annexure P-4 and commanded the writ respondents to grant relief in terms of Annexure P-4 in favour of the writ petitioners.

4. It would be profitable to reproduce Rule 2 (2) of the H.P. Departmental Examination Rules, 1976 (hereinafter referred to as "the Rules") herein:

> ***"2. Commencement and application. -***
>
> *(1) .....*
>
> *(2) They shall govern the Departmental Examination in respect of -*
>
> *(i) the members of the Himachal Pradesh Administrative Service;*
>
> *(ii) the members of the Himachal Pradesh Forest Service;*
>
> *(iii) Tehsildars and Naib Tehsildars;*
>
> *(iv) all other gazetted officers working in connection with the affairs of the State of Himachal Pradesh not included in clauses (i) to (iii) above; and*
>
> *(v) any other class or category of officers which may be included by the Government from time to time....."*

5. The service of the writ petitioners was not included within the fold of Rule 2 (2) of the Rules in terms of Clause (v) (supra) before they had got the status of gazetted officers. It appears that the concerned officers, who were manning the posts of the concerned department, at the relevant point of time, applied their minds in terms of the Rules occupying the field and passed Annexure P-4, but, thereafter, a clarificatory letter (Annexure P-2) was issued by the Special Secretary (Training), Government of Himachal Pradesh under the head 'Clarification regarding proficiency step up to Gazetted Officers'. It is apt to reproduce the relevant portion of Annexure P-2/T, the English translation of Annexure P-2, herein:

> *"..... The clarification/guidance for releasing proficiency step up to Gazetted Officers is as follows:-*
>
> *1. Proficiency step up as and when due to any officer may not be released till:-*
>
> *(a) He does not pass Departmental Examination.*
>
> *(b) Officer completes 50 years of age without passing departmental examination.*
>
> *2. An officer who passes departmental examination within 8 years of appointment / promotion to any service / class may be sanctioned proficiency step u from due date.*
>
> *....."*

6. While going through the same, it appears that the Proficiency Step up is not to be released to a Gazetted Officer unless he has not passed the departmental examination. It also provides that an officer, who makes the grade within eight years of appointment/promotion to any service/class, the proficiency step up may be sanctioned from the due date.

7. The word "due date" has been defined in the **Black's Law Dictionary, Sixth Edition,** at page No. 500 as under:

> *"**Due date.** In general, the particular day on or before which something must be done to comply with law or contractual obligation."*

8. In **The New Oxford Dictionary of English,** definition of the word "due date" has been given at page No. 570 as under:

> *"**due date.** noun. the date on which something falls due, especially the payment of a bill or the expected birth of a baby."*

9. Meaning thereby, the proficiency step up may be sanctioned to the writ petitioners from the due date, i.e. from the date they were entitled to.

10. Annexure P-5 has been issued on the basis of the said clarification, is not in accordance with the mandate of the Rules.

11. It would also be profitable to reproduce Rule 17 (1) (i) of the Himachal Pradesh Agricultural Services (Class-I Gazetted) Non-Ministerial Recruitment and Promotion Rules, 1995, herein:

> *"**17. Departmental Examination:** (1) Every member of the service shall pass a Departmental Examination as prescribed in the Departmental Examination Rules, 1976 as amended from time to time, failing which he shall not be eligible to:-*
>
> *(i) Cross the Efficiency Bar/Proficiency increment/placement in higher scale after 8 and 18 years of service,*
>
> *……."*

12. Annexure P-4 has been made in terms of the Rules. It is apt to reproduce the relevant portion of Annexure P-4 herein:

> *"……*
>
> *On the recommendations of Departmental Promotion Committee, I am directed to convey the approval of the Government for the grant of higher scales viz Rs. 10025-15100 and Rs. 12000-16350 after completion of 8 & 16 years of service as admissible in accordance with the instructions issued vide letter No. Audit II (B) 1/89 dated 8.10.90 and dated 123.3.91 in respect of*

the following of the Agriculture Department from the date shown against each:-

……."

13. The writ petitioners had passed the departmental examination, were entitled to proficiency step up with arrears as per clarification No. 2 of the clarificatory letter, Annexure P-2, as reproduced hereinabove.

14. Learned counsel for the appellants-writ respondents heatedly argued that the writ petitioners are entitled to the said benefit from the date of passing of their departmental examination. He was asked to show any rule in support of his arguments, failed to do so. However, he has stressed on the word "due date", but in the same breath, has stated that the said benefit was granted to the writ petitioners notionally from the due date and the monetary from the date of passing of their departmental examination. He was again asked to show in terms of which Rules the said benefit was granted in such a way, again failed to do so.

15. In the Rules or the guidelines, it is nowhere provided that the Gazetted Officers are entitled to the said benefit notionally from the due date and monetary from the date of passing the departmental examination.

16. As per the Rules and the guidelines (supra), they were entitled to the said benefit from the due date, but the only rider was that they had to pass the departmental examination, which the writ petitioners did. Thus, Annexure P-9, on the face of it, is bad in law and Annexure P-4 holds the field.

17. Viewed thus, the Writ Court/learned Single Judge has rightly made the impugned judgment. No case for interference is made out. Hence, the appeal is dismissed alongwith all pending applications.

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

The Board of Directors of H.P. Milkfed, Shimla and anr. ….Appellants.

versus

Chet Ram and anr. …..Respondents.

LPA No.715 of 2011.
Decided on: September 09, 2014.

Constitution of India, 1950- Article 226- petitioner was facing a departmental inquiry and penalty of censure was imposed upon him –his case was considered for promotion by a Departmental Promotion Committee but was kept in a sealed cover- held, that the penalty of censure does not amount to minor penalty in view of instruction 16.13

contained in chapter 16 of the Hand Book on Personnel Matters and promotion could not have been denied to the petitioner on the basis of penalty of censure. (Para-7)

Cases referred:

Union of India and others vs. A.N. Mohanan, (2007) 5 SCC 425

Union of India and others vs. Mihir Kumar Bandopadhyay and others, (2009) 16 SCC 329

For the Appellants: Mr.M.R. Verma, Advocate.
For the Respondents: Mr.J.L. Bhardwaj, Advocate, for respondent No.1.
Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.V.S. Chauhan, Addl.A.Gs. and Mr.J.K. Verma & Mr.Kush Sharma, Dy.A.Gs., for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This Letters Patent Appeal is directed against the judgment and order, dated 4th November, 2011, passed by a learned Single Judge of this Court, whereby writ petition filed by petitioner (respondent No.1 herein) was allowed and the writ respondents i.e. The Board of Director of H.P. State Cooperative Milk Producers Federation Ltd., (appellants herein), were directed to consider the case of the writ petitioner for promotion to the higher post after opening the sealed cover (for short, the impugned judgment).

2. The writ respondents-Federation, feeling aggrieved, have questioned the impugned judgment by the medium of this appeal on the grounds taken in the memo of appeal.

3. It appears that the petitioner was facing departmental inquiry and during the departmental inquiry, the Departmental Promotion Committee (for short, the DPC) was constituted and his case was considered for promotion, but was kept in a sealed cover vide resolution, dated 25th/27th June, 2002, made by the appellants. After the inquiry was completed, penalty of censure was imposed upon the petitioner. Thereafter, the petitioner requested the writ respondents-Federation to open the sealed cover and consider his case for promotion. The writ respondents i.e. the appellants have failed to do so, constraining the writ petitioner to file the writ petition praying for the following main reliefs, on the grounds taken in the memo of writ petition:

> *"1. That the impugned office order dated 20.3.2007 contained in Annexure A-15 whereby the Applicant has been imposed the penalty of censure and warning may kindly be quashed and set*

aside declaring the same as illegal, arbitrary, discriminatory and violative of mandatory provisions of procedure law. The respondents may be further directed to grant consequential benefits.

2. That the order dated 11.7.2007 at Annexure A-17 passed by the Additional Registrar (Administration), Cooperative Societies, Himachal Pradesh, Shimla may also be quashed and set-aside being not maintainable.

3. That the directions be issued to the Respondents to consider the case of the applicant for promotion to the post of Assistant Manager (Accounts) from the date his case for promotion has been kept in sealed cover i.e. 25/27.6.2002;

4. To further issue directions to the Respondents to grant to the Applicant proficiency step up increments which fallen due from 17.7.1992 and 17.7.2000, under the Assured Career Progression Scheme;

5. To command the respondents to allow the arrears of pay and allowances arising out of grant of promotion and proficiency step up increments alongwith interest @ 12% per annum;"

4. Writ respondents resisted the writ petition.

5. The Writ Court, after considering the rival contentions of the parties, directed the writ respondents to consider the case of the petitioner for promotion to the higher rank after opening the sealed cover. It is apt to reproduce operative paragraph of the impugned judgment hereunder:

> "9. Accordingly, in view of the observations and discussions made hereinabove, the petition is allowed. Respondent-Federation is directed to consider the case of the petitioner for promotion to the higher post after opening the sealed cover and in case he has been recommended, he will be entitled to all the consequential benefits from the due date. Needful be done within a period of two months from the date of production of certified copy of this judgment by the petitioner. No costs."

6. The main ground of attack of the appellants is that the departmental inquiry was drawn against the writ petitioner, was found guilty and penalty of censure was imposed upon him. Thus, the writ petitioner was not entitled to promotion.

7. Therefore, the only question, which remains for consideration is whether the Writ Court has rightly directed the writ respondents to open the sealed cover and consider the case of the petitioner for promotion to the higher post. It is clear from a perusal of the impugned judgment that the learned Single Judge has considered instruction 16.13 contained in Chapter 16 of the Hand Book on Personnel Matters Volume-I (Second Edn.), which provides that imposition of minor penalty of censure does not stand against

consideration of the case of such person for promotion. It is apt to reproduce relevant portion of instruction 16.13 hereunder:

> *"16.13* ***Minor penalties do not constitute a bar to eligibility and consideration for promotion.***
>
> *The imposition of minor penalty of censure does not by itself stand against the consideration of such person for promotion……"*

8. During the course of hearing, the learned counsel for the appellants has also argued that in view of the judgments of the Apex Court, in **Union of India and others vs. A.N. Mohanan, (2007) 5 SCC** 425 and **Union of India and others vs. Mihir Kumar Bandopadhyay and others, (2009) 16 SCC 329,** the direction given by the learned Single Judge to consider the case of the petitioner by opening the sealed cover is not legally correct and at the best, the case of the writ petitioner could be considered for promotion in the next DPC.

9. The judgments relied upon by the learned counsel for the appellants are distinguishable for the simple reason that instruction 16.13 (supra) was not part of the rules/instructions which were considered in those judgments. Instruction 16.13 (supra), at the cost of repetition, specifically provides that imposition of minor penalty of censure does not stand against considering the case of such person for promotion, but is to be considered after opening the sealed cover read with entire service record. Therefore, no fault can be found with the findings recorded by the Writ Court.

10. Having said so, we are of the considered view that there is no merit in the appeal filed by the appellants and the same is dismissed.

****

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

Commissioner of Income Tax ....Appellant

Vs.

Pawan Aggarwal .... Respondent.

ITA No. 17 of 2010 a/w Ors.
Judgment reserved on: 01.09. 2014
Date of decision: September 10, 2014

Income Tax Act, 1961- Section 80 IC.- Assessees are engaged in manufacturing paper insulated wires and strips of copper and aluminum- wires are drawn from wire rods and the insulation coating is done on the wires with different chemicals- Assessing Officer held that the activity of drawing wires of thinner gauges from rods and wires of thicker gauges does not amount to manufacture or production- held, that the qualitative change effected in the raw material by various means

amounts to manufacture- there is a complete transformation of raw materials into a new and different article having a different identity, characteristic and use- series of changes transform the commodity into a different commercial commodity, whereby it can no longer be recognized as the original commodity but can be recognized as a new and distinct article, therefore, the assessees are entitled to benefit of Section 80 IC.

(Para- 19 to 20)

Cases referred:

Collector of Central Excise vs. Technoweld Industries Ltd, (2003) 11 SCC 798

India Cine Agencies vs. Commissioner of Income Tax (2009) 308 ITR 98

Mamta Surgical Cotton Industries, Rajasthan vs. Assistant Commissioner (Anti-Evasion), Bhilwara, Rajasthan (2014) 4 SCC 87

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

For the Respondent(s) : M/s Anuj Nag, J.S. Bhasin, C.S.Anand, Salil Kapoor and Vishal Mohan, Advocates, in respective appeals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since these appeals raise common question of law and facts, therefore, the same are being taken up together for consideration and disposal.

2. The assessees have industrial undertaking in backward area of Himachal Pradesh and have claimed deductions under Section 80 IC of the Act. The case of the assessees is that they are engaged in manufacturing of paper insulated wires and strips of copper and aluminium, which are used in the oil filled electrical transformers. It is claimed by the assessees that wires are drawn from wire rods and thereafter insulation coating is done on the wires with different chemicals by enamel coating, annealing and then paper is wrapped on the wire to make it insulated. Some of the assessees are also manufacturing insulated wire strips and their product is further used to manufacture coils.

3. In the regular assessment made, the A.O. held that the activity of drawing wires of thinner gauges from wires and rods of thicker gauges does not amount to manufacture or production as the original commodity i.e. wire did not undergo any change in the process and the resultant commodity was also wire, albeit of different dimensions. To come to such conclusion, he relied upon the judgment of the Hon'ble Supreme Court in ***Collector of Central Excise vs. Technoweld Industries Ltd, (2003) 11 SCC 798.***

4. The assessment was confirmed in appeal by the CIT(A), who agreed with the AO that no new product had come into existence as a result of the process carried out and hence there was no manufacture or production within the meaning of Section 80 IC.

5. The assessees then filed appeal before the Income Tax Appellate Tribunal Chandigarh Bench (B) (for short 'ITAT'), who vide impugned orders allowed the appeals. It is being held that the process carried out by the assessees amounts to manufacture or production or both. It is against these orders passed by the ITAT, the department has come up in appeal.

6. The appeals have been admitted on the following substantial questions of law:

1. *Whether the process of drawing wire of thinner gauge from wire or rods of thicker gauge, followed by finishing processes like annealing would amount to manufacture or production or consequently whether the assessee was eligible for deduction under Section 80 IC of the Income Tax Act.*
2. *Whether the impugned judgment is contrary to the ratio of the judgment of the Hon'ble Supreme Court in Collector Central Excise vs. Technoweld Industries.*

7. We have heard learned counsel for the parties and have also gone through the records carefully.

Question No.1:

8. There is no dispute raised by the department regarding the assessees being entitled to deductions under Section 80 IC of the Act. The only dispute raised by the revenue is that the process undertaken by the assessees does not constitute 'manufacture' or 'production' and accordingly, the profit and gain derived from such activity have been denied deductions under Section 80 IC of the Act.

9. On the other hand, the respondents contend that the process of drawing wire from wire rods constitutes manufacture or production of article or thing in terms of Clause (a) of sub-section (2) read with Section 80 IC (1) of the Act.

10. The ITAT in its order dated 30.11.2009 has noted the contention of the respondents (who were the appellants before it) regarding the various processes of production and manufacture undertaken by the respondents and observed as follows:

> ***".....in the process of drawing of wires from wire rods, the input is firstly reduced in size through carbide dies i.e. wire-rod is drawn to smaller sizes such as intermediate wire, fine wire and, ultra fine wire. These wire rods, which constitute raw material, could either be steel rods or copper rods or aluminium rods. It has been further stated that to facilitate the drawing of wire at high speeds, the wire is passed***

through a dry powered lubricant so as to avoid sticking of the wire to the die surface and, this process done at high speeds, results in tensile pulling of the wire, which produces residual stresses and, increases its temperature. These stresses can cause distortions in the wire, cracking and embrittlement of the wire, which could result in premature breaking in service. To overcome these deficiencies, the wire is heated above its re-crystallization temperature to allow the metal grains to reform and relieve the stress. This process is called annealing. Further, to protect from oxidation, which would effect the mechanical and physical properties, the wire is galvanized. In other words, the process of drawing of wire involves following steps – annealing, pickling and, galvanizing, which can be briefly described as hereunder:

> ***a) Annealing: Annealing is a heat treatment in which a material is exposed to an elevated temperature for an extended time period and then slowly cooled. It is the process by which metals and other material are treated to render them less brittle and more workable. Any annealing process consists of three stages, firstly, heating to the desired temperature, secondly, holding or soaking at that temperature and, cooling, usually to room temperature. This provides the following benefits to the materials; Relieves stresses; increases softness, ductility and toughness; produces a specific microstructure or homogenizes the existing microstructure; improves machinability, electrical properties, dimensional stability and formability for cold working, such as cold heading and stamping.***
>
> ***b) Quenching, Acid Pickling and Flux Aplication: After the annealing process, the wire is quenched in a water bath. This step is necessary to prevent overheating of the acid, the next step in the process. In the acid pickling step, the wire is passed through a hydrochloric acid solution. Pickling removes oxides resulting from the hot wire being exposed to oxygen and it remove any remaining lead coating on the wire from the molten lead bath. These contaminants must be removed or they will interfere with the zinc galvanizing process. On passing the wire through the hydrochloric acid bath, the acid reacts with any remaining lead to form lead chloride. The lead chloride is a byproduct from the process. In addition, the hydrochloric acid baths are discarded periodically when they have become contaminated. Any remaining traces of acid are then removed by rising the wire with hot water. The rinsing process is a multitank, counter-flow, hot water rinse system. The counter flow***

is necessary to ensure that the water is the last tank remains relatively clean and free of contaminants. The water is hot to minimize both the process time and the potential for surface oxide formation. The rinsing process results in acidic wastewater that is neutralized prior to disposal. Subsequently, the wire is dipped in a flux bath, usually a zinc ammonium chloride solution flux is an anti-oxidant, dissolving any residual oxides and preventing further oxidation of the surface prior to galvanizing. Any oxidized or contaminated area on the wire can cause poor adhesion of the zinc coating the galvanizing process, leading to black spots and flaking. The flux does not cause adhesion of zinc and steel but only compensates for inadequate cleaning.

c) Galvanizing: Galvanizing is the practice of immersing clean, oxide-free iron or steel into molten zinc at about 860 F(above the melting temperature of 780 F) in order to form a zinc coating that is metallurgically bonded to the iron or steel surface. The zinc coating protects the surface against corrosion, oxidation and moisture. It shields the base metal from the atmosphere and, further the zinc provides anodic (or sacrificial) protection. The zinc protects the steel "Galvanizing", thus giving the process its name.

When the steel is dipped in the zinc bath, it heats up to above the melting temperature and a zinc iron reaction occurs, creating several layers of inter-metallic alloys that bond the outer layer of pure zinc to the steel. The reaction can only occur if the iron in the steel is in intimate contact with the liquid zinc and any surface contamination will impair this reaction.

d)Following the zinc hot dip, the wire is quenched in water to "freeze" the zinc layer and is then coiled or spooled, which is marketed as galvanized wire."

11. The above-mentioned processes were not contested by the revenue either before the authorities below or before this Court, yet, it is contended that such processes do not constitute 'manufacture' or 'production' of any article or thing within the meaning of Section 80 IC.

12. Now, what would appear from the aforesaid facts is that this Court is required to consider as to what would constitute 'manufacture' and 'production' under the Act. Indisputably, the word 'manufacture' was not defined under the Act, uptil the insertion of Section 2 (29BA) of the Finance (No.2) Act, 2009 introduced w.e.f. 1.4.2009, which reads as follows:

"29BA – "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing, -

(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."

Though, it may be noted here that this insertion has been made with effect from 1.4.2009, while we are dealing with the assessments prior to 1.4.2009.

13. The expression 'manufacture' as well as 'production' has come up repeatedly for interpretation and consideration not only before the various High Courts but even before the Hon'ble Supreme Court. The Hon'ble Supreme Court in ***India Cine Agencies vs. Commissioner of Income Tax (2009) 308 ITR 98*** considered the word 'manufacture' as also 'production' in the following manner:

"3. In Black's Law Dictionary, (5th Edition), the word `manufacture' has been defined as, "the process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine". Thus by process of manufacture something is produced and brought into existence which is different from that, out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres (1992 Supp. (1) SCC 290).

4. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when

the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan (1991 (4) SCC 473).

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

6. The prevalent and generally accepted test to ascertain that there is `manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between `processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See Ujagar Prints v. Union of India (1989 (3) SCC 488).

7. To put it differently, the test to determine whether a particular activity amounts to `manufacture' or not is: Does a new and different good emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and

name, whether be it the result of one process or several processes `manufacture' takes place and liability to duty is attracted. Etymologically the word `manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view, is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India (1985 (3) SCC 314).

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

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

> ***"There is no dispute that the plant in respect of which the assessee claimed deduction was owned by it and was installed after March 31, 1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore. Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. -The issue had arisen before different High Courts over a period of time. The High Courts have held that the activity amounted to "production" and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in CIT v. Singareni Collieries Co. Ltd. [1996) 221 ITR 48, the Calcutta High Court in Khalsa Brothers v. CIT [1996] 217 TTR 185 and CIT v. Mercantile Construction Co. [1994] 74 Taxman 41 (Cal) and the Delhi High Court in CIT v. Univmine (P.) Ltd, [1993] 202 ITR 825. The Revenue has not questioned any of these decisions, at least not successfully, and the position of law, therefore, was taken as settled.***

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

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

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

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

"In Webster's New International Dictionary, the word "produce" means something that is brought forth either naturally or as a result of effort and work; a result produced. In Black's Law Dictionary, the meaning of the word `produce' is to `bring into view or notice; to bring to surface'. A reading of the aforesaid dictionary meanings of the word `produce' does indicate that if a living creature is brought forth, it can be said that it is produced. (See Commissioner of Income Tax v. Venkateswara Hatcheries (P) Ltd. (1999 (3) SCC 632), Commissioner of Income Tax, Orissa and Ors. v. M/s N.C. Budharaja and Company and Ors. (1994 Supp 1 SCC 280).

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

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

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

(i) packing, labeling, relabelling of containers.

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

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

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

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

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

`Manufacture' includes any process-

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

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

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

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

“***9.1. Now, we may refer to some of the judicial precedents on the issue. The Hon'ble J & K High Court in the matter of CIT v. Abdul Ahad Najar, 248 ITR 744 (J&K) considered the question, whether the undertaking of a n assessee engaged in extraction of timber from forest and conversion of same into logs, planks, etc. constituted an industrial undertaking within the meaning of section 80J(4) of the Act or not ? In this case, the assessee claimed that it was engaged in the manufacture and production of articles. The case of the assessee was that the planks sawn out of logs and, articles produced therefrom were different in shape from the logs and the trees. However, the Assessing Officer did not accept the contention of the assessee as according to him the assessee did not manufacture or produce any article. According to the Assessing Officer, the process of converting trees into logs did not involve much sawing operations as after felling the trees, it had been cut into logs and sold as such. The Revenue also contended that the process of sawing of logs into planks also did not involve any manufacture of articles and that manufacturing process could not be carried out by bare hands without the aid of machinery. The claim of the assessee was, however accepted by the Appellate Commissioner, who held that the use of machinery was not indispensible to a manufacturing process and even for the conversion of the standing trees into logs, labour was required as something is converted into something else viz. logs. He was of the view that the logs could be said to be a new product emerging out of manufacturing process. He accordingly held that the assessee was entitled to deduction under section 80J of the Income-tax Act, which was confirmed by the Tribunal. The matter was considered by the Hon'ble High Court on the above facts. The Hon'ble High Court was of the view that in order to claim relief under section 80J, an industrial undertaking must manufacture or produce articles and it was a condition precedent. The Hon'ble High Court observed that the assessee cut trees in the forest, converted them not only into logs but also into planks and other articles for the purpose of sale. As a forest lessee, the assessee's business was to cut standing trees and to extract timber and convert the same into form of logs,***

planks, etc. f or the purpose of sale. It was observed that the logs and planks could never be known as trees ; that the two are undoubtedly different from the standing trees. The Hon'ble High Court accordingly upheld the stand of the assessee. It is clear from the above that the activity of the forest lessees of extraction of timber from the forest and conversion of the same into logs, planks, etc. is understood to be a manufacturing process. The Hon'ble High Court on the question of manufacturing further held as under:-

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

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

9.3. The Hon'ble Supreme Court in the case of CIT v. Sesa Goa Ltd. reported i n 27 1 IT R 331 while considering the question under section 32A(2)(b)(iii) for grant of investment allowance dealt with the question of 'production' in a case where the assessee's industrial undertaking was engaged in the business of excavating, mining and processing mineral ore. Mineral ore was not excluded by the Eleventh Schedule.

The only question was whether such business was one of manufacture or production of ore. The Hon'ble Supreme Court noted that the issue was dealt with by different High Courts over a period of time, and it was held that the activity amounted to "production" and answered the issue in question in favour of the assessee. The Hon'ble Supreme Court held as under :-

> ***"The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar [1961] 12 STC 150, defined the word 'production', albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning 'amongst other things that which is produced; a thing that results from any action, process or effort; a product; a product of human activity or effort'. From the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort ...***
>
> ***It is, therefore, not necessary, as has been sought to be contended by learned counsel for the Revenue, that the mined ore must be a commercially new product ...***
>
> ***Learned counsel appearing on behalf of the assessee, correctly submitted that the other provisions of the Act, particularly section 33(1)(b)(B) read with Item No. 3 of the Fifth Schedule to the Act, would show that mining of ore is treated as 'production'. Section 35E also speaks of production in the context of mining activity. The language of these sections is similar to the language of section 32A(2). There is no reason for us to assume that the word 'production' was used in a different sense in section 32A." [underlined for emphasis by us]***

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

them was held to be manufacturing or production of goods. It was held therein as under:

> ***" Section 80-I also refers to profits and gains in respect of an industrial undertaking. In view of the decision given in the case of the assessee, we are of the view that the Appellate Tribunal is right in law in coming to the conclusion that the original assessment which granted the relief under sections 32A and 80-I to the assessee was not erroneous and the inference of the Commissioner of Income-tax under section 263 was not proper. The Tribunal is also right in law in holding that extracting granite from quarry and cutting it to various sizes and polishing should be considered as manufacture or production of any article or thing and the assessee's business activity must be considered as an industrial undertaking for the purpose of granting reliefs under sections 32A and 80-I of the Income-tax Act, 1961."***

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

> ***"Apparently, the principle applied by the Supreme Court was that if without applying the process a thing in its raw form cannot be usable and it is made usable for particular purpose, it amounts to manufacture.***
>
> ***The court approved the principle enunciated in Saraswati Sugar Mills v . Haryana State Board [1992] 1 SCC 418 that essence of manufacture is a change of one object to another for the purpose of making it marketable.***
>
> ***On this principle, the court accepted the contention that by cutting jumbo rolls into smaller sizes, a different commodity has come into existence and the commodity which was already in existence serves no purpose and no commercial use, after the process. A new name and character has come into existence. The original commodity after processing does not possess original identity. Obviously, so far as physical characteristic of jumbo rolls and its shorter version in the form of typewriter and telex roll may have the same physical properties, none the less on the basis of their different use as a marketable commodity and after being cut, the same cannot be used for the purpose for which it could be used in original shape, the activity was held to be manufacture.***

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

9.6. Also, the aforesaid view has been followed by the Hon'ble Bombay High Court in the case of CIT v Fateh Granite (P) Ltd 314 ITR 32 (Bom.) and, the Hon'ble Delhi High Court in the case of CIT v Sophisticated Granite Marble Industries reported 225 CTR 410 (Del) and, it was held that, process of purchasing marble slabs and then converting these into tiles by applying various processes like cutting, sizing, polishing so as to produce marketable tiles constitutes "manufacturing" an article.

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

exist. Secondly, whether the commodity which was already in existence would not serve the desired purpose but for the said process. Applying this two-fold test to the fact situation of the appellants, it is irresistible to hold that the process undertaken by the appellants amount to manufacture.

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

> ***"12. In the backdrop and setting of the principles, as enunciated by the Supreme Court and various High Courts as relatable to the activity of "manufacture" of "processing of goods" and in the light of the various literature and books of foreign authors, relatable to the qualitative change having been brought about by well termed process, as referred to above, we may now proceed to consider and decide the moot question as to whether the activities carried on by the assessee namely, receiving untreated crankshafts and forgings and castings from its clients and subjecting them to heat treatment to toughen them up for being used as automobile spare parts can ever the construed as activities relatable to manufacture and, consequently enable it to claim investment allowance under s. 32A of the IT Act."***
>
> ***"13. We have to take note of the fact that the process of heat treatment to crankshaft, etc. were absolutely essential for rendering in marketable. Automobile parts as crankshafts, need to be subjected to heat treatment to increase the wear and tear resistance to remove the inordinate stress and increase tensile strength. The raw untreated crankshafts and the like can never by used in an automobile industry. Thus, in the crankshafts subjected to the process of heat treatment etc., a qualitative change is effected, to be fit for use in automobiles, although there is no physical change in them. In such state of affairs, it cannot at all the stated that the crankshafts, subjected to heat treatment, etc. cannot at all change the status of new products of different quality for a different quality for a different purpose altogether. In this view of the matter, we are of the view that the activities of the assessee in relation to raw or untreated crankshafts being subjected to heat***

treatment, etc., is definitely a "manufacturing activity" entitling it to claim "investment allowance" under s. 32A of the I. T. Act. We answer questions No. 2 and 3 according." [underlined for emphasis by us]

12. From perusal of the said judgement, it is evident that even qualitative changes effected in the raw material through heating, also amounts to a 'manufacturing activity'. The aforesaid view has also been followed by the Ahmedabad Bench of the Tribunal in the case of Anil Steel Traders (supra) to hold that the activity of annealing of steel rods and coils as per the customer specifications, amounts to 'manufacture'. Thus, in light of the aforesaid judgements alone, we do not find any justification in the stand of the Revenue that the assessee did not carry out any activity of manufacturing. Undoubtedly, the process undertaken by the assessee results in qualitative change in the inputs initially use d in the process of manufacturing. The argument of the Revenue, as manifested in the assessment orders, is that, the activity does not bestow any physical change in the article to which the heat treatment was given by the assessee. In our vie w, considered in the light of the judgement of the Hon'ble Madras High C ourt, which again has referred to various case laws on the issue, the aforesaid argument of the Revenue is not sustained.

13. Further, even if the test of marketability is applied to the facts of the case of the appellants, the process carried out by them constitutes manufacture, as enunciated by the Hon'ble Rajasthan High Court in the case of Arihant Tiles and Marbles (P) Lt d v I TO (supra) following the judgement of the Hon'ble Supreme Court i n t he case of Sesa Goa Ltd. (supra) and, Kores India (supra), since the original commodity, namely, wire rod could not be used for transformers, power cables, etc. as such, until it is drawn into enameled/insulated wires. It is only by this process that, input is made marketable as a distinct commodity and, therefore we hold, in the facts and, circumstances of the case, the process undertaken by the appellants amounts to manufacture of thing or article within the meaning of section 80IC of the Act.

14. In any case, the process amounts to production, as interpreted by the Hon'ble Supreme Court in the case of Sesa Goa Ltd. (supra) wherein it has been held that, the word "production" has been used in a very wide sense to mean to bring out a new product, may be not a commercially new product. In this case, undisputedly and, irrefutably new product has been produced as a result of the various processes undertaken by the appellant and, as such, even on this ground, the appellants are eligible for claim of deduction u/s 80IC of the Act."

15. In ***CIT vs. M/s Doon Valley Rubber Industries ITA No. 2 of 2009*** decided on 6.11.2013 this Court has taken into consideration all the relevant judgments to hold that the rubber crumb produced by the assessee therein was commercially different from its raw material and further held that it was commercially known to be different in the market. This Court proceeded to hold as under:

> ***"5. The question as to what amounts to manufacture is no more resintegra. The three Judges Bench of the Apex Court in the case of Aspinwall and Co. Ltd. v. Commissioner of Income Tax, 2001 (251) ITR 323, has expounded thus:***
>
> > ***....."The word "manufacture" has not been defined in the Act. In the absence of a definition of the word "manufacture" it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity."***
>
> ***6. In the latest decision of the Apex court in the case of Income Tax Officer vrs. Arihant Tiles and Marbles P. Ltd., (2010) 320 ITR 79 (SC) after analyzing its earlier decisions and including in the case of Aman Marble Industries P. Ltd. vrs. Collector of Central Excise, (2003) 157 ELT 393 (SC) it has been noted that the expression used in Section 80IA - which is analogous to the expression used in Section 801B, which uses words manufactures or produces, as applicable to the present case – mandates the Court to consider not only word "manufacture" but also the connotation of word "production". Having noted this position, the Court went on to observe that the said expressions have wider meaning as compared to the word "manufacture". Further, the word "production", means manufacture plus something in addition thereto. The Court also noticed the exposition in CIT vrs. Sesa Goa Ltd.(2004) 271 ITR 331 (SC) wherein it has been held that while every manufacture can constitute production, every production did not amount to manufacture. Further, the test for determining whether manufacture can be said to have taken place is whether the commodity, which is subjected to a process, can no longer be regarded as original commodity, but is recognized in trade as a new and distinct commodity. Further, the word "production", when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. The word "production" takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods."***

16. The word 'manufacture' and 'processing' came up for consideration before the Hon'ble Supreme Court in its recent judgment in ***Mamta Surgical Cotton Industries, Rajasthan vs. Assistant Commissioner (Anti-Evasion), Bhilwara, Rajasthan (2014) 4 SCC 87***. Though in that case the Hon'ble Supreme Court was dealing with an entirely different Act and the word 'manufacture' therein was in no manner pari materia with the term 'manufacture', now introduced in the Income Tax Act, how even the judgment assumes importance as it has dealt with the word 'manufacture' and 'processing' in detail alongwith relevant case law and held as under:

> ***"13. It is, therefore, relevant to notice the definition of 'manufacture' as defined in the dictionary clause of the Act. Section 2(27) of the Act defines the expression 'manufacture' as under:***
>
> > ***"2.(27) "manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."***
>
> ***The definition aforesaid is an inclusive definition and therefore would encompass all processing of goods which would produce new commodity which is commercially different and distinctly identifiable from the original goods. The definition however excludes all such mechanisms of processing of goods which have been notified by the State Government to the said effect. Admittedly, no such exclusion in respect of the process in analysis for surgical cotton has been notified by the State Government. Therefore, the process of transformation has to be tested on the anvil of proposition whether surgical cotton is processed such that it is commercially different and distinctly identifiable than cotton.***
>
> ***14. The essential test for determining whether a process is manufacture or not has been the analysis of the end product of such process in contradistinction with the original raw material. In 1906, Darling, J. had subtly explained the quintessence of the expression "manufacture" in McNichol and Anor v. Pinch, [1906] 2 KB 352 as under:***
>
> > ***"...I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made."***
>
> ***15. In order to understand the finer connotation of the expression 'manufacture', it may be useful to refer to the decision of this Court in the case of Empire Industries Limited and Ors. v. Union of India and Ors.,(1985) 2 SCC 314, wherein this Court after exhaustively noticing the views of***

the Indian Courts, Privy Council and this Court had stated as under: (SCC p.329, para 24)

> ***"24. .....'14. .....'Manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. '*"***

(CCE v. Osnar Chemical (P) Ltd., (2012) 2 SCC 282; Jai Bhagwan Oil & Flour Mills v. Union of India, (2009) 14 SCC 63; Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise, (2007) 4 SCC 155; CIT v. Tara Agencies, (2007) 6 SCC 429; Ujagar Prints (II) v. Union of India, 1986 Supp SCC 652; Saraswati Sugar Mills v. Haryana State Board, (1992) 1 SCC 418; Gramophone Co. of India Ltd. v. Collector of Customs, (2000) 1 SCC 549; CCE v. Rajasthan State Chemical Works, (1991) 4 SCC 473; CCE v. Technoweld Industries, (2003) 11 SCC 798; Metlex (I) (P) Ltd. v. CCE, (2005) 1 SCC 271; Aman Marble Industries (P) Ltd. v. CCE, (2005) 1 SCC 279; Shyam Oil Cake Ltd. v. CCE, (2005) 1 SCC 264; South Bihar Sugar Mills Ltd. v. Union of India, (1968) 3 SCR 21; Laminated Packings (P) Ltd. v. CCE, (1990) 4 SCC 51; Dy. CST v. Coco Fibres, 1992 Supp (1) SCC 290; CST v. Jagannath Cotton Co., (1995) 5 SCC 527; Ashirwad Ispat Udyog v. State Level Committee, (1998) 8 SCC 85; State of Maharashtra v. Mahalaxmi Stores, (2003) 1 SCC 70; Aspinwall & Co. Ltd. v. CIT, (2001) 7 SCC 525; J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO, (1965) 1 SCR 900; CCE v. Kiran Spg. Mills, (1988) 2 SCC 348 and Park Leather Industry (P) Ltd. v. State of U.P., (2001) 3 SCC 135).

16. The following observations by the Constitution Bench of this Court in Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Supp (1) SCR 586 where the change in the character of raw oil after being refined fell for consideration are also quite apposite: (AIR p.794, para 14)

> ***"14. ... The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance.'....."***

17. For determining whether a process is "manufacture" or not, this Court in Union of India v. J.G. Glass Industries Ltd., (1998) 2 SCC 32 has laid down a two-pronged test. Firstly, whether by such process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist and secondly, whether the commodity which was already in existence would serve no purpose but for the said process. In light of the said test it

was held that printing on bottles does not amount to manufacture.

18. A Constitution Bench of this Court in Devi Das Gopal Krishnan v. State of Punjab, (1967) 3 SCR 557 observed that if by a process a different identity comes into existence then it can be said to be "manufacture" and therefore, when oil is produced out of the seeds the process certainly transforms raw material into different article for use.

19. In CCE v. S.R. Tissues (P) Ltd., (2005) 6 SCC 310, the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court inter alia, held as under: (SCC p.317, para 12)

> ***"12. ... However, the end use of the tissue paper in the jumbo rolls and the end use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."***
>
> ***(emphasis supplied)***

20. At this stage the discussion of difference between "processing" and "manufacture" holds much relevance to well appreciate the contention canvassed by Shri Giri that the transformation of cotton into surgical cotton would be mere processing and not manufacture.

21. According to Oxford English Dictionary one of the meanings of the word "process" is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". In Chambers 21st Century Dictionary, the term "process" has been defined as

> ***"Process.- (1) a series of operations performed during manufacture, etc. (2) a series of stages which a product, etc. passes through, resulting in the development or transformation of it."***

22. In East Texas Motor Freight Lines v. Frozen Food Express, 351 US 49 the Supreme Court of United States of

America has held that the processing of chicken in order to make them marketable but without changing their substantial identity did not turn chicken from agriculture commodities into manufactured commodities.

23. A three-Judge Bench of this Court in Pio Food Packers case (supra) has dealt with the distinction between "manufacture" and "processing". Therein the appeals were filed against the order of the Kerala High Court holding that the turnover of pineapple fruits purchased for preparing pineapple slices for sale in sealed cans is not covered by Section 5- A(1)(a) of the Kerala General Sales Tax Act, 1963. This Court while deciding whether such conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture or not has observed as follows: (SCC p. 176, para 5)

> ***"5. ..... Commonly, manufacture is the end result of one [or] more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."***
>
> ***(emphasis supplied)***

This Court held that when the pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans, there is no consumption of the original pineapple fruit for the purpose of manufacture. Pineapple retains its character as fruit and whether canned or fresh, it could be put to the same use and utilized in similar fashion.

24. In Sterling Foods case (supra) this Court has observed that processed and frozen shrimps, prawns and lobsters cannot be regarded as commercially distinct commodity from raw shrimps, prawns and lobsters. The aforesaid view has further been adopted and applied by this Court in Shyam Oil Cake Ltd. case (supra) wherein the classification of refined edible oil after refining was under consideration and on

similar lines it was held that the process of refining of raw edible vegetable oil did not amount to manufacture.

25. In Aman Marble Industries case (supra), this Court has held that the cutting of marble blocks into smaller pieces would not be a process of manufacture for the reason that no new and distinct commercial product came into existence as the end product still remained the same and thus its original identity continued.

26. This Court in Crane Betel Nut Powder Works case (supra) citing the earlier decision in Brakes India Ltd. v. Supdt. of Central Excise, (1997) 10 SCC 717 wherein the process of drilling, trimming and chamfering was said to amount to "manufacture", has reiterated that if by a process, a change is effected in a product and new characteristic is introduced which facilitates the utility of the new product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product.

27. In Kores India Ltd. v. CCE, (2005) 1 SCC 385 the cutting of duty-paid typewriter/telex ribbons in jumbo rolls into standard predetermined lengths was considered by this Court and it was held that such cutting brought into existence a commercial product having distinct name, character and use and amounted to "manufacture" and attracted the liability to duty. In Standard Fireworks Industries v. Collector of Central Excise, (1987) 1 SCC 600 this Court held that cutting of steel wires and the treatment of paper is a process for the manufacture of goods in question.

28. In Lal Kunwa Stone Crusher case (supra), the decision relied upon by Shri Giri, this Court has considered that whether on crushing stone boulders into gitti, stone chips and dust different commercial goods emerge so as to amount to manufacture as per the definition of "manufacture" under Section 2(e-1) of the U.P. Sales Tax Act, 1948 and observed that even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, "stone" as under the relevant Entry is wide enough to include the various forms such as gitti, kankar, stone ballast. It is in this light, that the Court had opined that stone gitti, chips, etc. continue to be identifiable with the stone boulders.

After taking into consideration the entire law on the subject, the Hon'ble Supreme Court has finally concluded as under:

35. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different

identity, characteristic and use. While mere improvement in quality does not amount to manufacture, when the change or a series of changes transform the commodity such that commercially it can no longer be regarded as the original commodity but recognised as a new and distinct article.

17. In fairness to counsel for the parties, we may place on record that they cited several other reported and unreported decisions. That indeed, indicates their industry. However, we are of the considered opinion that the question to be answered in this appeal can conveniently be answered only with reference to the exposition in the decisions of the Apex Court and the decision of this Court in ***M/s Doon Valley*** (supra), referred to above, for which reason, we are not burdening this judgment with the other citations pressed into service by the respective counsel, across the Bar.

18. From the perusal of the factual aspects, it is evident that the qualitative changes effected in the raw material by various means like annealing, quenching, acid pickling and flux application, galvanizing and following the zinc hot dip, definitely amounts to manufacture. There is a complete transformation of raw materials into a new and different article having a different identity, characteristic and use. The series of changes transform the commodity into a different commercial commodity whereby it can no longer be regarded as the original commodity but recognised as a new and distinct article.

19. Further, keeping in mind the exposition of law set out above, we have no hesitation in concluding that the Appellate Tribunal was justified in concluding that the paper insulated wires and strips of copper and aluminium being manufactured/processed by the assessees were commercially different from its raw material and further it is commercially known different in the market. In other words, the assessees were engaged in the manufacture of the product and, therefore, were entitled to the deductions claimed under Section 80 IC of the Act. We find no reason to disagree with the said opinion of the Tribunal and the question No.1 is, therefore, answered accordingly against the revenue.

Question No.2:

20. The learned counsel for the revenue has heavily relied upon the judgment of the Hon'ble Supreme Court in the case of ***Technoweld Industries*** (supra), to contend that the case of assessees is fully covered by the ratio laid down in the aforesaid case. We have considered the aforesaid judgment in detail and are of the considered view that the facts in the aforesaid case were totally different from the facts in the present case. The assessee in that case was engaged in the business of wire drawing from thicker gauge to thinner gauge by cold drawing process and was in fact not engaged in manufacture or production of wire with different chemical/ electrical/mechanical properties and the product was also not made to undergo any process. Further there was no

manufacture of new product, this would be clear from the following observations:

> ***"2. In all these appeals, the respondents purchased duty paid wire rods and drew the wire into a thinner gauge. The question is whether by drawing wire into a thinner gauge, manufacture has taken place. The question is whether the wire of the thinner gauge is excisable to duty.***
>
> ***3. This question came to be considered by the Customs, Excise and Gold (Control) Appellate Tribunal. In the case of Vishvaman Industries v. CCE (2001) 127 ELT 155 (Trib) by an order dated 2.11.2000, it was held that the process of drawing wire from wire rods did not amount to manufacture. The Tribunal based its decision on an earlier decision of the Tribunal in the case of Jyoti Engg.Corpn. v. CCE (1989) 42 ELT 100. In Jyoti case, the tariff entry concerned was 26-AA (i-a) which included bars, rods, coils, wires etc. The Tribunal has held that the raw material was a wire rod and the final product was also a wire. It has held that no new product has come into existence and that there was no manufacture. Civil appeals filed against both the aforementioned decisions were dismissed.***
>
> ******* ********** *********
>
> ***7. This Court was also taken through the processes which are undergone by the manufacturer and which have been set out in some of the orders passed by the Commissioner. It was submitted that the raw material is a rod falling under Tariff Item 72.13 and/or 72.15 whereas after processing a distinct and separate marketable product falling under Tariff Item 72.17 has come into existence. It was submitted that the market price of both the products is also different inasmuch as the cost of the raw material was approximately Rs.13,000 per metric ton whereas for the final product the market price was approximately Rs.15,000 per metric ton. It was submitted that under these circumstances, the Court must now hold that the earlier decisions of the Tribunal are not correct and that the final product i.e. the wire which is drawn by the cold drawing process is an excisable product.***
>
> ***8. We are unable to agree with the submission. It is to be seen that the initial product was a wire rod. The ultimate product is also a wire. All that is done is that the gauge of the rod is made thinner and the product is finished a little better. In our view the earlier decisions of the Tribunal are correct. There is no manufacture of a new product. Merely because there are two separate entries does not mean that the product becomes excisable. The product becomes excisable only if there is manufacture."***

Now, insofar as these cases are concerned, we after taking into consideration the factual and legal aspects while answering question No.1, have already held that the process being carried out by the assessees amounts to manufacture or production and, therefore, the assessees are eligible for deduction under Section 80IC of the Income Tax Act.

Accordingly, this question also stands answered against the revenue.

21. In view of the findings recorded above, we find no merit in these appeals and accordingly, the same are dismissed, so also the pending application(s), if any. The parties are left to bear their own costs. An authenticated copy of this judgment be placed in all the connected files.

****

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

Mahalakshmi Oxyplants Pvt. Ltd. ...Petitioner.

Versus

State of Himachal Pradesh and another ...Respondents.

CWP No. 4897 of 2014-J
Reserved on: 03.09.2014
Decided on: 10.09.2014

Constitution of India- Article 226- State had invited tender for supplying Medical Oxygen Gas to IGMC and its associated hospital- petitioner challenged the tender on the ground that it contained conditions, which were aimed just to oust him from offering the tender and participating in the tender process- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless on the face of it, it is mala-fide, illegal, unconstitutional and the contract is made to favour a particular person- further, held, on the facts that the respondents had thought proper to incorporate the conditions in order to have a better which may conclude in the best. (Para- 9 & 23)

Constitution of India, 1950- Article 226- Practice and procedure- Petitioners had appeared before the selection committee and had challenged its constitution after they were declared unsuccessful - held, that petitioners having participated in the selection process cannot challenge the same. (Para-16)

Precedent- *per incuriam-* the judgment of Karnataka High Court in ***Ravi vs. The Karnataka University, (2006) 6 Kar.L.J. 192*** - holding that judgment of Hon'ble Supreme Court of India in ***Dalpat Abasaheb Solunke and others vs. Dr. B.S. Mahajan and others (1990) 1 SCC 305*** is per incuriam is not correct- the binding effect of the decision of

the Supreme Court does not depend upon whether the particular argument was considered or not but upon the fact whether the point under reference was actually in issue or not- it is not permissible to say that full facts had not been presented before the Supreme Court of India to dilute the authority of precedent. (Para- 7, 9 & 10)

Cases referred:

Tata Cellular versus Union of India, reported in (1994) 6 Supreme Court Cases 651

Association of Registration Plates versus Union of India and others, reported in (2005) 1 Supreme Court cases 679

Michigan Rubber (India) Limited versus State of Karnataka and others, reported in (2012) 8 Supreme Court Cases 216,

Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another, reported in (2012) 6 Supreme Court Cases 464

Aruna Rodrigues & Ors. versus Union of India & Ors., reported in 2012 AIR SCW 3340,

Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others, reported in (2014) 4 Supreme Court Cases 156

M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors., reported in 2014 AIR SCW 1249

For the petitioner:	Mr. Trilok Jamwal, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2. Mr. Manohar Lal Sharma, Advocate, for respondent No. 3. Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has called in question the tender notice (Annexure P-7), issued by respondent No. 3, whereby tenders have been invited for supply of Medical Oxygen Gas to IGMC and its Associated Hospitals, on the ground that it contains conditions which are aimed just to oust the petitioner from offering the tender and participating in the tender process.

2. The respondents have resisted the writ petition by the medium of replies.

3. Precisely, the case of the petitioner is that the official respondents had issued contract to the private respondent in the year 2007, was supplying all Medical Oxygen Gases on the basis of tender/contract, constraining the petitioner to file CWP No. 260 of 2014, titled as Mahalakshmi Oxyplants Pvt. Ltd. versus State of H.P. and others, seeking command to the respondents to issue fresh tenders, which was disposed of by this Court vide judgment and order, dated 24th June, 2014 (Annexure P-6). In pursuance, the impugned tender notice has been issued with mala fide exercise with the aim to oust the petitioner, by imposing the conditions, which precluded the petitioner to participate in the tender process.

4. Respondents No. 1 and 2 have filed reply and stated that the entire exercise is being made by respondent No. 3 in terms of the directions passed by this Court vide judgment and order, dated 24th June, 2014, (Annexure P-6) made in CWP No. 260 of 2014 (supra) and they have no role to play in issuing the tenders and the bid documents.

5. Respondent No. 3 has resisted the petition on the ground that the tender notice has been issued in terms of judgment and order, dated 24th June, 2014, made by this Court in CWP No. 260 of 2014 and in order to have the best supply, that too, from a firm, which is having good credentials and capability of having quality control system with a good financial background. Further stated that it is the prerogative of the Executive-Authority to issue tender, to impose conditions, which are required to have best competition in order to get the best quality and quick supply, thus, the conditions imposed are just to ensure that the supply of Medical Oxygen Gasses is made within time, which is a life saving drug, that too.

6. The conditions imposed by the respondents have been mentioned in sub-paras (v), (vi), (vii) and (viii) of para 11 of the writ petition. While going through the said conditions, it appears that the respondents have imposed these conditions just to ensure that a person/firm, who is having a strong financial background and capacity, should participate and supply is made without any break.

7. It is worthwhile to mention herein that the petitioner has not arrayed any person in his personal capacity in order to allege mala fide or malice or to establish the same. Also, there is nothing in the writ petition which can be made basis for holding that these conditions have been imposed with mala fide exercise.

8. The question is – whether such conditions can be called in question by any person, who is not fulfilling the eligibility criterion?

9. It is beaten law of land that issuance of tender notice, opening of financial bids, technical bids and contracts made cannot be subjected to judicial review unless, on the fact of it, it is mala

fide, illegal, unconstitutional and the said contract is made against the public interest just to favour a particular person.

10. This Court in **CWP No. 9337 of 2013-D,** titled as **Shri Ashok Thakur versus State of Himachal Pradesh & others,** decided on **6th May, 2014,** held that tenders cannot be questioned unless case for judicial review is carved out. It is apt to reproduce para 8 of the judgment herein:

> *"8. At the outset, it may be stated that this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India."*

11. The petitioner has not questioned the decision-making process, but has only questioned the eligibility criterion on the ground that he has been rendered ineligible, which he cannot do, as stated hereinabove.

12. The Apex Court in the first case reported in **Tata Cellular versus Union of India,** reported in **(1994) 6 Supreme Court Cases 651,** has held that in tender matters, the judicial review is not permissible unless there is arbitrariness or mala fide writ large on the face of it and has also laid down guidelines. It is apt to reproduce para 94 of the judgment herein:

> *"94. The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of*

contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administrative and lead to increased and unbudgeted expenditures.

……."

13. The Apex Court in a series of cases from the year 1994 till 2005 has also discussed the ambit of the powers of the writ Court, the writ jurisdiction and in which circumstances the tender documents, tender process and the decision-making process can be questioned. It is apt to reproduce paras 38 to 40, 43 and 44 of the judgment rendered by the Apex Court in **Association of Registration Plates versus Union of India and others,** reported in **(2005) 1 Supreme Court cases 679,** herein:

"38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are

intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

41. .....

42. .....

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute

the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entreprenneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

14. The Apex Court in **Michigan Rubber (India) Limited versus State of Karnataka and others,** reported in **(2012) 8 Supreme Court Cases 216,** has laid down some principles and has held that it is the prerogative of the department to fix any criterion and that cannot be made subject matter of a writ petition unless it is arbitrary or mala fide, which too appears on the face of it. It is apt to reproduce paras 23 and 35 of the judgment herein:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it

would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. .....

25. .....

26. .....

27. .....

28. .....

29. .....

30. .....

31. .....

32. .....

33. .....

34. .....

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public

> *authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."*

15. In this judgment, the Apex Court, in paras 11 to 15, has also discussed and made reference to all the judgments of the Apex Court on the issue. In these judgments, the same ratio has been laid down and after taking note of all these judgments, the Apex Court has culled out the principles, reference of which has been made in para 23 (supra).

16. The Apex Court, in another case titled as **Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another,** reported in **(2012) 6 Supreme Court Cases 464,** has discussed what is judicial review, how it is to be exercised in economic cases and other cases related to business. It is apt to reproduce paras 27 and 31 of the judgment herein:

> *"27. That leaves us with the second ground on which the appellant questioned the eligibility of Respondent 2 to offer a bid, namely, the non-execution by Respondent 2 of a single integrated water supply scheme for the requisite value. The appellant's case, in this connection, is twofold. Firstly, it is contended that the works executed by Respondent 2 for Vyare and Songadh were*

> *distinct and different works which did not constitute a single integrated water supply scheme hence could not be pressed into service to show satisfaction of the condition of eligibility stipulated under the tender notice. The alternative submission made by the learned counsel appearing for the appellant in connection with this ground is that the work executed by Respondent 2 for Upleta also did not satisfy the requirement of the tender notice inasmuch as the said work did not involve the construction of intake wells, which was an essential item of work for any integrated water supply scheme.*
>
> *28. .....*
>
> *29. .....*
>
> *30. .....*
>
> *31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent 2."*

17. Applying these tests to the instant case, as discussed hereinabove, we are of the considered view that it is the prerogative and domain of respondent No. 3 to decide how to have a good supply, that too, of good quality and not from a person, who is not competent.

18. The Courts have no expertise to determine the issue whether the conditions imposed are relevant or otherwise and cannot interfere unless the petitioner carves out a case for interference in public interest.

19. The Apex Court in **Aruna Rodrigues & Ors. versus Union of India & Ors.,** reported in **2012 AIR SCW 3340,** has laid down the same principle. It is apt to reproduce para 2 of the judgment herein:

> *"2. This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short 'GEAC'). I.A. No.4 was filed, in which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September,*

2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences.

(Emphasis added)"

20. The Apex Court in a latest judgment in the case titled as **Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others,** reported in **(2014) 4 Supreme Court Cases 156,** has also laid down the principles. It is apt to reproduce paras 11 and 14 of the judgment herein:

" 11. We have extensively referred to these principles in Arun Kumar Agrawal case, (2013) 7 SCC 1, where we have held as follows: (SCC p. 17, para 41)

"41. .....This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is

not a ground to hold that the decision was mala fide or taken with ulterior motives."

12. .....

13. .....

14. We are of the view that these are purely policy decisions taken by the State Government and, while so, it has examined the benefits the project would bring into the State and to the people of the State. It is well settled that non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise of power. The courts have always held that it is open to the State and the authorities to take economic and management decisions depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest. We are of the view that is what has been done in the instant case and the High Court has rightly held so. We, therefore, find no reason to entertain this special leave petition and the same is dismissed."

21. The Apex Court in **M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors.,** reported in **2014 AIR SCW 1249,** has taken note of all the judgments right from the year 1949 and has culled out the principles. It is apt to reproduce paras 17, 18 and 22 of the judgment herein:

"17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489 : (AIR 1979 SC 1628) which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (AIR 1996 SC 11) (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court

held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:

> *(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;*
>
> *(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and*
>
> *(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.*

18. The principles governing judicial review were then formulated in the following words:

> *(i) The modern trend points to judicial restraint in administrative action.*
>
> *(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an*

> *administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of*
>
> *Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
>
> *(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.*
>
> *19. .....*
>
> *20. .....*
>
> *21. .....*
>
> *22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest"*

22. This Court in **CWP No. 9337 of 2013-D (supra), CWP No. 765 of 2014,** titled as **Namit Gupta versus State of H.P. and others,** decided on 27th March, 2014, and **CWP No. 4112 of 2014,** titled as **Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on 15th July, 2014, has laid down the same principle.

23. Keeping in view the ratio laid down by the Apex Court and by this Court, as discussed hereinabove, we are of the considered view that the respondents have, in their wisdom, thought it proper to incorporate the conditions in terms of the tender notice in order to have a better, which may conclude in the best, keeping in view the purpose of supplies aimed at.

24. Applying the principle to the instant case, no case for interference is made out.

25. We deem it proper to record herein that tenders have been issued, parties/firms have participated and the selection/tender process is over. The private respondent has made the grade and because of the orders made by this Court in this petition, it has not been able to execute the contract, which is against public interest and that too, at the cost of public exchequer.

26. The petitioner has already invoked the jurisdiction of this Court. Perhaps, he was expecting that the contract should have been awarded to it. Earlier, the supplies were made to the official respondents on cheaper rates, but because of the intervention of this Court, the arrangement stands cancelled and now, the supplies have to be made on higher rates, thus, has made the State to suffer because of the conduct of the petitioner.

27. The way the petitioner is trying to get the contract speaks itself and in order to prevent the litigation of such nature, we deem it proper to saddle the petitioner with costs. Accordingly, the writ petition is dismissed alongwith all pending applications, if any, with costs, quantified at Rs. 20,000/-.

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

Nanak Chand ....Appellant
Versus
Parmod Kumar & others ....Respondents

FAO (MVA) No. 49 of 2007
Decided on : 12.09.2014

Motor Vehicle Act, 1988- Section 166- MACT had awarded compensation and had directed the Insurance Company to pay the same- held, that the award was legal and speaking one and required no interference. (Para-3)

For the appellant : Mr. Anup Rattan, Advocate.
For the respondents : Mr. G.D. Sharma, Advocate, for respondent No. 2.
Respondents No. 1 & 3 ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Appellant has questioned the award, dated 30th December, 2006, passed by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (hereinafter referred to as "the Tribunal"), in MAC Petition No. 24 of 2003, titled as Parmod Kumar versus Nanak Chand & others, whereby compensation to the tune of Rs.55,396/- with interest @ 7.5% per annum came to be awarded in favour of the claimant-respondent No.1 herein and against the owner-appellant herein, from the date of the claim petition till its realization, (for short "the impugned award"). However, the liability to satisfy the award amount on behalf of the owner was fastened upon the insurer-insurance company.

2. I wonder, why the appellant has questioned the impugned award, when liability to satisfy the award amount was fastened upon the Insurer-Insurance Company.

3. I have gone through the impugned award, which is legal and speaking one, needs no interference.

4. Accordingly, the appeal is dismissed and the impugned award is upheld.

5. Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

6. Send down the records after placing copy of the judgment on the record.

**********e

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

FAO (MVA) No. 56 of 2007 a/w FAOs (MVA) No. 431 & 437/2007, 61, 62, 63, 65 & 69 of 2010.
Reserved on : 05.09.2014
Decided on : 12.09.2014

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1. **FAO (MVA) No. 56 of 2007**
Oriental Insurance Company Ltd. .....Appellant
Versus
Shri Sanjay Kumar & others ...Respondents

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2. **FAO (MVA) No. 431 of 2007**
Oriental Insurance Company Ltd. .....Appellant
ersus
Des Raj & others ...Respondents

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3. **FAO (MVA) No. 437 of 2007**
Amar Singh .....Appellant
Versus
Desh Raj & others ...Respondents

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4. **FAO (MVA) No. 61 of 2010**
Amar Nath .....Appellant
Versus
Roshani Devi & others ...Respondents

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5. **FAO (MVA) No. 62 of 2010**
Amar Nath .....Appellant
Versus
Sukh Dei & others ...Respondents

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6. FAO (MVA) No. 63 of 2010

Amar Nath .....Appellant

Versus

Smt. Rekha & others ...Respondents

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7. FAO (MVA) No. 65 of 2010

Amar Nath .....Appellant

Versus

Pawan Kumar & others ...Respondents

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8. FAO (MVA) No. 69 of 2010

Amar Nath .....Appellant

Versus

Neema Devi & others ...Respondents

Motor Vehicle Act, 1988- Section 149- the driver was holding a license authorizing him to drive light motor vehicle - however, he was driving a bus at the time of accident having seating capacity of 42- driver was not competent to drive the vehicle - held, that the insurance company is liable to satisfy the award made in respect of third party with the right of recovery the same from the insured. (Para- 10 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, reported in AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, reported in 2013 AIR (SCW) 3120

FAO (MVA) No. 56 of 2007

For the appellant : Mr. G.C. Gupta, Senior Advocate with Mr. Vinod Sharma, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.
Mr. Tara Singh Chauhan, Advocate, for respondent No. 2.
Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 3.

FAO (MVA) No. 431 of 2007

For the appellant : Mr. G.C. Gupta, Senior Advocate with Mr. Vinod Sharma, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.
Mr. Tara Singh Chauhan, Advocate, for respondent No. 2.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 3.

FAO (MVA) No. 437 of 2007

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Yashwardhan Chauhan, Advocate, for respondent No. 1.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 2.

Mr. G.C. Gupta, Senior Advocate with Mr. Vinod Sharma, Advocate, for respondent No. 3.

FAO (MVA) No. 61 of 2010

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 2.

Mr. Ajay Chandel, Advocate, for respondent No. 3.

FAO (MVA) No. 62 of 2010

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 2.

Mr. Ajay Chandel, Advocate, for respondent No. 3.

FAO (MVA) No. 63 of 2010

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondents No. 1 & 2.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 3.

Mr. Ajay Chandel, Advocate, for respondent No. 4.

FAO (MVA) No. 65 of 2010

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 2.

Mr. Ajay Chandel, Advocate, for respondent No. 3.

FAO (MVA) No. 69 of 2010

For the appellant : Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondent No. 1.

Mr. Pankaj Negi, Advocate, vice Mr. Rajiv Jiwan, Advocate, for respondent No. 2.

Mr. Ajay Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

All these eight appeals have been preferred against the awards, passed on different dates, in different claim petitions, by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (hereinafter referred to as "the Tribunal"), which are outcome of a motor vehicular accident involving vehicle-bus bearing registration No. HP-24-3003, (hereinafter referred to as "the impugned awards"). Thus, I deem it proper to determine all these appeals by a common judgment.

2. In **FAO No. 56 and 431/2007,** the insurer-Oriental Insurance Company has questioned the impugned awards passed in MAC Petition No. 56 of 2004, dated 04.01.2007 and MAC Petition No. 73 of 2004, dated 10.07.2007, respectively, on grounds taken in the memo of appeals.

3. By the medium of **FAO No. 437 of 2007, FAOs No. 61, 62, 63, 65 & 69/2010,** owner-Amar Nath has questioned the impugned awards made by the Tribunal in MAC Petition No. 73 of 2004, dated 10.07.2007, MAC Petitions No. 66 of 2005/04, 69 of 2005/04, 98 of 2005/04, 75 of 2005/2004 and 68 of 2005/04, respectively, dated 29th December, 2009, on the grounds taken in the memo of appeals.

Brief Facts:

4. The claimants-injured and the dependants of deceased, namely, Shri Ravi Kant, Smt. Rama Devi , Smt. Rachna Devi, Shri Surjit Kumar, Shri Hem Raj and Shri Ajay Singh, being victims of the motor vehicular accident, which has allegedly been caused by driver, namely, Babu Ram, while driving vehicle-bus bearing registration No. HP-24-3003, rashly and negligently, on 21.12.2003, at about 11.20 a.m., near Dehar at Village Samlehu, Tehsil Sunder Nagar, District Mandi, the vehicle went off the road; fell into a gorge, as a result of which, 35-40 occupants sustained injuries and Shri Ravi Kant, Smt. Rama Devi , Smt. Rachna Devi, Shri Surjit Kumar, Shri Hem Raj and Shri Ajay Singh, succumbed to the injuries; filed claim petitions, before the Tribunal for grant of compensation, as per break-ups given in the respective claim petitions.

5. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

6. The Tribunal, on the pleadings of the parties, framed common issues in all the death cases. It is apt to reproduce the issues framed in MAC Petition No. 73 of 2004:

1. *Whether the deceased Rachna Devi had died due to rash and negligent driving of Shri Babu Ram respondent No. 2, driver of Bus No. HP-24-3003, as alleged?....OPP*
2. *If issue No. 1 supra is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents?....OPP*
3. *Whether the driver of Bus No. HP-24-3003 did not have valid and effective driving license at the time of accident, if so, its effect? OPR-3*
4. *Relief.*

7. Following issues came to be framed in MAC Petition No. 56 of 2004, i.e. injury case:-

"1. Whether the petitioner Sanjay Kumar suffered injuries on account of rash and negligent driving of Bus No. HP-24-3003 by the respondent No. 2, as alleged? ...OPP

2. *In case issue No. 1 is proved to what amount of compensation and from whom is the petitioner entitled to? ...OPP*
3. *Whether the respondent No. 2 driver of bus No. HP-24-3003 was not having a valid and effective driving license, at the time of the accident, if so, its effect? ...OPR-3*
4. *Relief"*

8. The insurer-Oriental Insurance Company has questioned the impugned awards passed in MAC Petitions No. 56 of 2004 and 73 of 2004, on the grounds that the owner had engaged a driver, namely, Babu Ram, who was not having a valid and effective driving licence at the time of accident; has committed willful breach and the Tribunal has fallen in error in saddling the insurer with liability, with right of recovery.

9. Admittedly, the driver was driving bus bearing registration No. HP-24-3003, at the relevant time and the owner was insured with the insurer-Insurance Company.

10. All the documents as well as the evidence on record do disclose that the driver was not having a valid and effective driving licence to drive the bus i.e. "heavy passenger motor vehicle". He was only competent to drive "light motor vehicle", as per the driving licence Ex. RW-4/A in MAC Petition No. 69 of 2005/04.

11. Neither the owner nor the driver has led any evidence to prove that the driver was having a valid and effective driving licence to drive “heavy passenger motor vehicle”.

12. In terms of the documents on record, i.e. Registration Certificate Ext. R-B and Insurance Policy Ext. R.C., the vehicle in question was a passenger bus, having seating capacity of ‘42’. Bus falls within the definition of “heavy passenger motor vehicle”. Thus, the driver was not competent to drive the said vehicle.

13. The claimants in all the claim petitions are third parties. In terms of the mandate of Section 149 of the Motor Vehicles Act, 1988 read with the Insurance Policy, the insurer has to satisfy third party claim, with right of recovery.

14. Having said so, the Tribunal has rightly directed the insurer-Insurance Company to satisfy the awarded amount with right of recovery from the owner-insured.

15. The owner-insured has questioned the impugned awards on the ground that the Tribunal has fallen in error in saddling him with liability. The vehicle was insured and the insurer has to indemnify and satisfy the third party claim.

16. It was for the owner to establish that he had taken all steps to ascertain that the driver was having a valid and effective driving licence to drive a passenger bus. But the owner has not led any evidence to the effect that he has not committed any breach. The driver was not having a valid and effective driving licence to drive the vehicle in question at the time of accident. Thus, the Tribunal has rightly decided the said issue.

17. I have gone the impugned awards and record of the claim petitions and am of the considered view that the claimants have proved by leading evidence, oral as well as documentary, that the driver has driven the offending vehicle, rashly and negligently. Thus, the Tribunal has rightly held that the accident was outcome of rash and negligent driving of the driver.

18. The Tribunal has also assessed the compensation in all the cases reasonably, cannot be said to be excessive, in any way, but is just and appropriate keeping in view the ratio laid down by the Apex Court in case titled as **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120**. The Tribunal has rightly awarded compensation to the tune of Rs.4,14,000/-, in MAC Petition No. 73 of 2004, Rs.2,44,000/- in MAC Petition No. 66 of 2005/04, Rs.2,30,000/- in MAC Petition No. 69 of 2005/04, Rs.2,61,000/- in MAC Petition No. 98 of 2005/04, Rs.3,34,000/- in MAC Petition No. 75 of 2005/04 and Rs. 2,62,000/- in MAC Petition No. 68 of 2005/04, i.e. death cases and Rs.76,640/- in

MAC Petition 56 of 2004, i.e. injury case, with 7.5% interest per annum in all the cases.

19. The Tribunal has fallen in error in not granting right of recovery to the insurer-Insurance Company in terms of award dated 04.01.2007, passed in MAC Petition No. 56 of 2004, impugned in FAO No. 56 of 2007. The impugned award passed in the claim petition (*supra*) is modified by providing that the insurer has right of recovery.

20. Having said so, the all these appeals except FAO No. 56 of 2007, merit to be dismissed. Ordered accordingly.

21. FAO No. 56 of 2007 is disposed of, as indicated above.

22. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned awards.

23. Send down the records after placing copy of the judgment on the record.

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Krishana Devi & others ..... Respondents

FAO No.52 of 2007

Date of decision: 12.09.2014

Motor Vehicle Act, 1988- Section 149- Claimant had specifically pleaded that deceased was travelling in the vehicle as owner of goods- owner did not deny the same- claimant led evidence to prove that the deceased was travelling as owner of goods and no evidence was led by the Insurance Company to prove that there was contravention of the terms and conditions of the insurance policy, therefore, Insurance Company is liable to pay compensation. (Para- 12 to 16)

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. Arun Verma, Advocate, for respondents No.1 and 2.

Nemo for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Learned counsel for respondents No.1 and 2 has stated that the appeal of the insurer i.e. FAO No.53 of 2007, (***Oriental Insurance Co. Ltd. vs. Smt. Rattani Devi & others***), was outcome of the same

accident, stands dismissed on 5.9.2014. He placed copy of judgment, made part of the file.

2. I have gone through the impugned award, record and the judgment. Both the appeals are outcome of same accident and the pleas taken are the same/identical. Thus, this appeal merits to be dismissed in view of the said judgment.

3. Having said so, the appeal is dismissed alongwith all pending applications. The copy of the said judgment shall form part of this order.

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

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

Hem Raj. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondents.

CMPMO No. 220 of 2014
Decided on: 13.10. 2014

Constitution of India, 1950- Article 226- Encroachment proceedings were initiated against the petitioner under Section 163 of Himachal Pradesh Land Revenue Act, which resulted in the eviction- Appeal was preferred, which was allowed and the matter was remanded to Ld. A.C. 2nd Grade- fresh demarcation was conducted and the petitioner was found to be an encroacher- again order of ejectment was passed- petitioner preferred an appeal before Learned District Judge, which was dismissed as not maintainable- held, that petitioner had taken a plea in his reply that the land was granted in Nautor- therefore, his plea that he had raised a plea of adverse possession which was not considered by Learned Assistant 2nd Grade was not acceptable- merely making a bald assertion that a person has become the owner by way of adverse possession is not sufficient and he must place on record, some prima facie material in support of his allegations- when the petitioner had claimed Nautor, there was no question of his becoming owner by way of adverse possession- petition dismissed. (Para- 2 and 3)

For the Petitioner: Mr. Vinod Thakur, Advocate.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G.

The following judgment of the Court was delivered:

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

Encroachment proceedings were initiated against the petitioner under section 163 of the Himachal Pradesh Land Revenue Act, 1954 on the basis of the report of Patwari dated 28.7.2009. The Assistant Collector 2nd Grade, Bharari passed order of eviction in case No. 16/13 dated 22.9.2010 on the basis of statements of PW-1 Basu Dev, Patwari Halqua and PW-2 Parkash Chand, Kanungo. He ordered the eviction of the petitioner from the suit land bearing Khasra No. 328/1 measuring 0-3 bigha. In fact, petitioner has constructed a house and cow-shed on the same. Warrants of ejectment were ordered to be issued against the petitioner after the expiry of period of limitation. Petitioner preferred an appeal before the Sub-Divisional Collector, Ghumarwin. He remanded the matter to the Assistant Collector 2nd Grade, Bharari on 30.3.2012. Fresh demarcation was carried out by the Tehsildar, Ghumarwin on 26.5.2012. Petitioner was again found to be encroacher upon Khasra No. 328/1 measuring 0-3 bigha. Thereafter, Assistant Collector 2nd Grade, Bharari passed the ejectment order on 30.10.2012. Petitioner feeling aggrieved by the order of Assistant Collector 2nd Grade, Bharari filed Civil Appeal No. 54-13 of 2013 before the District Judge, Bilaspur. It was dismissed by the District Judge on 16.11.2013, being not maintainable. Hence, the present petition.

2. Mr. Vinod Thakur has vehemently argued that since the petitioner has raised the question of adverse possession over the suit land, the matter was required to be heard by the Assistant Collector 1st Grade as per section 163 (3) of the Himachal Pradesh Land Revenue Act, 1954. According to him, he was required to determine the question as if he were a civil court and he was to exercise all such powers as are exercised by a civil court.

3. We have gone through the reply filed by the petitioner filed before the Assistant Collector 2nd Grade. Petitioner in his reply has specifically taken a plea that land measuring 4-17 bighas comprised in Khasra No.1020/1 situated in village Lathyani, Pargana Ajmerpur, Tehsil Ghumarwin, District Bilaspur was granted to his grand-father, namely, Nanku son of Sh. Thitho on 24.5.1962. The possession was delivered to his grand-father. He remained in possession of the same as well as in possession of Nautor land as per delivery of possession on 28.9.1962 openly, peacefully, continuously and without any interruption. In case petitioner's grand-father had been granted Nautor land then there was no question of his claiming adverse possession on the same. The owner cannot claim adverse possession qua his own land. It is true that as per section 163 (3) of the Himachal Pradesh Land Revenue Act, 1954, if the plea of adverse possession is taken, the same is required to be adjudicated upon by Assistant Collector 1st Grade by converting himself as a civil court and has to exercise all such powers as are exercisable by a civil court. The person is required to at least show prima facie that he has acquired title by way of adverse possession. Merely making bald assertion that his possession was adverse to the true owner would not

entail the matter to be adjudicated upon by the Assistant Collector 1st Grade. In this case, the matter has rightly been adjudicated upon by the Assistant Collector 2nd Grade on the basis of fresh demarcation dated 26.5.2012. The Assistant Collector 2nd Grade was competent to decide the matter. The appeal was maintainable against his order as prescribed under law and not before the District Judge. Since the order has been passed by Assistant Collector 2nd Grade under section 163 (3), the appeal was not maintainable before the learned District Judge. The appeal was maintainable, if the order had been passed by the Assistant Collector 1st Grade by converting himself to a civil court and then passing a decree as per section 163 (4) of the Himachal Pradesh Land Revenue Act, 1954.

4. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Meera Devi and others. ...Petitioners.

Versus

Sushma Rani Aggarwal. ...Respondent.

Civil Revision No.153/2014
Decided on: 28.10.2014

H.P. Urban Rent Control Act, 1987- Section 14- Landlady had sought eviction of the tenant on the ground that tenants were in arrears of rent, the premises had become unsafe and unfit for human habitation- premises were required bona fide for building and rebuilding which could not be carried out without vacating the same and the tenants had committed such act which had impaired material value and utility of the premises - tenants had sublet the demised premises without the consent of the landlady- held, that the premises was located in the residential area or more than 78 years old- locality had tremendous commercial value and landlady had assets of Rs. 50-60 lacs and could take loan from Financial Institution- she had submitted the building plan to M.C. Shimla – the fact that plans have not been proved is not sufficient to dismiss the petition as sanctioned building plan is not a condition precedent for eviction of the tenant – Petition allowed. (Para-6 to 9)

Cases referred:

Hari Dass Sharma vs. Vikas Sood and others, (2013) 5 SCC 243

Syed Jameel Abnbas and others vs. Mohd. Yamin alias Kallu Khan, (2004) 4 SCC 781

For the Petitioners: Mr. Sunil Mohal Goel, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

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

This revision petition is directed against the judgment dated 7.7.2014 passed by the learned Appellate Authority (III), Shimla in Rent Appeal RBT No. 28-S/13 (b) of 2013/12.

2. "Key facts" necessary for the adjudication of this petition are that respondent-landlady (hereinafter referred to as the "landlady" for convenience sake) filed eviction petition against the petitioners-tenants (hereinafter referred to as the "tenants" for convenience sake) seeking eviction of the tenants from double storeyed "Kucha" structure known as Narain Bhawan bearing Municipal House No.3 comprising of two rooms in each floor with kitchen and bath room (hereinafter referred to as the "demised premises") on the ground that demised premises was initially let out by her husband to Kamal Kumar, predecessor-in-interest of the tenants and thereafter tenants succeeded his tenancy rights. Rent of demised premises was Rs. 350/- per month exclusive of taxes. Landlady has also sought eviction of the tenants on the ground that they were in arrears of rent with effect from 1.10.1998. Demised premises were 125 years old and have become unfit and unsafe for human habitation. Demised premises were required bona fide for building and rebuilding which could not be carried out without the demised premises being vacated by the tenants. Tenants have committed such acts which have impaired material value and utility of the premises. Tenants have sublet the demised premises without the consent of the landlady.

3. Petition was contested by the tenants. Issues were framed by the Rent Controller on 5.5.2009. Rent Controller partly allowed the petition. Landlady was held entitled to relief clause. Eviction of the tenant was also ordered from the demised premises on the ground of bona fide requirement of the premises for the purpose of building and rebuilding on 14.5.2012. Tenants feeling aggrieved by the order dated 14.5.2012 filed an appeal before the Appellate Authority. The Appellate Authority has upheld the eviction of the tenants on the ground of bona fide requirement of the landlady for the purpose of building and rebuilding. However, impugned order was modified as per final order and tenants were directed to handover the vacant possession of the demised premises within three months from the date of passing of judgment. Landlady was directed to commence the construction within the period of six months and complete the same within further period of one year after obtaining statutory permissions. Tenants were ordered to be inducted in the demised premises in terms of provisions contained under First and Second proviso to section 14 (3) (c) of the H.P. Urban Rent Control Act, 1987 after one month of the construction of the building. Tenants were ordered to be re-inducted in the same place, location and area equivalent to the area which was in occupation of the tenant before passing orders by the Rent Controller. Hence, the present petition.

4. Mr. Sunil Mohal Goel has vehemently argued that landlady has failed to prove that demised premises were bona fide required by her for building and rebuilding of the premises. He has also contended that tenants were not in arrears of rent.

5. I have heard Mr. Sunil Mohal Goel at length and have perused the order and judgment passed by the authorities below.

6. Demised premises are located in residential area. These are located near old bus stand, Shimla. Demised premises are more than 78 years old. This fact has been admitted by Sunny Sharma, one of the tenants. Demised premises are situated in the locality which has tremendous commercial value. PW-4 B.C. Sharma, Civil Engineer has prepared the building plan Ex.PW-4/A. He has submitted the same to the Municipal Corporation, Shimla for approval. PW-5 has deposed that landlady was running a cloth business in the lower bazaar having total assets of Rs. 50-60 lakhs. He has also tendered Ex.PW-5/B copy of statement of account of the petitioner. Landlady could always raise loan from financial institutions. Demised premises cannot be rebuilt and reconstructed without demolishing the same and evicting the tenants. PW-3 L.P. Gupta has deposed that proposed reconstruction cannot be carried out without eviction of the demised premises. Landlady is in possession of sufficient means and has taken all necessary steps, like preparation of building plans etc. These have been submitted to the Municipal Corporation, Shimla. Landlady has conclusively proved that demised premises were required by her bona fide for the purpose of building and rebuilding.

7. As far as the plea of building and rebuilding is concerned, the landlady is not supposed to prove that building is in dilapidated condition. Landlady can always demolish the existing structure to make the building economically more viable.

8. Mr. Sunil Mohan Goel has vehemently argued that the building plans have not been approved and the tenants cannot be evicted.

9. Their Lordships of the Hon'ble Supreme Court in ***Hari Dass Sharma*** vs. ***Vikas Sood and others***, (2013) 5 SCC 243, have held that under section 14 (3) (c) of the H.P. Urban Rent Control Act, 1987 duly sanctioned building plan is not a condition precedent for entitlement of landlord for eviction of tenant. Their Lordships have held as under:

> **17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr. (supra) and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of**

demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

9. Learned Appellate Authority below has taken into consideration while modifying the order, First and Second proviso to section 14 (3) (c) of the H.P. Urban Rent Control Act by ordering the tenants to vacate the possession of demised premises within a period of three months from the date of passing of the judgment. The landlord has been ordered to commence construction within the period of six months and complete the same within further period of one year after obtaining the statutory permissions and to re-induct the tenants after one month

of the construction of the building on the same place, location and area. The Appellate Authority has modified the order strictly as per law.

10. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Tenant is now directed to handover the vacant possession to the landlady within a period of eight weeks from today. Thereafter, the landlady shall commence construction within a period of 6 months and complete the same within a period of one year after obtaining the statutory permissions. Tenant shall be re-inducted in the demised premises after one month of the construction of the building in the same place, location and area equivalent to the area which was in occupation of the tenants before the orders were passed by the Rent Controller. The rate of rent after the induction of the tenant by the landlady would be determined as per the law laid down by their Lordships of the Hon'ble Supreme Court in ***Syed Jameel Abnbas and others*** vs. ***Mohd. Yamin alias Kallu Khan***, (2004) 4 SCC 781. Pending application(s), if any, also stands disposed of. No costs.

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

Sunil Kumar .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 74 of 2011.
Reserved on: October 28, 2014.
Decided on: October 29, 2014.

Indian Penal Code, 1860- Section 302- Accused inflicted serious injury on his mother with a *Guava* stick causing her death- the version of the prosecution was corroborated by the testimonies of PW-1 and PW-3- both of them also identified the stick with which the injury was caused- medical evidence also proved that the death was caused due to head injury- minor contradictions in testimonies were bound to come with the passage of time and were not sufficient to discredit the prosecution version- blood was found on the pant of the accused- these circumstances proved the prosecution case beyond reasonable doubt- Appeal dismissed. (Para-20 to 23)

For the appellant: Mr. Hamender Chandel, Advocate.
For the respondent: Mr. M.A.Khan, Addl. Advocate General with Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 30.10.2010 and consequent order dated 3.11.2010, of the learned Addl.

Sessions Judge, Fast Track Court, Una, H.P., rendered in Sessions Trial No. 8 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence under Section 302 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- and in default of payment of fine, the accused was ordered to undergo simple imprisonment for three months.

2. The case of the prosecution, in a nut shell, is that on 15.2.2010 at about 5:00 PM, at village Badwana the accused inflicted serious injuries on Usha Devi, his mother with a *Guava* stick, as a result of which Usha Devi succumbed to injuries. The accused also inflicted injuries on Usha Devi with kick blows. The accused was demanding money from Usha Devi and when she could not provide money to him, the accused got enraged and inflicted grievous injuries on her head. Smt. Usha Devi died on the spot and the accused threw the stick used by him in the commission of offence on the spot. He ran away from the spot. PW-1 Jyoti Devi on hearing cries of Usha Devi reached on the spot and saw accused person on the spot. She informed the police on telephone regarding the incident. The police visited the spot. The statement of Jyoti Devi under Section 154 Cr.P.C. was recorded. The accused was arrested by the police. The blood stained stick was taken into possession. The police prepared the sketch of the stick on the cloth vide Ext. PW-1/C. The I.O. took photographs on the spot. The blood stained shawl and shirt were also taken into possession by the I.O. which were worn by Smt. Usha Devi, deceased. The post mortem was got conducted. The statements of the witnesses under Section 161 Cr.P.C. were recorded. The investigation was completed and charge-sheet was filed after completing all the codal formalities.

3. The prosecution has examined as many as 14 witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has pleaded innocence. The learned Trial Court convicted and sentenced the accused, as stated hereinabove.

4. Mr. Hamender Chandel, Advocate for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. He has also argued that there are material contradictions in the statements of the material witnesses. On the other hand, Mr. M.A.Khan Addl. Advocate General, has supported the judgment of the learned trial Court, dated 30.10.2010 and consequent order dated 3.11.2010.

5. We have heard learned counsel for both the sides and gone through the judgment and material available on record very carefully.

6. PW-1, Jyoti Devi deposed that her elder brother-in-law died last year. The name of his wife was Usha Devi. Her sister-in-law had three sons. The accused was one of the sons of Usha Devi. On 15.2.2010 at about 4:00 PM, her *Jethani* had gone to give fodder (bread) to the cow in the nearby house. She returned and went to her house, where she used to live with her three sons. She heard noise of quarrel from the house of the accused. She rushed to the spot. She saw the

accused Sunil Kumar inflicting injuries on his mother Usha Devi with *Guava* stick. The accused inflicted injuries with the help of said stick on the head of Usha Devi. The accused also inflicted kick blows on Usha Devi. The accused was demanding money from Usha Devi. Usha Devi fell down near the gate of her house. Thereafter, the accused threw the stick on the spot and ran away from the spot. She informed the police on telephone. The police visited the spot and recorded her statement under Section 154 Cr.P.C. vide Ext. PW-1/A. Her mother-in-law also visited the spot after some time on hearing the noise of cries from the spot. The brothers of accused, namely, Suresh and Rakesh also came on the spot. She touched the body of Usha Devi. She was motionless. The police took into possession the blood stained stick vide memo Ext. PW-1/B. The police also took into possession blood stained soil from the spot. The police also prepared the sketch of stick on a piece of cloth vide memo Ext. PW-1/C. She signed the same. The stick was sealed in a sealed parcel 'T'. The police took photographs on the spot. She identified the stick Ext. P-1. She also identified *shawl* and *kurti* Ext. P-3 and pant of the accused Ext. P-4. In her cross-examination, she admitted that the house of the deceased Usha Devi was on the higher side and her house is situated on the lower level. She denied the suggestion that the cow shed in which Usha Devi had gone to serve bread/fodder to the cow is not visible from her house. The accused was un-employed. Volunteered that, he used to demand money from his mother. She denied the suggestion that the accused was mentally ill. The accused behaved with the children as if he was mentally ill person. Due to the abnormal behavior of the accused, nobody employed him as a labourer. She denied the suggestion that the accused did not know what he was doing. She admitted that when she reached on the spot, Usha Devi was lying on the ground. She touched the body of Usha Devi but she was dead. The accused told her that he wanted money from his mother and due to that reason he had beaten up his mother. The people of the nearby houses also assembled on the spot and they made a noise upon which she rushed to the spot. She could not name those persons being elders. However, one of them was Pappi's father, father of Kallu and one Langru etc.

7. PW-2 Ishia Devi, deposed that the accused was her grand son. On 15.2.2010, at about 4:00 PM, she heard the noise from the house of Usha Devi. Her daughter-in-law Jyoti Devi and she herself heard the noise of cries. Her daughter-in-law went ahead of her towards the house of Usha Devi. She also followed her. When she rushed in the residence of Usha Devi, she saw Usha Devi lying near the gate of her house. Jyoti Devi told her that accused had inflicted injuries on the head of Usha Devi with a stick which resulted in serious injuries on her person. The people of the locality had gathered there. The police also reached the spot. She identified the stick Ext. P-1. She denied the suggestion in her cross-examination that when she reached at the spot, the stick Ext. P-1 was with the police.

8. PW-3 Subhash Chand deposed that on 15.2.2010, he had gone to attend his duties as Beldar at Village Ghangret. At about 5:30

PM, he received a telephonic message on his mobile that Smt. Usha Devi, his sister-in-law (*Bhabhi*) was killed by accused Sunil with a stick. He reached on the spot at about 5:45 PM and saw that Usha Devi was lying near the gate of her house. The police reached the spot. His wife Jyoti Devi handed over a stick stained with blood to the police. The police recorded his statement under Section 161 Cr.P.C. The police also prepared sketch of the stick vide memo Ext. PW-1/C. He signed the same. The stick was also taken into possession by the police. It was sealed with seal impression 'T'. He signed the recovery memo Ext. PW-1/B. He denied the suggestion in his cross-examination that the police had already prepared the documents before his arrival at the spot. According to him, the stick was already lying nearby the body of Usha Devi. The stick was handed over by his wife to the police in his presence.

9. PW-4 Naresh Kumar deposed that he and his younger brother had gone to Chintpurni on 15.2.2010 to work. Accused and his mother were at the home. He received a call on his mobile from his house that quarrel had taken place in the house. He came back to Nari at about 6:00 PM where he came to know that a quarrel had taken place with her mother. He saw that his mother was lying dead near the gate of the house. The blood was lying on the earth. The police had also reached there. The people of the locality also assembled there. Jyoti Devi told him that accused Sunil Kumar had killed his mother with a stick. The police had taken into possession the earth stained with blood from the spot in a box sealed with seal 'S' vide memo Ext. PW-4/A. He signed the same. He denied the suggestion in his cross-examination that the accused was suffering from mental ailment.

10. PW-5 Constable Rajesh Kumar deposed that he was posted as Constable at Police Station Chintpurni. He visited the spot of occurrence alongwith ASI Kaur Chand and took photographs of the spot with government Camera. The I.O. took into possession the blood stained soil. It was contained in a plastic container Ext. P-5. It was sealed with seal impression 'S'. The seizure memo Ext. PW-4/A was prepared. The police also took into possession stick Ext. P-1. It was produced by Jyoti Devi. The stick was packed in a cloth parcel with seal impression 'T'. It was taken into possession vide seizure memo Ext. PW-1/B.

11. PW-6 Dr. Umesh Gautam, has conducted the post mortem on the dead body of the deceased. He issued Post mortem report Ext. PW-6/A. According to his opinion, the death occurred as a result of head injury with multiple fracture of skull bone and legs leading to hypovolemia and asphyxia. The *danda* was produced before him, which was sealed with FSL seal. The seals were intact. He opened the seals and after seeing the *danda*, he opined to the police that the injuries present on the body of Usha Devi were possible with *danda* Ext. P1.

12. PW-7 Roshan Lal deposed that in his presence, the accused had identified the place from where he has taken the *danda* with which he had given blow to his mother. The accused has also identified the

place where he had thrown the *danda*. Regarding this, memo Ext. PW-7/A was prepared.

13. PW-8 Jeewan Rana has developed the photographs.

14. PW-9 Ram Pal Patwari has prepared *'Aks Latha'* Ext. PW-9/A and '*Fard Jamabandi'* Ext. PW-9/B on 6.3.2010.

15. PW-10 Inspector Negi Ram, is a formal witness.

16. PW-11 HC Parveen Kumar deposed that on 15.2.2010 at 5:55 PM, Smt. Jyoti Devi informed him telephonically to the Police Station Chintpurni that Smt. Usha Devi deceased has been murdered by her son Sunil Kumar. Regarding this fact, rapat No. 29 was recorded in the *Rapat Rojnamcha*. The police visited the spot at 7:40 PM. Constable Rajesh Kumar brought '*ruka'*/statement Ext. PW-1/A of Smt. Jyoti Devi, on the basis of which, FIR Ext. PW-11/B was registered at Police Station Chintpurni. A.S.I Kaur Chand handed over to him two parcels containing *danda* Ext. P-1 and blood stained soil Ext. P-5. The *danda* was sealed with seal impression 'T' with five seals and soil parcel was sealed with seal 'S' of three in number alongwith sample seals, which were deposited by him in the *Malkhana* of Police Station Chintpurni. On 16.2.2010, ASI Kaur Chand also deposited three parcels which were sealed with Una mortuary seal containing clothes of the deceased, blood sample of the deceased and the sample containing *Pant/Paijama* of the accused. He deposited the same in the *Malkhana*. He sent these parcels alongwith the copy of the FIR and other documents through Constable Rajinder Singh vide RC No. 25 of 2010 dated 18.2.2010 for chemical test to FSL Junga. He did not allow anybody to tamper with the same. The case property was collected from FSL Junga and the same was deposited with him on 27.4.2010. He handed over the parcel of stick to ASI Kaur Chand on 28.4.2010 for opinion from the doctor and he deposited the same with him with seal impression of Una Mortuary.

17. PW-12 Constable Rajinder Singh deposed that on 18.2.2010 he was deputed by MHC Parveen Kumar for depositing the four parcels in FSL Junga alongwith one vial. One parcel containing stick sealed with seal impression 'T' second parcel sealed with seal 'S' third and fourth sealed with seal Una Mortuary/envelope and seal samples were handed over to him by MHC Parveen Kumar vide RC No. 25/10 dated 18.2.2010 for depositing the same in FSL Junga. On 19.2.2010, he deposited the same in the office of FSL Junga.

18. PW-13 ASI Kaur Chand deposed that he was posted as I.O. in Police Station Chintpurni since 2009. Smt. Jyoti, the complainant informed the Police Station telephonically that accused has beaten his mother Usha Devi. He entered the *rapat* vide memo Ext. PW-11/A. He alongwith other police personnel went to the spot. Jyoti Devi made a statement under Section 154 Cr.P.C. vide Ext. PW-1/A. FIR Ext. PW-11/B was registered. Photographs of the spot were taken. On examination of body of deceased, injury marks on her left ear and left knee were found. He prepared the inquest report in triplicate which is

Ext. PW-4/B. He prepared the site plan Ext. PW-13/A. Jyoti Devi produced before the police stick Ext. P-1 stained with blood. It was measured. Memo was prepared. The blood stained soil was also taken into possession and accused was apprehended by the police party on the same day, at about 10:30 PM from nearby jungle. The post mortem of Usha Devi deceased was got conducted at Zonal Hospital, Una. The post mortem report is Ext. PW-6/A. The Medical Officer preserved the pant stained with blood of the accused. It was sealed by the Medical Officer. The sealed parcel was handed over to him by the Medical Officer. He deposited the same with MHC, Police Station Chintpurni. The accused was taken to the spot for spot verification. He also prepared the site plan Ext. PW-13/F. He also got the revenue documents prepared. He also obtained the opinion of Dr. Umesh Kumar. In his cross-examination, he deposed that he reached the spot at 6:15 PM. There were two houses adjoining to the place of occurrence. The house of Des Raj was on the back side of the house of the accused. The house of Jyoti Devi was about 40-50 meters away from the house of the accused. He also admitted in his cross-examination that the house of Jyoti Devi was not visible from the place of occurrence. He did not examine father of Pappi, father of Kalu and one Langru. Volunteered that, they were not present on the spot. He denied the suggestion that Smt. Jyoti Devi told him that these persons raised noise at the time of occurrence and that they were present when she visited the spot on hearing noise.

19. PW-14 Dr. Parveen Kumar, has examined the accused. He issued MLC Ext. PW-14/A. There were stains of blood on his pant. The pant of the accused was wrapped in the sealed parcel and handed over to the police.

20. According to PW-1 Jyoti Devi, she heard the noise on 15.2.2010. She immediately reached the spot. She saw the accused inflicting injuries on his mother with stick. The accused also gave kick blows to his mother. He was demanding money from his mother. Mr. Hamender Chandel, Advocate, appearing for the accused has vehemently argued on the basis of the statement made by PW-1 Jyoti Devi in her cross-examination that when she reached the spot Smt. Usha Devi was lying on the ground. The statement of PW-1 Jyoti Devi has to be read in totality.

21. The statement of PW-1 Jyoti Devi has been corroborated by PW-2 Smt. Ishia Devi. According to her, she heard the noise emanating from the house of the deceased. PW-1 Jyoti Devi went ahead of her and reached at the spot. She also followed her. When she reached the house of Usha Devi, she saw Usha Devi was lying near the gate of her house. She was bleeding. PW-1 Jyoti Devi has told her that accused had inflicted injuries on the head of Usha Devi. PW-1 Jyoti Devi and PW-2 Ishia Devi have identified the stick Ext. P-1. PW-3 Subhash Chand and PW-4 Naresh Kumar deposed that they were informed telephonically about the murder of Usha Devi. Both of them have reached the spot and seen Usha Devi lying dead. In the presence of PW-4 Naresh Kumar, blood stained stick was taken into possession.

22. PW-6 Dr. Umesh Gautam has conducted the post mortem on the dead body and issued post mortem report Ext. PW-6/A. According to him, the death occurred as a result of head injury with multiple fractures of skull bones and legs leading to hupovolemia and asphyxia. The probable time between injury and death was upto few minutes and between death and post mortem was within 24 hours. According to Mr. Hamender Chandel, Advocate, PW-6 Dr. Umesh Gautam gave the opinion that the injuries have led to hypovolemia and asphyxia. However, no suggestion was put to PW-6 Dr. Umesh Gautam in his cross-examination to this aspect.

23. Mr. Hamender Chandel, Advocate, has also argued that in Ext. PW-1/A *'ruka'* the timing given is 5:00 PM but when PW-1 Jyoti Devi and PW-2 Ishia Devi appeared, they have deposed that the incident had taken place at about 4:00 PM. These are the minor contradictions. PW-1 Jyoti Devi and PW-2 Ishia Devi are villagers and there was bound to be some variation in the timings given by PW-1 Jyoti Devi while recording statement Ext. PW-1/A and while appearing before the Court after about five months time. There is no variance in Ext. PW-1/A, statement of PW-1 Jyoti Devi recorded under Section 154 Cr.P.C and statement recorded before the Court when she appeared as PW-1. The stick Ext. P-1 has been taken into possession strictly in accordance with law. PW-6 Dr. Umesh Gautam has opined that injuries on the deceased could be inflicted with Ext. P-1. Human blood was found as per Ext. PW-1/D on Ext. P-1 *danda*-stick. The blood was also found on the shirt and shawl of deceased Usha Devi. The blood was also present on Ext. P-6, Pant of the accused.

24. Thus, the prosecution has proved the case against the accused in view of the analysis of the statements made, hereinabove. There is no reason for us to disagree with the well reasoned judgment of the learned trial Court.

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

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

Lalman. ...Petitioner.

Vs.

State of Himachal Pradesh and others. ...Respondents.

CWP No. 3715 of 2014
Reserved on : 29.10.2014
Decided on: 30.10.2014

Constitution of India, 1950- Article 226- Petitioner had submitted an application for grant of nautor land on 16.7.1969 which was rejected on 19.1.1972- appeal was preferred which was allowed on 27.6.1973- case

was remanded to SDO (Civil) who rejected it on 4.8.1993- appeal was filed which was allowed on 19.12.1994 and nautor land was sanctioned in favour of petitioner- appeal was preferred before Deputy Commissioner which was allowed- petitioner filed an appeal before Divisional Commissioner who allowed the same and remanded the matter to Deputy Commissioner- appeal was preferred which was allowed and the matter was remanded to Deputy Commissioner, Mandi who allowed the appeal and upheld the grant- again an appeal was preferred before Divisional Commissioner who dismissed the same- Revision was allowed by the Financial Commissioner on the ground that nautor land could not have been granted in favour of the petitioner as there was a ban as per order dated 19.3.1990- held, that the order dated 19.3.1990 was not applicable to the grant- since, the matter was pending in the appeal, therefore, his case was covered under the exception and it was wrongly held that he was not entitled to the grant. (Para-4 and 5)

For the Petitioner:	Ms. Ritta Goswami, Advocate.
For the Respondents:	Mr. Anup Rattan, Addl. A.G. for respondents No.1 and 2.
	Mr. G.R. Palsra, Advocate for respondents No.3 to 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Petitioner submitted an application for the grant of Nautor land on 16.7.1969 to the Sub Divisional Officer (Civil), Sarkaghat. He rejected the application on 19.1.1972. Petitioner preferred an appeal before the Deputy Commissioner, Mandi. He allowed the same on 27.6.1973 and the case was remanded back to the Sub Divisional Officer (Civil), Sarkaghat. The Sub Divisional Officer (Civil) again rejected the case on 4.8.1993. Petitioner filed an appeal before the Deputy Commissioner, Mandi. He allowed the same on 19.12.1994. Consequently, the Sub Divisional Officer (Civil), Sarkaghat sanctioned Nautor land in favour of the petitioner comprising Khasra No. 745/1 measuring 0-40-00 hectares situated in Muhal Sherpur, Tehsil Dharampur on 7.10.1995. Respondents No.3 to 5 filed an appeal against the order dated 7.10.1995 before the Deputy Commissioner, Mandi vide Nautor Appeal No.3. The Deputy Commissioner, Mandi allowed the same on 1.5.2000. According to him, land in dispute was **Dhank** and not fit for cultivation and the petitioner has not cultivated the land within a period of two years after the grant. Petitioner filed an appeal before the Additional Commissioner (Appeals) bearing Appeal No. 60/2001 against the order dated 1.5.2000. The Additional Commissioner (Appeals) allowed the appeal on 10.7.2001 and remanded the matter to the Deputy Commissioner, Mandi. Deputy Commissioner, Mandi allowed the appeal on 12.7.2004 upholding the grant made by the Sub Divisional Officer (Civil), Sarkaghat vide order dated 7.10.1995 in favour of the petitioner.

Respondents No.3 to 5 filed an appeal before the Divisional Commissioner, Mandi Division, Mandi. He dismissed the same on 15.2.2010. Respondents No. 3 to 5 filed a Revision No. 123/2010 before the Financial Commissioner (Appeals). He allowed the same on 19.7.2013. According to him, neither the Sub Divisional Officer (Civil), Sarkaghat nor the Deputy Commissioner, Mandi was competent to grant Nautor in favour of the petitioner. According to him, grant of Nautor was *void ab initio*. Order of the Deputy Commissioner, Mandi dated 12.7.2004 and the Divisional Commissioner, Mandi Division, Mandi dated 15.2.2010 were set aside. Hence, the present petition.

2. Respondents No.1 and 2 have filed the reply. There is a reference to various instructions issued from time to time governing the grant of Nautor. The sum and substance of the reply is that Nautor land has been sanctioned when there was complete ban as per order dated 19.3.1990. Respondents No.3 to 5 have filed the reply. They have supported the decision of the Financial Commissioner (Appeals) dated 19.7.2013.

3. We have heard the learned counsel for the parties and have gone through the pleadings carefully.

4. What emerges from the facts enumerated hereinabove is that the Sub Divisional Officer (Civil) has sanctioned the Nautor land in favour of the petitioner comprising Khasra No. 745/1 measuring 0-40-00 hectares situated in Muhal Sherpur, Tehsil Dharampur on 7.10.1995. The Deputy Commissioner, Mandi has cancelled the same in an appeal filed by respondents No.3 to 5 on 1.5.2000. According to him, petitioner has not cultivated the land and it was a ***Dhank***. Petitioner has filed an appeal before the Additional Commissioner (Appeals). He allowed the same and remanded the matter back to the Deputy Commissioner, Mandi on 10.7.2001. The Deputy Commissioner, Mandi has held that petitioner was duly eligible. Respondents No.3 to 5 could not be issued any permit after the Nautor has been sanctioned in favour of the petitioner vide order dated 12.7.2004. Order dated 12.7.2004 was upheld by the Divisional Commissioner, Mandi Division, Mandi on 15.2.2010. He has taken into consideration the contention raised by the private respondents that petitioner has encroached upon the Government land measuring 10-0-0 bighas. He has referred to the entry made in the column of cultivation as per copy of Jamabandi for the year 1999-2000, i.e. "***Kabja Malik Tabbe Haquk Bartandaran Mutabik Naqusha Bartan***". According to these entries, respondents No.3 to 5 had only user rights to cut the grass etc. from the land. The fact of the matter is that once the nautor has been sanctioned in favour of petitioner on 7.10.1995, those rights stood extinguished. Financial Commissioner (Appeals) while allowing the revision preferred by respondents No. 3 to 5 has relied upon instructions issued on 7.1.1975 whereby the powers of revenue officials to sanction nautors, except in favour of harijans and agricultural landless labourers was withdrawn. Thereafter, clarification was issued by the State Government for the grant of Nautor on 24.12.1980. According to this, land could be granted

only in the tribal areas of the State and for other districts and areas only for construction of residential house, cow-sheds and Gharats etc. The ban was lifted vide Government letter dated 26.12.1989. Complete ban was imposed on 19.3.1990. Financial Commissioner (Appeals) has not taken into consideration the subsequent letter issued on 1.9.1993 wherein letter issued on 19.3.1990 has been clarified. Text of letter dated 1.9.1993 reads as under:

> **"I am directed to say that certain doubts have been expressed by some of the Deputy Commissioners about the implications of this department telex of even number dated 19th March, 1990 vide which the ban was imposed on the grant of nautor land. The matter has been considered by the Govt. and following clarifications are issued for guidance:-**
>
> **i) The ban is applicable on fresh Grant of Nautor.**
>
> **ii) The ban will not be on grants given as a result of Appeals, Revisions and Reviews filed before the Deputy Commissioners, Divisional Commissioners and Financial Commissioner.**
>
> **You are accordingly advised to take action in the light of these clarifications."**

5. It is evident from the letter dated 1.9.1993 that the ban was not relatable to grants as a result of appeals, revisions and reviews filed before the Deputy Commissioners, Divisional Commissioners and Financial Commissioner. It was applicable only on fresh grant of nautor. These clarifications have direct bearing in this case. Petitioner has submitted application on 16.7.1969 and it remained under litigation upto 7.10.1995 when nautor land was sanctioned in favour of petitioner for the first time by the Sub Divisional Officer (Civil), Sarkaghat. The notifications issued qua grant of land on 7.1.1975, 24.12.1980 and 19.3.1990 were applicable prospectively and could not affect the proceedings which had already commenced before the issuance of these notifications. Petitioner has acquired a right to get the land sanctioned on the basis of rule position at the time of submission of an application. This right could not be taken away by applying the notifications retrospectively.

6. Accordingly, in view of the discussion and analysis made hereinabove, the petition is allowed. Annexure P-5 dated 19.7.2013 is set aside. Orders dated 7.10.1995 passed by the Sub Divisional Officer (Civil), Sarkaghat, Annexure P-2 dated 12.7.2004 passed by Deputy Commissioner, Mandi, Annexure P-3 dated 15.2.2010 passed by Divisional Commissioner, Mandi Division, Mandi are upheld. Respondents No.1 and 2 are directed to get these orders executed within a period of eight weeks from today. However, before putting the petitioner in possession of the land sanctioned vide letter dated 7.10.1995, the Deputy Commissioner, i.e. respondent No.2 shall ascertain within a period of three weeks from today whether the petitioner has encroached upon the Government/Forest land and in case after the inquiry it is found that the petitioner has encroached upon the Government/Forest

land, all necessary steps shall be taken for the eviction of the petitioner from the Government/Forest land by instituting eviction proceedings and to complete the same in a time bound manner. If the petitioner is found encroacher on the Government/Forest land, he would not be put in possession of the Nautor land till his eviction. Pending application(s), if any, also stands disposed of.

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

Surya Parkash .....Petitioner.

Versus

State of H.P & others. ....Respondents.

CWP No. 7969 of 2014-G
Decided on : 30.10.2014

Constitution of India, 1950- Article 226- Petitioner was found in unauthorized occupation of the premises and was ordered to be evicted from the same- he filed an appeal before Divisional Commissioner Shimla along with an application under Section 5 of Limitation Act- Divisional Commissioner dismissed the application seeking condonation of delay- held, that counsel for the petitioner was present on 31.12.2012 which would show that petitioner was aware of passing of the order- counsel could have filed appeal before the Divisional Commissioner in view of his Vakalatnama- further, his plea that he was taking treatment at Delhi was not acceptable as the illness and advise of the Doctor asking the petitioner not to go out from Delhi was not placed on record- Writ petition dismissed. (Para-4)

For the Petitioner: Mr. Neeraj Gupta, Advocate.

For the Respondents: Mr. Anup Rattan, Additional Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Annexure P-1 was rendered by the Collector, Sub Division, Nahan District Sirmaur, H.P, whereby the petitioner herein, who was arrayed as a respondent therein, on his being concluded, on the strength of material which existed before the Collector, to be in unauthorized occupation of the suit premises, was hence ordered to be evicted therefrom. The suit premises are owned by respondent No.4 herein. The petitioner was aggrieved by the order rendered by the Collector comprised in Annexure P-1 and he assailed the same by way of preferring an appeal before the Divisional Commissioner, Shimla. Since

the appeal preferred by the petitioner herein against the order comprised in Annexure P-1 was beyond limitation, hence, the appeal was accompanied by an application under Section 5 of the Limitation Act comprised in Annexure P-3 for condoning the delay in filing the appeal at his instance for setting aside the impugned order comprised in Annexure P-1. However the Divisional Commissioner under an order impugned before this Court comprised in Annexure P-4 dismissed the application preferred by the petitioner for condoning the delay in preferring an appeal against the order rendered by the Collector Sub Division, Nahan. It obviously sequelled affirmation of the order comprised in Annexure P-1.

2. The learned counsel for the petitioner concerts to marshal an inference from this Court that the learned Divisional Commissioner while rendering Annexure P-4 has dealt with the averments comprised in the application for condonation of delay in a short shrift manner, in as much as even when good , sound, tenable and sufficient cause was disclosed in the application for condonation of delay comprised in Annexure P-3, in as much as the petitioner being deterred by his illness which gripped him at Delhi, to proceed to Nahan for filing earlier an appeal against it within limitation. Therefore, in the overlooking of the aforesaid good cause, the learned counsel for the petitioner submits that the order rendered by the Divisional Commissioner comprised in Annexure P-4 is ridden with a legal infirmity of it having discountenanced a valid and sustainable explanation. The learned Additional Advocate General vindicates the impugned order by his filing a detailed response to the corresponding averments enshrined in the writ petition divulging for the reasons detailed therein the legal frailty gripping the impugned order.

3. The learned counsel on either side have been heard at length and the entire record has been rummaged with incision and care.

4. The learned counsel for the petitioner has been unable to controvert the factum as divulged in the impugned order, of the counsel for the petitioner being present on 31.12.2012 before the Collector, Sub Division, Nahan, who rendered Annexure P-1. The fact of representation then on behalf of petitioner forecloses an inference that the acquisition of knowledge by the petitioner through his counsel qua rendition of the impugned order is to be construed to be acquisition of knowledge by the petitioner too qua rendition of Annexure P-1 unless there was weighty material adduced on record that the knowledge as acquired by the learned counsel for the petitioner qua the rendition of Annexure P-1 was neither communicated nor transmitted to the petitioner. Since no material exists on record that the counsel was present at the time of rendition of Annexure P-1 never communicated it to the petitioner, the obvious corollary is that the petitioner then acquired knowledge qua its rendition. As a sequel, when he is omitted to assail it by filing an appeal earlier is estopped from availing any purported good cause having deterred him to do so. Even otherwise the presence of the counsel for the petitioner could not have been marked before the authority who rendered Annexure P-1 unless he was represented by such counsel under a

Vakalatnama executed in his favour by the petitioner. The terms of the vakalatnama constituting the counsel for the petitioner as his authorized legal representative has not been placed on record so as to infer that no condition or term was contemplated therein so as to bar the institution of an appeal by the counsel on behalf of the petitioner before the Divisional Commissioner against the order comprised in Annexure P-1. For omission on the part of the learned counsel for the petitioner to place on record the terms of the Vakalatnama and theirs displaying that no terms existed therein interdicting the counsel for the petitioner who was present before the authority at the time of rendition of Annexure P-4, to institute an appeal before the Divisional Commissioner constrains an inference that hence, such terms existed in the vakalatnama executed by the petitioner in favour of the counsel and as such even on the oral instructions of the petitioner the copy of impugned order comprised in Annexure P-1 could have been collected well in time by the authorized counsel and thereafter an appeal on behalf of petitioner by his counsel holding a vakalatnama on his behalf for the said purpose could have been instituted within time before the Divisional Commissioner, Shimla. In face thereof the ground as agitated in the application under Section 5 of the Limitation Act, preferred by the petitioner before the Divisional Commissioner, Shimla for condoning the delay in filing the appeal at his instance against the order comprised in Annexure P-1 appears to be nebulous, shaky as well wholly rudderless. Consequently, even in the face of his receiving treatment at Delhi and his hence being constrained to visit his native place for instructing his counsel, too staggers and falls apart. Even otherwise the factum of the petitioner undertaking treatment at Delhi as unraveled in Annexure P-3 is in an extremely vague and nebulous expression qua his illness. It required further expression both in elaboration and in precision qua both intensity of illness as also the advice of the Doctor against his moving out from Delhi for personally imparting instructions to his counsel for collecting copy of impugned order and thereafter instituting an appeal. For lack of elaboration qua the aforesaid facet as also for lack of the petitioner not appending alongwith his application under Section 5 of the Limitation Act a medical certificate disclosing therein the magnitude of his illness or its enormity tenably constrained the learned Divisional Commissioner while rendering Annexure P-4 to hold that no good and sufficient cause has been made out for condoning the delay in filing the appeal. Obviously the application under Section 5 of the limitation Act necessitated dismissal as tenably done by the Divisional Commissioner in his impugned order comprised in Annexure P-4. Preponderantly at the outset, in as much, as, at the stage of institution of Annexure P-3 before the Divisional Commissioner the petitioner ought to have then to immediately seize the attention of the Divisional Commissioner qua the factum of the gravity of his illness, appended a medical certificate qua the aforesaid fact. His omission to do so does perse as held by the Divisional Commissioner portray the factum of the purported illness/treatment which he was undertaking at Delhi, hence its constraining him to visit his native place for imparting instructions to his counsel for preparing an appeal against Annexure P-

1, being both flimsy as well as concocted. In view of above, present petition is dismissed, as also pending applications, if any.

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

Sher Singh and others .....Appellants/Plaintiffs.
Versus
Virender Singh and others ..... Respondents/Defendants.

RSA No. 489 of 2014-C.
Date of decision: 31.10.2014.

'Benami' Transactions (Prohibition) Act, 1988 - Section 4 - Plaintiff pleaded that the transaction between L and K was 'Benami' transaction in the names of M and H - purchase money was paid by K and the land was also possessed by K - held, that since the transaction was admitted to be a 'Benami' transaction, therefore, suit was not maintainable in view of the bar contained in Section 4 of the Act. (Para-11)

Code of Civil Procedure, 1908- Order 14- Issues- plaintiffs claimed that they had become owner by way of adverse possession- Court framed an issue, Whether the plaintiffs are owners in possession of the suit land - held, that when the plaintiff had raised mutually inconsistent pleas, an omnibus issue cannot be framed to determine these pleas- plaintiff could have been asked to opt either of the pleas-further held that the plaintiff could not have filed a civil Suit for seeking declaration that he had become the owner by way of adverse possession as adverse possession can be used as a shield and not as a sword. (Para-14)

Cases referred:

R. Rajagopal Reddy (dead) by L.R.s and others versus Padmini Chandrasekharan (dead) by L.R.s, AIR 1996 SC 238

Mithilesh Kumari and another versus Prem Behari Khare AIR 1989 SC 1247

Smt.Rebti Devi versus Ram Dutt and another AIR 1998 SC 310

P.Periasami (dead) by LRs. Versus P.Periathambi and others (1995) 6 SCC 523

Mohan Lal (deceased) through his LRs Kachru and others versus Mirza Abdul Gaffar and Another (1996) 1 SCC 639

L.N.Aswathama and another versus P.Prakash (2009) 13 SCC 229

Gurdwara Sahib versus Gram Panchayat Village Sirthala and another (2014) 1 SCC 669

For the Appellants : Mr.Vijay Chaudhary, Advocate.
For the Respondents : Mr.G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral) .

This appeal is directed against the judgment and decree dated 29.11.2013 passed by the learned Additional District Judge (I), Mandi (Camp at Sundernagar) in Civil Appeal No. 80 of 2013 whereby he affirmed the judgment and decree dated 26.11.2012 passed by the learned Civil Judge (Senior Division), Court No.1, Sundernagar, District Mandi, in Civil Suit No.52/2008 dismissing the suit of the appellants-plaintiffs (hereinafter referred to as the plaintiffs).

2. "Key facts" leading to the filing of the appeal may be noticed thus.

3. The plaintiffs had filed a suit for declaration that they are owners in possession over the land comprised in Khata/Khatauni No. 24/58, Khasra No.3, 14,15, plots-3, measuring 8-5-19 bighas, situate in Mauza Rangar/33, Sub Tehsil Nihri, Tehsil Sundernagar, District Mandi (hereinafter referred to as the suit land) and the revenue entries reflecting the respondents/defendants (hereinafter referred to as the defendants) as owners in possession over the suit land be declared wrong, illegal, null and void and the defendants be restrained from interfering in any manner over the suit land by way of permanent prohibitory injunction. It was averred that the suit land is recorded in the ownership of Mani Ram and Hari Singh to the extent of half shares each and as per remarks, Hari Singh has expired and had been succeeded by the defendants and further Mani Ram had transferred his half share in favour of the plaintiffs. Mani Ram and Hari Singh were real brothers of father of the plaintiffs namely Khub Ram, who was posted as Patwari in 1970 at Muhal Rangar. The suit land was earlier owned by one Luharu and Khub Ram, predecessor-in-interest, of the plaintiffs had purchased the suit land from him on 25.01.1970 for a consideration of `5,000/- and purchase money was paid by Khub Ram to said Luharu and eversince Khub Ram possessed the property and after his death the same has been inherited by the plaintiffs as his legal heirs.

4. It was further averred that Hari Singh was younger brother of Khub Ram and died in 2007 leaving behind the defendants as his legal heirs. In July, 2007, the defendants started proclaiming themselves to be the owners of the suit land to the extent of half shares and after obtaining the revenue record, the plaintiffs came to know about the entries in the revenue record in favour of Mani Ram and Hari Singh. On inquiry, it was found that Khub Ram purchased the land from Luharu in 1970 and the purchase money was paid by Khub Ram to Luharu. Though the property was purchased by Khub Ram in the names of Mani Ram and Hari Singh as Benami Transaction, neither they paid the purchase money nor ever they possessed the property in any capacity. It was also averred that thereafter plaintiffs asked the defendants and Mani Ram to admit the claim of the plaintiffs as owners of the suit land and get the revenue entries corrected. Mani Ram transferred his share in the name of the plaintiffs but the remaining defendants refused to

transfer the property in the name of the defendants on 04.05.2008. The plaintiffs averred that neither Mani Ram nor the defendants were in possession of the suit land at any time and their names figured in the revenue record as owners only on account as 'Benami' Transaction effected by Khub Ram in their names. The plaintiffs averred that the act of Khub Ram was prior to coming into force of the 'Benami' Transactions (Prohibition) Act, 1988 and the possession of the plaintiffs is open, continuous and hostile to the knowledge of the defendants and has matured into ownership by way of adverse possession since the possession of plaintiffs and their predecessor-in-interest Khub Ram over the suit land is continuous since 25.01.1970 and had matured into ownership by way of adverse possession on 26.01.1982, hence this suit was filed.

5. The suit was contested by the defendants No.1 to 4 by filing written statement on the grounds of maintainability, valuation, estoppel and it was averred that the alleged transaction sought to be enforced by the plaintiffs is prohibited under law and moreover the suit land is an orchard and the court fee is payable on its value. The defendants admitted that the land was earlier owned and possessed by Luharu, however, it was denied that Khub Ram purchased the land from Luharu and possessed the same as owner till his death. The defendants averred that the ownership of Hari Singh and Mani Ram qua the suit land was in the knowledge of the plaintiffs and denied the averments contrary made by the plaintiffs. The plaintiffs had purchased the suit land regarding the share of Mani Ram vide registered sale deed No.24 dated 23.01.2008 and were compelling the defendants to sell their shares and when they refused, the plaintiffs filed the suit against them. The defendants prayed for dismissal of the suit. The proforma defendant Mani Ram in his written statement admitted the claim of the plaintiffs.

6. Plaintiffs filed replication re-asserting the averments made in the plaint and refuting the averments made by the defendants in the written statement.

7. On the pleadings of the parties, the following issues were framed by the learned trial Court on 10.09.2009:-

1. Whether the plaintiffs are owners in possession of the suit land as alleged? OPP

2. Whether the entries in the names of the defendants as owners in possession qua the suit land is null and void? OPP

3. Whether the plaintiffs are entitled for the decree of permanent prohibitory injunction against the defendants qua the suit land as alleged? OPP

4. Whether the suit is not maintainable in the present form? OPD

5. Whether proper court fee has not been affixed as alleged ? OPD.

6. Whether the plaintiffs are estopped to file present suit by their own acts, conduct and acquiescence? OPD.

7. Relief.

8. After recording and evaluating the evidence, the learned trial Court on 26.11.2012 dismissed the suit filed by the plaintiffs. The appeal filed by the plaintiffs against the judgment and decree of the learned trial Court was also dismissed by the learned lower appellate Court on 29.11.2013 and this is how the matter has reached before this Court.

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

10. The learned counsel for the plaintiffs has vehemently contended that the learned Courts below have failed to take into consideration the provisions of Section 3 sub-section (a) and (b) of 'Benami' Transactions (Prohibition) Act, 1988 (hereinafter referred to as 'the Act') and thereby reached a wrong conclusion. It is further contended that the learned trial Court could not have given a findings on the point of adverse possession without framing a specific issue with respect thereto.

11. Insofar as the first contention is concerned, the plaintiffs in their pleadings themselves had contended that the transaction between Luharu and Khub Ram was 'Benami' transaction in the names of Mani Ram and Hari Singh and purchase money was paid by Khub Ram and the land was also possessed by Khub Ram after purchase thereof. It was thereafter contended that since the transaction was entered prior to coming into force of the Act, therefore, bar under the said Act could not apply to them. But, then since the transaction was admitted to be a 'Benami' transaction, therefore, no suit, claim or action to enforce any right in respect of 'Benami' transaction entered even prior to coming into force of the Act was barred under Section 4 of the Act. This was so held by the Hon'ble Supreme Court in its three Judges' decision in ***R. Rajagopal Reddy (dead) by L.R.s and others*** *versus* ***Padmini Chandrasekharan (dead) by L.R.s, AIR 1996 SC 238*** wherein the earlier decision in ***Mithilesh Kumari and another*** *versus* ***Prem Behari Khare AIR 1989 SC 1247*** was over-ruled. Yet, again in ***Smt.Rebti Devi*** *versus* ***Ram Dutt and another AIR 1998 SC 310*** it has been explained that even if transaction had been entered into prior to coming into force of the Act i.e. 19.05.1988, even then no suit could be filed on the basis of such a plea. This contention is answered accordingly.

12. Insofar as the second contention is concerned, the learned counsel for the plaintiffs has rightly argued that there is no issue whatsoever framed with respect to the plaintiffs' having become owners of the suit land by way of adverse possession. Though, Mr. Bhagwati Chander Verma, learned counsel for the defendants would contend that the same is covered by issue No.1, but I cannot agree to this plea because issue No.1 reads as under:-

> "1. Whether the plaintiffs are owners in possession of the suit land as alleged? OPP"

13. The plea of ownership simpliciter is based on the concept of title which one may have acquired through various sources like succession, gift, will, sale, exchange etc. where one is in possession of the suit land lawfully. On the other hand, when the plea of adverse possession is projected, inherent in the plea is that someone-else was the owner of the property. (***See: P.Periasami (dead) by LRs.*** *Versus* ***P.Periathambi and others (1995) 6 SCC 523).*** To establish a claim of title by prescription, that is adverse possession for 12 years or more, possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period existing 12 years. Having said so, it can safely be concluded that the pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (*Refer:* ***Mohan Lal (deceased) through his LRs Kachru and others*** *versus* ***Mirza Abdul Gaffar and Another (1996) 1 SCC 639****,* ***L.N.Aswathama and another*** *versus* ***P.Prakash (2009) 13 SCC 229)****.*

14. Once, the plaintiffs have raised mutually inconsistent pleas, an omnibus issue cannot be framed to determine these pleas. The suit of the plaintiffs was not maintainable when they sought to raise pleas which were mutually destructive. The plaintiffs were required to opt for either one of the two claims. Even in that case, the plaintiffs could have only opted to set-up the plea of title because suit for declaration on the basis of adverse possession could not have been filed as this claim can only be agitated by way of defence and can be used only as a shield and not a sword as held by the Hon'ble Supreme Court ***Gurdwara Sahib*** *versus* ***Gram Panchayat Village Sirthala and another (2014) 1 SCC 669*** in the following terms:-

> *"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."*

15. Surprisingly, despite there being no issue to this effect, the learned trial Court in Para-20 of its judgment has given findings on the plea of adverse possession. Admittedly, this plea in terms of ***Gurdwara Sahib's*** case (supra) was not available to the plaintiffs and moreover these findings are beyond the scope of issues framed in this case.

16. Though, the suit is not maintainable, it needs to be clarified that in case the plaintiffs are in possession of the suit property, they cannot be disturbed except by due process of law and it further needs to be clarified that in any future litigation it shall be open to the plaintiffs to

plead in defence that they had become owners of the property by way of adverse possession. This clarification has been necessitated on the basis of the following observations of the Hon'ble Supreme Court in ***Gurdwara Sahib's*** case (supra) which reads thus:-

> *"10. As the appellant is in possession of the suit property since 13-4-1952 and has been granted the decree of injunction, it obviously means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case the respondents file suit for possession and/or ejectment of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of Issue 1 to the effect that the appellant is in possession of adverse possession since 13-4-1952 operates as res judicata. Subject to this clarification, the appeal is dismissed."*

17. Subject to this clarification, the appeal is dismissed, so also the pending application, if any.

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

State of Himachal Pradesh .....Appellant.

Versus

Manohar Lal .....Respondent.

Cr. Appeal No. 593 of 2008.
Reserved on: October 30, 2014.
Decided on: October 31, 2014.

Indian Penal Code, 1860- Sections 436 and 506 – complainant found that his house had been set on fire- villagers trying to extinguish the fire but could not succeed – an FIR was lodged against the accused- held, that complainant had admitted that he had strained relation and litigation with the accused- PW-3 admitted that he had deposed against the accused before Learned C.J.M., Lahul Spiti- complainant and PW-3 admitted that they had made the inquiry from the villagers to ascertain the identity of the person who had put the house on fire- testimony of PW-7 was contradictory- extra judicial confession made by accused was also not proved- house of the complainant and accused are located adjacent to each other- no sane person would put the adjacent house on the fire as there is risk of the fire spreading to his house as well- in these circumstances, acquittal of accused was justified. (Para- 15 to 17)

For the appellant: Mr. Ashok Chaudhary, Addl. Advocate General.
For the respondent: Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted by the State against the judgment dated 25.6.2008, of the learned Addl. Sessions Judge, Fast Track Court, Kullu, H.P., rendered in Sessions Trial No. 36 of 2007, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence under Sections 436 & 506 IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that the complainant Het Ram is a resident of village Sar. He is retired teacher. On 30.8.2006, he was present in his house with his two wives. He went to bed at 10:00 PM. At about 1:00 AM (night), he came out of the house to urinate. He saw that his three storeyed house, locally known as '*PADACHHA*' has been set on fire. The house was slate posh. He alongwith his wives raised alarm. The villagers also assembled on the spot. They tried to extinguish the fire. The fire could not be controlled and the house was reduced to ashes. He had stacked 22 sleepers and grass inside the house. He was put to loss to the tune of Rs. 80,000/-. He suspected that his house was set on fire by the accused. The statement of the complainant Het Ram under Section 154 Cr.P.C. was recorded and on the basis of this statement, FIR was registered. The site plan of the occurrence was prepared. Ash and burnt pieces of wood were sent to FSL, Junga in a sealed parcel. The report of FSL, Junga was received. The investigation was completed and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 9 witnesses. The statement of the accused under Section 313 Cr.P.C. was recorded. The accused has denied his involvement in the case. According to him, he had strained relations with Het Ram and his son and as such, he has been falsely implicated in the case. The learned Trial Court acquitted the accused on 25.6.2008. Hence, this present appeal on behalf of the State.

4. Mr. Ashok Chaudhary, learned Addl. Advocate General has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. G.R.Palsra, Advocate, for the accused, has supported the judgment dated 25.6.2008 of the learned trial Court.

5. We have heard learned counsel for both the sides and gone through the judgment and material available on record very carefully.

6. PW-1, Het Ram testified that on 30.8.2006, he was present in his house with his two wives. During night, he came out of his house for urination. He found that his three storeyed house had been set on fire. That house was used for the purpose of stacking of grass during winters. Flames were emitting from the top story of the house. His wives raised alarm. Villagers had also assembled on the spot. They tried to

extinguish the fire. The entire house was reduced to ashes. He had kept 20 or 22 sleepers of Deodar inside the house. He was put to loss to the tune of Rs.80,000/-. He suspected the hands of accused Manohar Lal in setting his house on fire. The accused was having strained relations with him. He was locked in litigation with him in many cases. He reported this matter to the police and his statement Ext. PA was recorded. On 8.9.2006, he was sitting in his shop. Accused came there and started abusing him. Accused also stated that he had already burnt his three storeyed house and that he would also burn his residential house. At that time, Tilak Raj, Sunder Singh, Dhineshwari Devi and Mohar Singh were also present in his shop. He had also informed the police about this incident on telephone. In his cross-examination, he deposed that apart from these four persons, nobody else was present in his shop when the accused had threatened to burn his residential house. He runs a Tea stall. He has admitted in his cross-examination that he has strained relations with the accused since 1990. He also admitted that the accused was facing criminal trial on the complaint of his son. In his cross-examination, he has admitted that Tilak Raj, Sunder Singh, Dhineshwari Devi and Mohar Singh were not present inside his tea stall when accused had threatened him. He went to the shop of Mool Singh and accused was roaming outside the shop on the road. He has also admitted that he inquired from the villagers for a period of 8 or 9 days in order to ascertain the person who had set his house on fire. He also admitted that neither he nor police came to the conclusion as to who was responsible for setting his house on fire.

7. PW-2 Jaswant Singh, deposed that at 1:00 AM, they heard noise. They came out of the house and found that three storeyed house of Het Ram had been set on fire. They tried to extinguish the fire, but in vain. Manohar Lal did not come to the spot to extinguish the fire. He admitted in his cross-examination that the house of Het Ram and accused are situated adjacent to each other. About 150 persons had assembled on the spot to extinguish the fire.

8. PW-3 Om Prakash, deposed that his younger brother informed him that their house had been set on fire. He alongwith his younger brother went to Village Sar. He found that their three storeyed house had been reduced to ashes. *'Turi' (Fodder)* and 20 or 22 sleepers of deodar kept in the house had been burnt. They have incurred loss to the tune of Rs. 80,000/-. In his cross-examination, he admitted that he has deposed in a criminal case against the accused in the Court of learned CJM, Lahaul and Spiti at Kullu. He admitted that after this incident, they made inquiries about the identity of person responsible for setting their house on fire.

9. PW-4 Sunder Singh, deposed that he was taking meals in the Dhaba of Mool Singh. At about 2:30 PM, accused Manohar Lal was abusing Het Ram outside the Dhaba of Mool Singh. Accused stated that he had already burnt his three storeyed house and that he would also burn his residential house. In his cross-examination, he deposed that the distance between the tea stall of Het Ram and Dhaba of Mool Singh was about 20 meters.

10. PW-5 Pardip Kumar, deposed that at about 1:30 AM, he heard noise. He came out of the room and found that the house of Het Ram had been set on fire.

11. PW-6 HC Chaman Lal, deposed that FIR Ext. PC was recorded on the basis of statement under Section 154 Cr.P.C by ASI Mathru Ram of Het Ram. One sealed parcel was handed over to him by ASI Mathru Ram. He deposited the sealed parcel in the Police *Malkhana*, Banjar.

12. PW-7 Lali Devi, deposed that she was sleeping in her room. At about 1:00 AM in the midnight, she saw that her house had been set on fire. She came out of the room and found that accused Manohar Lal was running towards his house. The family members of Manohar Lal had switched off the lights of their house. She fell unconscious on the spot. When she regained consciousness, she knocked at the door of adjoining room in which his husband was sleeping with his second wife. Both of them came out of the house. The villagers had also assembled on the spot. They tried to extinguish the fire. She had disclosed to the police during the course of recording her statement that she had seen accused Manohar Lal setting their house on fire. In her cross-examination, she deposed that her son Om Parkash was President of Panchayat *Khada-gad*. She had told her son Om Parkash and husband Het Ram that she had seen accused Manohar Lal running away from the spot towards his house after setting their house on fire. On the day of occurrence many persons had visited the village in the holy procession of deity "*Shringa Rishi*". She had regained consciousness after a lapse of 10-15 minutes. When she regained consciousness, the house was burning and villagers were extinguishing the fire. She had told the villagers that Manohar Lal had set their house on fire. They are having strained relations with accused Manohar Lal for the last about 14-15 years. The distance between burnt house and house of Manohar Lal was about 20 meters. The police had visited the spot during the night of occurrence. She had disclosed to the police during the recording of her statement that she had seen Manohar Lal running from the spot at the time of occurrence towards his house. (Confronted with her statement Mark 'A' recorded under section 161 of the Cr.P.C. wherein it is not so recorded.)

13. Statement of PW-8 Constable Laxman Dass, is formal in nature.

14. PW-9 ASI Mathru Ram, deposed that on 31.8.2006 at 3.30 AM, Om Parkash had informed the police on telephone that his house / *Parachha* had been set on fire. He alongwith police officials went to the spot. The statement of complainant Het Ram Ext. PA was recorded by him. He inspected the spot and prepared the site plan Ext. PH. He also took photographs. He also took into possession ash and burnt pieces of wood in the form of Charcoal vide memo Ex. PB and were sealed in a parcel.

15. PW-1 Het Ram has admitted that he had strained relations with the accused. He was locked in litigation with the accused in many

cases. PW-3 Om Parkash, son of Het Ram, complainant has deposed that he had deposed in a criminal case against the accused in the Court of learned C.J.M. Lahul & Spiti at Kullu. PW-1 Het Ram has deposed in his cross-examination that he enquired from the villagers for about 8-9 days in order to ascertain the person as to who has set his house on fire. PW-3 Om Parkash has also deposed that after the incident he had made enquiries about the identify of the person responsible for setting their house on fire. There is variance in the statements of PW-1 Het Ram, PW-3 Om Parkash and PW-7 Lali Devi. PW-7 Lali Devi has deposed that she noticed that her house had been set on fire. She came out and saw the accused Manohar Lal running towards his house. In her cross examination she deposed that she told her son Om Parkash and her husband Het Ram that she had seen accused Manohar Lal running from the spot towards his house after setting their house on fire. If PW-7, Lali Devi has told her husband PW-1 Het Ram and her son PW-3 Om Parkash that she had seen the accused running from the spot, there was no occasion for PW-1 Het Ram and PW-3 Om Parkash to make enquiries from the villagers to ascertain who had set their house on fire. PW-7, Lali Devi was also confronted with her statement recorded under section 161 Cr.P.C. According to her, she had told the police that she has seen Manohar Lal running from the spot. However, it was no recorded in her statement under Section 161 Cr.P.C.

16. Now, as far as the extra judicial confession made by the accused is concerned, the same also does not inspire any confidence. According to PW-1, Het Ram, he was sitting in his shop and the accused came and started abusing him and told him that he had already burnt his three storeyed house and that he would burn his residential house as well. According to PW-1 Het Ram, Tilak Raj, Sunder Singh, Dhineshwari Devi and Mohar Singh were present in his shop at that time. However, in his cross-examination he deposed that these persons remained outside the Stall. His version that he went to the shop of Mool Singh is belied rather those persons were standing on the road and never entered the shop.

17. There is another interesting aspect of the matter. The houses of Het Ram and accused are adjacent to each other as per the statement of PW-2 Jaswant Singh. No prudent man would set the adjoining house on fire for the simple reason that there is possibility of fire spreading to his house as well.

18. What emerges from the facts enumerated hereinabove, is that, there is litigation going on in between the parties. The statement of PW-7 Lali Devi does not inspire confidence in view of the statements of PW-1 Het Ram and PW-3 Om Parkash. The extrajudicial confession as stated to have been made by the accused before PW-1 Het Ram, is also not convincing.

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

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

State of Himachal Pradesh. …Appellant.

Versus

Ramesh Chand. …Respondent.

Cr.A.No. 588 of 2008
Reserved on : 30.10.2104
Decided on: 31.10. 2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.500 grams of charas- there were contradictions in the testimonies of eye-witnesses regarding the place of search- no independent witness was associated, although, there were many houses around the place of incident- there were contradictions regarding the of weight and scales- held, that in these circumstances, prosecution case was not reliable and acquittal of the accused was justified. (Para-18 and 19)

For the Appellant: Mr. Ashok Chaudhary, Addl. A.G.
For the Respondent: Mr. Ashwani Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge .

This appeal is instituted against the judgment dated 9.6.2008 rendered by the Special Judge, Hamirpur in Sessions Trial No. 12 of 2007, whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has been acquitted.

2. Case of the prosecution, in a nutshell, is that PW-10 Nek Ram was posted as Incharge, Police Post, Jahu. He alongwith Head Constable Kuldip Singh, Constable Kamaljit and Constable Bipan Kumar had laid a Naka on 15.2.2007 in front of Police Post, Jahu. They were checking the vehicles in routine. At about 11.10 P.M., a bus of Una Depot bearing registration No. HP-72-0163 came. It was intercepted. Police boarded the bus. Accused was sitting on seat No.16. He became panicky. He was ordered to get down from the bus alongwith two persons, who were sitting near his seat. He was informed of his legal right that he could offer his search before a Magistrate or a Gazetted Officer or a Police Officer. Accused gave consent on the memo Ex.PW-1/A. He agreed to be searched by the police. On his personal search, a polythene pack of light green colour was found inside the inner which he was wearing inside his trousers. It was kept near his private parts. Constable Kamaljeet was deputed to bring weights and scale. Charas

was weighed. It was found to be 350 grams. Two samples of 25 grams each were separated and sealed with seal 'K'. The bulk Charas was also sealed in a different parcel with the same seal. The specimen impressions of seal were taken on a piece of cloth Ex.PW-1/F. The seal was handed over to PW-1 Sushil Kumar. Accused was arrested. Rukka Ex.PW-6/A was sent to the Police Station. FIR Ex.PW-7/A was registered. Site plan was also prepared. Station House Officer Baldev Singh re-sealed the parcels with seal 'R' vide memo Ex.PW-11/A and seal impressions of seal 'R' were taken on piece of cloth Ex.PW-11/B. He also made endorsement on the N.C.B. form. Case property was deposited with PW-9 Kishore Chand. He entered the same in Malkhana register. Contraband alongwith N.C.B. form and seal impression were sent through HHC Chuni Lal on 19.2.2007 to Forensic Science Laboratory, Junga. The report Ex.PW-10/D was received. Special report Ex.PW-8/A was also sent to the office of Superintendent of Police, Hamirpur. 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 eleven witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He denied the case of the prosecution in entirety. Learned trial Court acquitted the accused vide judgment dated 9.6.2008. Hence, the present appeal.

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

5. Mr. Ashwani Kumar Sharma 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 Sushil Kumar has deposed that on 15/16.2.2007, he alongwith Raj Kumar were travelling in a bus. When the bus reached near Police Chowki, the police had laid Naka. Bus was signalled to stop. Police entered into the bus. One boy, who was sitting in the bus, got perplexed. Police got suspicion. Accused consented for his personal search by the police vide memo Ex.PW-1/A. He signed the same. Raj Kumar also signed the same in his presence. Accused put his signatures on the consent memo. Police official gave his personal search. Nothing incriminating was found. Memo Ex.PW-1/B was prepared. Police conducted search of the accused. He was found in possession of one envelope wrapped in polythene from the private part inside the inner. Police sent Constable to bring weights and scale to measure the substance. It was weighed. Two samples were separately taken and thereafter, sample as well as bulk was packed and sealed on the spot. He did not remember what was recovered except the substance during personal search. He was declared hostile. He was cross-examined by the learned Public Prosecutor. He has admitted in his cross-examination that the police told the accused about his legal right of personal search

to be conducted either by the police or by any Magistrate/Gazetted Officer. Charas weighed 350 grams. Two sample of 25 grams each were separately taken and put in a cigarette pack and sealed with seal impression 'K'. In his cross-examination by the learned defence counsel, he has categorically admitted that he had not taken ticket of the bus from the conductor. The bus was full as per capacity. The distance between Police Chowki and Bus Stand was about ½ KM. Personal search of the accused was conducted by the police in the Police Chowki. He remained on the spot till the completion of proceedings. The weights were small but he did not know the details of the weights brought by the police official. He had not gone through the memos prepared by the police, but he has signed the memos as per the proceedings conducted by the police.

8. PW-2 Ramesh Chand has deposed that the police had come to his shop and taken the weights and scale. They had taken weights of 50 grams, 100 grams, 200 grams and 500 grams.

9. PW-3 Head Constable Kuldip Singh has deposed the manner in which accused was apprehended from the bus. He was sitting on seat No.16. Personal search of the accused was conducted. Charas was recovered from the accused. Sampling and seizure process was completed in accordance with law. Charas was weighed. It weighed 350 grams. In his cross-examination, he has deposed that the Naka was laid at 10.30 P.M. According to him, the shop from were the weights and scale were brought was closed at that time. Personal search of the accused was conducted on the spot.

10. PW-4 Chuni Lal has deposed that on 19.2.2007, MHC Kishore Chand handed over to him one sample of Charas duly sealed with seal 'R' vide RC No. 23/07 alongwith N.C.B. form in triplicate having seal impression 'K' and 'R' in a docket. He deposited the case property with the Forensic Science Laboratory, Junga.

11. Statement of PW-5 Constable Pawan Kumar is formal in nature.

12. PW-6 Constable Bipan Kumar has deposed that Naka was laid in front of the Police Chowki. He alongwith Constable Kamaljit was present on the spot. The bus was stopped. He and ASI entered into the bus from the front door of the bus. Accused was found sitting on seat No.16. He got panicky. Independent witnesses Raj Kumar and Sushil Kumar were associated. He was deputed to carry rukka Ex.PW-6/A. He took the same to Police Station, Bhoranj for registration of case.

13. PW-7 S.I. Shashi Paul has recorded the FIR Ex.PW-7/A on the basis of rukka Ex.PW-6/A.

14. PW-8 ASI Ashwani Kumar has deposed about the special report.

15. PW-9 Head Constable Kishore Chand has deposed that on 16.2.2007, Inspector/SHO Baldev Singh deposited with him one parcel

weighing 300 grams and two sample parcels of 25 grams each duly sealed with seal 'R'. The bulk was having eight seals and sample parcels were having four seals affixed on the same alongwith N.C.B. form in triplicate having seal impressions 'K' and 'R'. He made entry in Register No.19 at Sr. No.513. He handed over one sample parcel on 19.2.2007 which was duly sealed and marked as A-1 alongwith N.C.B. form in triplicate and sample seal to HHC Chuni Lal vide RC No.23/07 to be deposited at F.S.L. Junga. HHC Chuni Lal after depositing the case property with F.S.L. Junga handed over the original R.C. to him on his return.

16. PW-10 S.I. Nek Ram has also deposed the manner in which accused was apprehended from the bus sitting in seat No.16. Personal search of the accused was carried. Charas was recovered. It was weighed. Samples were drawn. The bulk charas and samples were duly sealed and marked. He prepared rukka Ex.PW-6/A. It was sent through Constable Bipan Kumar to Police Station, Bhoranj. Spot map was also prepared. He also sent the special report. In his cross-examination, he has deposed that Naka was laid at 10.30 P.M. It was laid in front of Police Chowki, Jahu. The bus which was checked was bounded from Manali to Amritsar. One ticket of ` 30/- was of Kanika Hari Bus Service. Volunteered that there were also tickets of H.R.T.C. bus which were recovered from the accused. He has not taken into possession any record relating to the tickets from the conductor as well as from the Department. The checking of passengers including the accused was conducted inside the bus. No local persons were joined in the proceedings. The Station House Officer, Baldev Singh visited the spot at about 12.30 A.M. He has completed the proceedings before the arrival of the Station House Officer. The rukka was given at about 1.15 A.M.

17. PW-11 Inspector Baldev Singh has deposed that on 16.2.2007 at about 4.00 A.M. after patrolling, he reached near Police Post, Jahu, ASI Nek Ram met him. He was carrying on investigation of the case. Nek Ram told him all the facts of the case. He produced before him one bulk parcel containing 300 grams of charas sealed with eight seal impressions 'K' and two sample parcels containing 25 grams each charas which were sealed with four seal impressions 'K' and NCB-1 form in triplicate. He put all the three parcels in a separate three cloth parcels and resealed the same with seal having impression 'R'. He prepared certificate Ex.PW-11/A. Sample of seal on a piece of cloth Ex.PW-11/B was taken. The bulk parcel is Ex.P-1 and sample parcels are Ex.P-2 and P-3. He reached the Police Post alongwith other Police officials. He deposited all the three parcels alongwith sample seal 'K' and sample seal 'R' and N.C.B. form No.1 in triplicate with MHC Kishore Chand. In his cross-examination, he has admitted that he had reached Jahu at about 4.00 A.M.

18. Statement of PW-1 Sushil Kumar does not inspire confidence. In his cross-examination, he has admitted that he has not purchased any ticket from the conductor. According to him, personal search of the accused was conducted by the police in Police Chowki.

However, PW-3 Kuldip Singh has deposed that personal search of the accused was conducted on the spot. Prosecution has not examined any independent witness, though according to PW-1 Sushil Kumar, place where the Naka was laid was surrounded by many residential houses. PW-10 S.I. Nek Ram has also admitted that no local person was joined in the proceedings. Accused was apprehended at 11.10 P.M. The police could easily associate independent witnesses from the adjoining houses. According to PW-10 S.I. Nek Ram, S.H.O. Baldev Singh reached the spot at 12.30 A.M. However, PW-11 Baldev Singh has categorically deposed that on 16.2.2007 he reached Police Post, Jahu at 4.00 A.M. He has reiterated in his cross-examination that he reached Jahu at about 4.00 A.M. Accused was apprehended at 11.10 P.M. Proceedings might have been completed within two hours. PW-1 Baldev Singh had reached Jahu at 4.00 A.M. According to him, he has re-sealed the bulk charas and samples on the spot. It cannot be believed that proceedings were continued upto 4.00 A.M. on 16.2.2007. According to PW-1 Sushil Kumar, Constable was deputed to bring weights and scale. PW-2 Ramesh Chand has deposed that police people had come to the spot and took weights and scale. However, PW-3 Kuldip Singh has deposed that the shop from where the weights and scale were brought was closed at that time. He does not say that the police had requested the shopkeeper to open the shop. PW-10 Nek Ram has not taken the tickets of PW-1 Sushil Kumar and Raj Kumar into possession. Thus, the version of prosecution that PW-1 Sushil Kumar was travelling in the bus cannot be believed. If PW-1 Sushil Kumar was travelling in the bus, he was supposed to buy the ticket.

19. 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.

20. 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.

21. Consequently, the appeal is dismissed.

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