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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 is 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

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

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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.
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Title: Smt. Sukanya Devi Vs. Smt. Karmi Devi &ors.

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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.

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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

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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.
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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

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

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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.
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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

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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.
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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.
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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 learned 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

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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

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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

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Indian Penal Code, 1860- Section 498-A, 306 read with Section 34- The deceased was married to accused and the 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, the accused were acquitted by learned Trial Court and an appeal was preferred against the order of acquittal- Held that, no specific allegations of cruelty constituted 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.
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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 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
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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.
Title: Union of India Vs. Chhering Tobden & ors
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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 re-concile 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

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 a 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

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Motor Vehicle Act, 1988- Section 166- The deceased was a Manager of Dhauladhar Public Education Society- his salary was Rs. 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, hence the loss of dependency would be Rs. 13,000 per month- Age of the deceased was 49 years and therefore, the multiplier of 13 would be applicable and the claimants would be entitled for compensation of Rs. 20,28,000/- towards loss of dependency, Rs. 2,000/- towards funeral expenses, Rs. 5,000/- toward loss of consortium and Rs. 2,500/- towards loss of estate .

Title: New India Assurance Company Limited Vs. Smt. Kiran Sharma & others

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Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal 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- 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 Rs. 6000/- X 12 X 9= 6, 48,000/-, Rs.2,000/- towards expenses on the obsequies, Rs. 2,500/- towards loss of estate and Rs.5,000/- towards loss of consortium .

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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 of 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 4:00 A.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

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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

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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

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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

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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-further held that 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

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

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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 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.
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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

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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 villages 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 proved his case.
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Ram Sukh and others Vs. State of Rajasthan and others, 1990 SC 592

Ramjas Foundation and another Vs. Union of India and others (2010) 14 SCC 38

Ravi Kant vs. Bhupender Kumar AIR 2008 HIMACHAL PRADESH 31

Ravi Yashwant Bhoir Vs. District Collector, Raigad and others (2012) 4 SCC 407

Reshma Kumari & ors Vs. Madan Mohan & anr. AIR 2013 SCW 3120

Rohit Singhal and others Vs. Principal, Jawahar N. Vidyalaya and others, (2003) 1 SCC 687

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State of West Bengal Vs. Debasish Mukherjee, AIR 2011 SC 3667

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Visha Lochan Madan vs. Union of India and ors., (2014) 7 SCC 707

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

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

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 re-concile 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. <u>Cr.MMO No. 80 of 2014</u>

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. <u>Cr.MMO No. 195 of 2014</u>

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-further held that 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 of 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 4:00 A.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 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.

****

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 ` 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 ` 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. .....

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."

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.

****

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

The following judgment of the Court was delivered:

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 learned 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.

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 6,255/- per biswa and by granting appreciation @ 10% from 1991, the value would come to 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 = ` 10.62 lac;

2. Solatium 30% (u/s 23(2) of the Act)= ` 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 = ` 4.9914 lac.

Total:- 18.7974 lac.

(ii) PHATI BARUA:-

1. Market value of 371-09-00 bigha land = ` 169.245;

2. Solatium 30% of above =` 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:- ` 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 ` 7505/- per biswa ( 1,50,100/- per bigha) and of Phati Barua ` 8838/- per biswa (` 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 ` 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 ` 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 ` 4,56,000/- to Ramanand Sagar i.e. at the rate of ` 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 ` 15,000/- to Ramesh in the same Phati. Thus, the value of one biswa land comes to ` 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 ` 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 ` 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 ` 6255/- per biswa and by granting appreciation in the value of land @ 10% from 1991, it would come to ` 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 ` 1,00,000/- per biswa, 10-12 years ago and now it is ` 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 ` 15,000/-. Thus, the market value of the land comes to ` 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 ` 55,000/-. Thus, by giving 10% appreciation in the value of land for subsequent two years, the market value comes to ` 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 ` 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 ` 8838/- per biswa and ` 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 @ ` 7505/- per biswa i.e. ` 1,50,100/- per bigha and @ ` 8838/- per biswa and ` 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.

****

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 is 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/-	*Sd/-*
Chairman,	*President,*
Managing Committee,	*Managing Committee,*
Ramanujam Royal College of Education, H.P. 177.	*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 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 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 Ext.PW11/B	*Inquest reports*
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 in 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. 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 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, CJ & HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

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."

17. 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.

18. 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.

19. 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.

20. 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.

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."

21. 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.

22. 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."

23. 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."

24. 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.

25. 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."

26. 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.

27. 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.

28. 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.

29. 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.

30. 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 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. (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 way of 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.

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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, deputation, transfer, grade from which promotion/ deputation transfer is to be made	By promotion from amongst the Fishermen who are matriculate and also possess 5 years 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	Provided further that where a person becomes ineligible to be considered for promotion on account 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

	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 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.	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 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 `2800-4400, whereas that of fishermen `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 PW18/2	Thumb impression of 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 the innocence of accused.

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 and the 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, the accused were acquitted by learned Trial Court and an appeal was preferred against the order of acquittal- Held that, no specific allegations of cruelty constituted 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.

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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 villages 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 proved 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 a 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 ` 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 ` 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 ` 16,000/- as a milk vendor and ` 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 ` 3,000/- per month and the claimants have lost source of dependency to the tune of ` 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 ` 2,000/- x 12 = ` 24,000/- x 18 = ` 4,32,000/- plus ` 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.

****

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 Rs.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 ` 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.

CWP No. 4499/2012

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-
>
> (a) to establish and maintain institutions for religious and charitable purposes;
>
> (b) to manage its own affairs in matters of religion;
>
> (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

> "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.

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.

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.
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> 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.
>
> 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 Rs. 4,000/-, HRA of Rs. 200/-, FTA of Rs. 75/- and GIS of Rs. 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 Rs.

6000/- X 12 X 9= 6, 48,000/-, Rs.2,000/- towards expenses on the obsequies, Rs. 2,500/- towards loss of estate and Rs.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 Rs. 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, hence the loss of dependency would be Rs. 13,000 per month- Age of the deceased was 49 years and therefore, the multiplier of 13 would be applicable and the claimants would be entitled for compensation of Rs. 20,28,000/- towards loss of dependency, Rs. 2,000/- towards funeral expenses, Rs. 5,000/- toward loss of consortium and Rs. 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 ` 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 ` 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 ` 17,500/- per month and that is the income taken by the Tribunal. Though, the claimants have pleaded that the deceased was also earning ` 25,000/- per annum from agriculture and ` 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 ` 4,500/-. The claimants have lost source of dependency to the tune of ` 13,000/- per month(` 17500/- - ` 4500/-), i.e. ` 13,000/- x 12 = ` 1,56,000/- per annum. The Tribunal has rightly applied the multiplier of '13'. The total loss of income comes to ` 1,56,000/- x 13 = ` 20,28,000/-. The claimants are also entitled to ` 2,000/- under the head 'funeral expenses', ` 5,000/- under the head 'loss of consortium' and ` 2,500/- under the head 'loss of estate'. Viewed thus,

the claimants are held entitled to the enhanced compensation to the tune of ` 20,28,000/- + ` 2,000/- + ` 5,000/- + ` 2,500/- = ` 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. FAO No. 171 of 2007.

Oriental Insurance Co. Ltd. .....*Appellant.*

Vs.

Smt. Neelam Nadda and others ...*Respondents.*

Motor Vehicle Act, 1988- Section 166- The deceased was drawing Rs.18,443/- as salary – Tribunal had taken the income of deceased as Rs.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 Rs.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 Rs. 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:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

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."*
>
> *"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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