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HIMACHAL SERIES, 2015

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'C'

for the custody of minor children – an application under Section 12 was filed, which was allowed and the petitioner was directed to produce the minor children before the Court on 22.8.2015- petitioner filed an application for recall/modification of the order and also for extension of time- a show cause notice was issued to the petitioner as to why contempt proceedings for deliberate disobedience of order of the Court be not initiated against her- it has come on record that respondent No. 1 is in the habit of consuming liquor and taking drugs - he is taking treatment from the rehabilitation centre Panthaghati - congenial atmosphere is of utmost importance while bringing up the children- order for custody of the minor children was passed on the ground that respondent No. 1 is a businessman who has sufficient amount with him- held, that welfare of the child and not affluence of the parents is a paramount consideration while deciding the question of custody- Court had erred in ordering the production of children and dismissing the application filed by the petitioner- petition allowed and order passed by Civil Judge (Senior Division) set aside.

Title: Aarti Rana Vs. Gaurav Rana and others Page-1066

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a suit seeking permanent prohibitory injunction- they filed an application for amendment of the plaint to incorporate the relief of possession- held, that relief of injunction proceeds on the premises that a person claiming such relief is in possession of the property- the date of dispossession of the plaintiffs was not pleaded - plaintiffs could have sought injunction if they were in possession and if they are out of possession only then they can seek relief of possession- both these pleas are self-contradictory and cannot be claimed simultaneously – amendment makes out a new case- it was also not pleaded as to why the amendment could not be sought earlier despite exercise of due diligence- application dismissed.

Title: State of HP & anr. Vs. Saunu Ram & ors. Page-1053

Code of Civil Procedure, 1908- Order 6 Rule 17- Suit listed for defendants evidence- defendant sought an amendment to written-statement to incorporate the plea that the suit property was self acquired in the hands of plaintiff – he also sought permission to correct the khasra numbers wrongly written in the written statement-prayer for amendment declined by the court holding that the defendant knew this fact from the very beginning and had not exercised due diligence at the time of filing of written statement- held, that the facts sought to be introduced were known to the defendant from the very beginning - the defendant has failed to exercise due diligence and amendment cannot be allowed at this belated stage- so far as incorporation of the khasra numbers of the suit property after consolidation in the written statement is concerned, the same is liable to be allowed being necessary to pass an executable decree- petition partly allowed.

Title: Data Ram Vs. Ram Dayal & another Page-738

Code of Civil Procedure, 1908- Order 34- Plaintiff filed a suit for possession by way of redemption of the shop- plaintiff pleaded that he had mortgaged the shop with the defendant for consideration of Rs.5,000/-- defendant was requested to accept the amount but he refused- defendant pleaded that he was inducted as tenant and the deed was prepared to defeat the provisions of H.P. Urban Rent Control Act- defendant admitted the execution of the registered deed- it was duly proved that defendant was mortgagee and not a tenant- after the redemption of the mortgage, the defendant is not entitled to protection of Urban Rent Control Act- appeal dismissed.

Title: Hukam Chand Vs. Jayoti Parkash Page-741

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff contended that he is joint owner in possession with his brother over Khasra No.154- defendants were raising construction over the same- defendants stated that there was a katcha passage constructed by Gram Panchayat which was taken over under the scheme PMGSY for the construction of the road- when construction work reached at Khasra No.155, plaintiff raised objection - it was found during demarcation that road was being constructed on Khasra No. 155 and not on the suit land- an application for interim injunction was dismissed by the trial Court which order was upheld in appeal- State further averred that proceedings for ejectment have been initiated against the plaintiff for encroachment upon the government land bearing Khasra No. 155/1 over which the plaintiff has raised construction of three stroyed building- held, that once it was established that road was not being constructed on the land of the plaintiff and the plaintiff was facing eviction proceedings for encroaching upon the land where the construction was being raised, no prima facie case was made out- further interest of public is a relevant consideration while granting/refusing injunction- hence, order passed by trial Court does not suffer from any infirmity- appeal dismissed.

Title: Tulshi Ram Vs. The Superintending Engineer, HPPWD and others Page-1090

Code of Criminal Procedure, 1973- Section 125- Petitioner filed a petition seeking maintenance for herself and her children - respondent denied the paternity of the children and claimed that he was married to 'B' and not the petitioner- petition was dismissed by the Magistrate- revision was allowed by the Additional Sessions Judge-II, Shimla- petitioner had proved her marriage- a Civil Suit filed by respondent against the petitioner that she was not his legally wedded wife was dismissed- respondent has not placed any document on record to show that he was married to 'B' and not to the petitioner- direction was issued to the respondent to appear before the Medical Board for DNA profiling - adverse inference was rightly drawn against him- petition dismissed.

Title: Nand Lal alias Lumcha Ram Vs. Master Kamal & anr. Page-759

Code of Criminal Procedure, 1973- Section 446- Petitioner had stood surety for appearance of the accused- accused jumped the bail- he was asked to show cause but he did not appear- Court held that petitioner had nothing to say in the matter and issued warrant to realise the forfeited amount- held, that forfeiture of personal bond is not a condition precedent to forfeiture of the surety bonds- amount of surety bond can be recovered as if it were a fine imposed by the Court.

Title: Ram Lal Dogra Vs. State of H.P. Page-1085

Code of Criminal Procedure, 1973- Section 482- A criminal case was filed against the petitioner for the commission of offence punishable under Section 186 of IPC - it was contended that permission to investigate was wrongly granted to the police- held, that a public servant was obstructed in the discharge of his official duty- the offence was against the public and the permission was rightly granted to investigate into offence- merely, because record was summoned would not mean that subsequent proceedings conducted by the Magistrate after passing the order calling the record are without jurisdiction- petition dismissed.

Title: Pawan Kumar son of Lalman Vs. State of H.P. Page-1165

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279, 337 and 338 of IPC- the matter was settled between the parties and, therefore, proceedings be quashed-

held, that an offence punishable under Section 279 of IPC is against the society at large- therefore, any settlement will not result in quashing of the proceedings- petition dismissed.

Title: Naresh Rai son Sh. Prahlad Rai Vs. State of H.P and another Page-1163

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offence punishable under Section 498-A read with Section 34 IPC- parties entered into a compromise and prayed for quashing of proceedings- it was duly proved on record that matter was compromised between the parties without any pressure – offence relates to the private dispute and it would be unfair to continue the criminal proceedings after the compromise- petition allowed and the proceedings quashed.

Title: Rashpal Singh son of Harcharan Singh and others Vs. Rimpi wife of Rashpal Singh and others Page-1381

Code of Criminal Procedure, 1973- Section 482- Wife lodged an FIR against the husband and his relatives for the commission of offence punishable under Section 498-A of IPC – she also filed a complaint under Section 12 of Protection of Women from Domestic Violence Act- parties have entered into a compromise and, further proceedings will be abuse of process of law- petition allowed - FIR and the proceedings under Domestic Violence Act ordered to be quashed.

Title: Sikander Chander Bhushan Chauhan and others Vs. State of H.P. and another Page-730

Constitution of India, 1950- Article 226- An antique bell gifted by the Raja of Nepal to the then Viceroy of India in 1903 was stolen from the Indian Institution of Advance Studies in April 2010-the investigation remained inconclusive- held that police had not carried out intensive and extensive investigation but had filed the untrace report after interrogating some suspects -the respondents have omitted to carry out a nationwide hunt to recover the stolen property and to nab the culprits; hence investigation handed over to CBI Shimla.

Title: Indian Institute of Advanced Studies Vs. State of H.P. and Ors. (D.B.) Page-786

Constitution of India, 1950- Article 226- Appeal is covered by the judgment of High Court in case titled as **Saraswati Devi and others vs. State of H.P. and others, LPA No.53 of 2008 decided on** 23rd September, 2015 (I L R 2015 (V) HP 641 (D.B.))- order upheld and appeal dismissed.

Title: Prithvi Chand and others Vs. Divisional Commissioner and others (D.B.) Page-1380

Constitution of India, 1950- Article 226- Applications for allotment of licences for Retail sale of Country Liquor and IMFL were invited- petitioners were declared successful – they deposited 5% of licence fee which was duly accepted by respondent- respondent, however, notified the retail units afresh including the outlets already allotted to the petitioners – respondent contended that no offer was received for many units and, therefore, they were re-clubbed with other units and a fresh advertisement was issued – allotment in favour of petitioner was not confirmed by Excise and Taxation Commissioner- held, that when allotment in favour of the petitioner was not confirmed and the decision to re-club the units was taken in the interest of revenue, no fault can be found with the same - mere deposit of 5% of the amount by petitioner will not give rise to any right of allotment- since, allotment

had not been confirmed, therefore, there was no requirement of following the principles of natural justice- petition dismissed.

Title: Sumit Gupta and others Vs. State of Himachal Pradesh & others (D.B.)

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Constitution of India, 1950- Article 226- Clause 5(c) of the Policy provides that when one or more persons of the family of the deceased were already in government job or employment of Autonomous bodies Boards/Corporations of the State or Central Government, employment assistance, under any circumstances, would not be provided to the second or third member of the family- however, in case widow makes a representation that her employed sons/daughters were not supporting her, her request could be considered- held that in a case where a widow is not possessing the minimum qualification or due to any other reasons, she does not intend to seek employment and makes a representation carving out sufficient reason, the Authority may consider such cases sympathetically.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226 - Clause-7 of the policy for appointment on compassionate ground provides the power to relax the educational qualification and the age limit - therefore, the compassionate appointment cannot be refused to class-IV posts on the basis of age/education disqualification.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226- Deputy Commissioners were directed to ensure that the land is transferred for the construction of Gosadans to the respective Panchayats within a period of three months and to submit the amount to be incurred for the construction of Gosadans- Deputy Commissioners filed affidavits in compliance of the directions of the High Court outlining the steps taken by them- direction issued to Director Animal Husbandry to release the necessary funds for the construction of Gosadans- Panchayati Raj Institutions also directed to ensure that funds are made available for the construction of Gosadans- Superintendent of Police directed to ensure the compliance and to file a status report after every three months- Panchayat also directed to adopt micro-chipping number process on private/stray cattle- Chief Secretary directed to take disciplinary action against the Superintendent Engineer, Commissioner, M.C. Shimla, Executive Officers of all the Municipal Councils, Nagar Panchayats and Pradhans of the Gram Panchayats in whose jurisdiction stray cattle are found on the road- Union of India directed to consider to enact a legislation to prohibit slaughtering of cow/calf, import and export of cow/calf and selling of beef or beef products within three months- Union of India directed to provide necessary funds to the State Government for providing fodder to cows /stray animals within three months.

Title: Bhartiya Govansh Rakshan Sanverdhan Parishad, H.P. Vs. The Union of India & ors. (D.B.) Page-1108

Constitution of India, 1950- Article 226- Father of the petitioner died in service in the year 1994 when the petitioner was minor - the mother of the petitioner desired that her son be considered for compassionate employment on his attaining the age of maturity- the respondent also issued a letter to the mother of the petitioner to this effect-after qualifying his 10+2 the petitioner applied for being appointed on compassionate ground- the respondents verified the background of the petitioner and on finding that the family was still living in destitution and needed employment assistance, recommended the case-the

case was rejected by the respondents in the year 2013 on the ground of delay-held that, the aim of providing employment assistance on compassionate ground was to help the family which has come to a naught after death of the breadwinner-once the family of the petitioner was found to be living in destitution and in need of employment, the case could not be rejected on the ground of delay when delay is not attributable to the petitioner-the petitioner has acted promptly on the assurance given by the respondents- writ petition allowed with the directions to the respondents to consider petitioner's case afresh and pass orders within three months.

Title: Lalit Kumar Vs. Union of India and others Page-819

Constitution of India, 1950- Article 226- Father of the petitioner was working as Constable in the police department - he died while in services- petitioner applied for appointment on compassionate ground which was rejected on the ground that family income of the petitioner exceeds the ceiling fixed by the government- held, that Government is not to take into consideration the terminal benefits and the income from the family pension while computing the income of the family - decision quashed and the Government directed to take a fresh decision in accordance with the judgment.

Title: Sandeep Kumar Vs. State of H.P. and another Page-1239

Constitution of India, 1950- Article 226- Father of the petitioner died in service- petitioner applied for appointment on compassionate ground on attaining the age of majority and after completing 10+2 - the appointment was denied to the petitioner on the ground of his marriage - held that, compassionate appointment cannot be claimed as a matter of right and can be granted as per the scheme/Policy/ Regulations occupying the filed- since the petitioner was married son of the deceased, he could not be considered as dependent and the appointment was rightly declined-writ petition dismissed.

Title: Vinod Kumar Vs. Union of India and others (D.B.) Page-893

Constitution of India, 1950- Article 226- Father of the petitioner was working as postman who died while in the service- petitioner applied for grant of appointment on compassionate ground- Selection Committee found that petitioner was not living in indigent circumstances and the case was rejected- Administrative Tribunal issued a direction to consider the case in the next meeting – it was contended on behalf of the Department that family of the employee had received the terminal benefit and was getting the family pension, family was having additional income from landed property and the case was rightly rejected- scheme provided that a balanced and objective examination of financial condition of the family is required- no maximum income slab was provided in the scheme which can be made the basis for rejecting the claim on compassionate ground- grant of terminal benefits and income from the family pension cannot be equated with the employment assistance on compassionate ground and case could not have been rejected on the basis of same- there is no infirmity in the order passed by Tribunal- petition dismissed.

Title: Union of India and others Vs. Ram Kishore (D.B.) Page-1367

Constitution of India, 1950- Article 226- Father of the petitioner was working as Beldar on daily wages who died while in the service- petitioner filed an application for appointment on compassionate ground which was rejected on the ground that family income of the petitioner exceeded ceiling fixed by Government- held, that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground- when no income ceiling has been fixed in the scheme, the claim of the petitioner

cannot be rejected on that ground - respondent directed to examine the case of the petitioner and to take a suitable decision in accordance with the law.

Title: Sunil Kumar Vs. State of H.P. and others (D.B.) Page-1383

Constitution of India, 1950- Article 226- Father of the petitioner was working as semi skilled worker who died in the service- petitioner filed an application for appointment which was rejected on the ground that family income of the petitioner exceeded ceiling fixed by the Government- held, that grant of terminal benefits and income from the family pension cannot be equated with the employment assistance on compassionate ground - when no income ceiling has been fixed in the scheme, the claim of the petitioner cannot be rejected on that ground- respondent directed to examine the case of the petitioner and to pass an order within a period of 6 weeks.

Title: Gian Chand Vs. State of H.P. and others (D.B.) Page-1374

Constitution of India, 1950- Article 226- Father of the petitioner no. 1 and husband of petitioner no. 2 expired on 1.8.1999 while in service- petitioner No. 2 applied to the respondent for appointment on compassionate ground, but her application was rejected in the year 2000- petitioner No. 1 also applied for appointment on compassionate ground which application was also rejected on 23.6.2005- writ petition was filed on 12.5.2009- held, that the purpose of compassionate appointment is to provide immediate succor to the family- when the first application was rejected in the year 2000, and the writ was filed in the year 2009, petitioners are caught by the doctrine of delay, laches and waiver- the very purpose of granting appointment on compassionate ground had lost efficacy by efflux of time.

Title: Abhishek Thakur and another Vs. General Manager, SBI and others (D.B.)
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Constitution of India, 1950- Article 226- H.P. University issued advertisements for filling up the posts of Assistant Professors – however, process was never completed – a writ petition was filed and it was directed that process be completed within three months- SLP filed by the University was dismissed - interviews were conducted but again process was not completed- a writ petition was filed and direction was issued to re-consider all the recommendations made by Selection Committee from time to time- Executive Council took a decision to hold fresh interviews after calling fresh applications without considering recommendations made by the Selection Committee- a writ petition was filed against this decision - University filed a reply pleading that petitioners are ineligible as they had not qualified NET/SLET/SET - petitioners admitted that they had not qualified NET/SLET/SET but contended that they were exempted as they had been awarded Ph.D. degree- UGC had resolved that all the candidates having M. Phil. degree on or before 10.7.2009, Ph.D. degree prior to 31.12.2009 or who had registered themselves for the Ph.D. before this said date, but were awarded degree subsequently were exempted from the NET- Central Government did not agree with this resolution and insisted upon qualifying NET/SLET/SET- this direction of central govt. was upheld in ***P. Suseela & ors. Vs University Grants Commission & ors. (2015) 8 SCC 129*** – petitioners had only right to be considered for appointment but no right of appointment – since, petitioners had not qualified NET/SLET/SET, therefore, their petitions are not maintainable and are dismissed.

Title: Dr. Nitin Vs. H.P. University & anr. Page-797

Constitution of India, 1950- Article 226- Petition dismissed in view of judgments titled **State of H.P. and others versus Gehar Singh, (2007) 12 Supreme Court Cases 43 and Gauri Dutt & ors. versus State of H.P., Latest HLJ 2008 (HP) 366.**

Title: State of Himachal Pradesh and another Vs. Jarm Chand (D.B.) Page-1305

Constitution of India, 1950- Article 226- Petitioner appeared in Teachers Eligibility Test- petitioner contended that the answer to question No. 13 indicated as 'C' is incorrect- the annexure relied upon by the petitioner shows that the correct answer is 'D' - similarly correct answer to question No. 25 is 'D' –answer to question No. 29 is not correct and the same is ordered to be deleted- Board is directed to re-check the papers and to prepare fresh merit list.

Title: Rajnesh Vs. Himachal Pradesh Board of School Education, Dharamshala & another Page-734

Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Civil Judge (Junior Division) in Himachal Pradesh and qualified the preliminary examination- however, he failed to qualify the main written (narrative) examination- petitioner assailed his non-selection on the ground that there was tempering in his answer books more particularly relating to Hindi and Criminal Law- petitioner seeks roving inquiry to re-scrutinize the entire record of selected candidates- It was not specified at whose instance cuttings were made in the answer sheets of the petitioner - the allegations are vague and based upon suspicion- Court cannot direct roving or fishing inquiry- petition without merits, hence, dismissed.

Title: Ashutosh Parmar Vs. State of Himachal Pradesh and others (D.B.) Page-773

Constitution of India, 1950- Article 226- Petitioner applied for admission to 5 year B.A. L.L.B course- he deposited the amount of Rs. 32,900/- on admission- subsequently, he got admission in the Punjab University Regional Centre, Ludhiana- he surrendered the seat and applied for refund which was declined- held, that Educational Institution cannot act like commercial establishment - fee can be refunded in case of surrender of the seat if the surrendered seat is filled, but if seat remains vacant, there is no question of refund of fee - the University had taken a specific stand that seat vacated by the petitioner had remained vacant and was not filled by any other person- therefore, refund of the fee cannot be directed in these circumstances.

Title: Anubhav Bansal Vs. H.P. University and others Page-1100

Constitution of India, 1950- Article 226- Petitioner applied for appointment on compassionate ground on the death of his father and his claim was rejected- directions were given in the writ to re-consider the case- claim of the petitioner was again rejected on the ground that income of the family does not fall under the income ceiling fixed by the Government- held that, family pension and other retrial benefits received by the family of the deceased are not to be included in the family income to deny the compassionate appointment - the scheme of 1990 also does not prescribe any income slab- writ petition allowed and the impugned order quashed with the direction to re-consider the case of the petitioner.

Title: Yudhvir Singh Vs. State of Himachal Pradesh and others (D.B.) Page-951

Constitution of India, 1950- Article 226- Petitioner challenged the order of Assessing Authority PWD-II District Solan on various grounds-petition contested on the plea of maintainability as efficacious remedy of filing of appeal was available- writ petition permitted to be withdrawn with liberty to file an appeal within three weeks - further time spent in prosecuting this petition shall be excluded while computing the period of limitation in filing the appeal.

Title: M/s Trishul Traders and another Vs. State of H.P. and others (D.B.)

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Constitution of India, 1950- Article 226- Petitioner filed a public interest litigation- respondent contended that petition has been filed to espouse private interest – held, that it is duty of the Court hearing public interest litigation to be satisfied about the bona fides of the petitioner and that he is espousing the cause of the public through such litigation - any abuse of public interest litigation has to be viewed very seriously- petition was dismissed by respondent No. 9 after conducting the inquiry which shows that petitioner is filing petition with malafide objectives and for vindication of his personal grievances- the process of the Court cannot be abused for oblique considerations- petition dismissed.

Title: Satish Kumar Singh Vs. Union of India and others (D.B.) Page-822

Constitution of India, 1950- Article 226- Petitioner filed a writ petition for directing the respondent to carry out necessary repairs and to make the road functional- held, that petitioner has no right to file such petition – however, in view of public interest, State directed to do needful as per applicable rule.

Title: Narender Kumar Vs. State of Himachal Pradesh and others(D.B.)

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Constitution of India, 1950- Article 226- Petitioner filed a writ petition which was opposed on the ground that a writ petition seeking similar relief was filed before Calcutta High Court by the wife of the petitioner which was dismissed- petitioner contended that the findings recorded in the petition filed by his wife are not binding upon him and that issues raised in the writ petition were not properly appreciated by Calcutta High Court - wife of the petitioner had sought same relief which has been sought by the petitioner - Calcutta High Court had discussed all the issues raised by wife of the petitioner and had ordered the dismissal of the petition on merits- no appeal was preferred against the judgment of Calcutta High Court- if the questions were not properly addressed by the Calcutta High Court, the remedy was to file an appeal before the Supreme Court and not another writ petition- petition dismissed with the costs of Rs.1 lac. Title: Satish Kumar Singh Vs. Union of India and others (D.B.) Page-822

Constitution of India, 1950- Article 226- Petitioner filed an application for establishment of Kisan Sewa Kendra, which was rejected on the ground that property offered by the petitioner was not suitable for establishing Kisan Sewa Kendra and the offered plot was against the IRC (Indian Road Congress) 2009 norms- held, that merely because IRC guidelines have no statutory value do not mean that they cannot be taken into consideration while deciding the suitability- however, petitioner cannot claim any negative parity by saying that respondent had violated the norms of IRC 2009 in other cases as well- the purpose of prescribing 100 meters distance of the road intersection was to ensure safety, therefore, petitioner cannot have any reason to complain - petition dismissed.

Title: Mamta Devi Vs. Union of India and others Page-1341

Constitution of India, 1950- Article 226- Petitioner had filed a writ petition for quashing of the order of allotment- main relief was sought against respondent No. 5, a co-operative society- held, that a co-operative society does not fall within the definition of State or instrumentality of the State and no writ petition lies against it- petitioner permitted to withdraw the petition with liberty to initiate appropriate proceedings.

Title: Pushpa Sharma Vs. State of H.P. and others (D.B.) Page-1356

Constitution of India, 1950- Article 226- Petitioner sought a writ of mandamus seeking a direction to the respondents to acquire the land and to pay the compensation from the date of taking of possession- petitioner claimed that notification was issued for acquiring 0-01-89 hectares of the petitioner's land- however, the petitioner was dispossessed from his entire land- he filed a civil suit in which it was held that respondent No. 2 had encroached upon the entire area of the petitioner but no direction could be issued for acquiring the remaining land- held, that the right to hold the property is not only constitutional right but also a human right which cannot be taken away without following due course of law- it was found on the basis of demarcation that Khasra No.1464/383 was not acquired but 50% of the area is submerged and remaining 50% is in the danger zone- similarly, points were put towards the end of Khasra No. 1464/383 but it was not acquired – some portion of khasra No.384/1 had submerged and remaining was in the danger zone, although, it was not acquired - Khasra No. 391 was six meters above the water level- report clearly shows that un-acquired land was being used by the respondents- therefore, direction issued to acquire the land of the petitioner bearing Khasra No. 1464/383 and Khasra No. 384/1.

Title: Prem Lal Vs. State of Himachal Pradesh and others Page-1011

Constitution of India, 1950- Article 226- Petitioner sought directions against the respondents to grant permanent registration to its Unit and not to pass any penal orders against it- Reply also filed- Respondents directed to examine the representation of the petitioner, dated 22nd March, 2012, and to pass appropriate orders--the petitioner also given liberty to file fresh representation before the respondents encapsulating all the grounds taken in the writ petition- time bound directions issued to the respondents.

Title: Monal Potteries & Ceramics (Pvt.) Ltd. Vs. State of H.P. and others Page-821

Constitution of India, 1950- Article 226- Petitioner sought directions to the respondents to enter his name in the column of ownership in respect of land detailed in the petition- Reply also filed by the respondents- writ petition disposed off with the directions to respondent No. 2 to examine the case of the petitioner in light of the averments contained in the writ petition, along with annexure appended thereto, read with the Rules occupying the field, within six weeks.

Title: Kawaljeet Singh Duggal Vs. State of H.P. and others (D.B.) Page-818

Constitution of India, 1950- Article 226- Petitioner sought directions to respondents to not to merge Branch of K.C.C Awha Devi with Samirpur Branch- reply filed justifying the merger being the decision taken by higher authorities as the branch was running in loss- held that the writ petitioner has not challenged the proceedings of the meeting in which this decision was taken-it is a prerogative of the concerned authorities to take the policy decision and the court cannot sit in appeal to decide the correctness of the policy- since the decision making process was not challenged- petition is not maintainable- petition dismissed.

Title: Surjeet Singh Vs. State of Himachal Pradesh and others (D.B.) Page-924

Constitution of India, 1950- Article 226- Petitioner took admission in 2nd semester M.Com. (distance learning) in which she failed- after re-appearing in 2nd semester examination, she found that she had obtained 52 marks out of 100 marks thereby making an aggregate of 198 marks out of 400 marks which was less than 50% - she made a representation for awarding 2 grace marks, so that her aggregate could become 50%- request was accepted and consolidated mark sheet was issued- subsequently, a letter was issued by the University for returning the mark-sheet on the ground that grace marks were inadvertently added- necessary correction had been made in the office record and the certificate be returned for making correction in the same- petitioner informed the University that she had already acquired the UGC-NET examination and had taken admission in Ph.D course on the basis of the result declared by the University- any modification in the mark-sheet will prejudice her entire career - respondent/University claimed that petitioner was claiming two marks to make her aggregate 55% which is not permissible as per Ordinance- Ordinance provides that 1% of total aggregate marks can be awarded as grace marks, if the candidate had failed to obtain first or second division and addition of such marks would increase the percentage- reading of the ordinance shows that the marks can be awarded to the candidate who has passed examination but has failed to obtain first or second division and if by the addition of such grace marks he is enabled to be placed in first or second division - grace marks can be awarded not only to pass examination but to improve the part of the examination - ordinance does not provide that marks shall only be awarded at the end of the examination and cannot be awarded after the end of the semester- therefore, University had rightly awarded the marks to the petitioner at the end of the semester but had wrongly withdrawn the same.

Title: Rupali Gupta Vs. State of H.P. and others Page-1024

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer on contract basis - he sought regularization of services- record shows that petitioner worked on contract basis and thereafter worked as guest faculty – it was specifically mentioned in the agreement that contractual appointment will not confer any right for regularization and, therefore, he cannot claim regularization- petition dismissed.

Title: Joginder Pal son of Shri Prem Dass Vs. Baba Balak Nath Temple Trust Deoth Sidh and others Page-1131

Constitution of India, 1950- Article 226- Petitioner was appointed as Imam of Masjid- he submitted a conditional resignation which was accepted – however, the petitioner was permitted to work as an honorary Imam and in lieu thereof he was allowed to retain the accommodation- some news item appeared against the petitioner after which a decision was taken to discontinue the services of the petitioner from the post of honorary Imam and to vacate the accommodation- petitioner filed a representation but when no action was taken, he filed the present petition- record shows that contention raised by petitioner had already been rejected in RFA no. 484 of 2011, hence, present proceedings would be barred by the principle of res-judicata- petitioner filed a writ petition after eight years without explaining delay- petition dismissed.

Title: Mumtaz Ahmad Vs. State of H.P. and others Page-1345

Constitution of India, 1950- Article 226- Petitioner was charge-sheeted on the ground that he had received an illegal gratification for recruitment in the army- an inquiry was conducted- petitioner had also written a letter of pardon and had asked for mercy- the Inquiry Officer recommended the punishment of reduction to lower stage- held, that there

was no material on record to show that a false complaint was made against the petitioner- order passed by the Tribunal was speaking one- petition dismissed.

Title: Lekh Ram Vs. Union of India and others (D.B.) Page-1396

Constitution of India, 1950- Article 226- Petitioner was compulsorily retired from service- he filed a writ petition and all the service benefits were granted to him- however, no monetary benefits were granted for the period- he was out of service- held, that petitioner was out of service because of the act of the respondent- it is not the case of the respondent that petitioner was gainfully employed during the period- hence, 50% salary granted to the petitioner.

Title: Trilok Chand Vs. Union of India and others (D.B.) Page-1243

Constitution of India, 1950- Article 226- Petitioner was diagnosed for 'Choroidal Neovacular Membrane' in his right eye- he underwent treatment at Dr. Rajinder Prasad Centre for Ophthalmic Sciences, New Delhi- he filed a claim for reimbursement of Rs. 65,000/- which was rejected on the ground that petitioner had not undergone hospitalization for treatment and reimbursement was not permissible for treatment taken as outdoor patient- record shows that petitioner was admitted in the Hospital in the morning for treatment and was discharged in the evening - it cannot be said that hospitalization under the Rule has to be overnight- Bank had decided to consider the similar claims when the treatment was taken for a few hours in the hospital – Bank was not justified in denying the claim of the petitioner- petition allowed and the respondent directed to reimburse the amount paid by the petitioner.

Title: Ravinder Parshad Bhardwaj Vs. H.P. Gramin Bank Page-1020

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages as Beldar- services of 1087 workmen including petitioner were retrenched- retrenchment orders of 43 workmen were set aside by the Labour Court- their services were re-instated but the services of the petitioner were not re-instated, although, he was senior- petitioner raised an industrial dispute but the case was not referred to the Labour Court on account of delay- held, that there is no limitation for reference to the Labour Court- order passed by Labour Commissioner set aside with the direction to refer the dispute to the Labour Court.

Title: Inder Singh son of Bazira Ram Vs. State of H.P. through Secretary and others Page-1127

Constitution of India, 1950- Article 226- Petitioner was holding the additional charge of Junior Accountant- he prayed for the relief of special pay which was denied- he filed a writ petition which was allowed- appeal was preferred against the order of the writ court- held that petitioner had discharged the additional duties and is entitled to special pay in terms of bye-laws- writ petition dismissed.

Title: Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited and others Vs. Shri Kartar Singh (D.B.) Page-1077

Constitution of India, 1950- Article 226- Petitioner was promoted temporarily for the period of three months – it was specifically provided in the appointment order that the order will not confer any right upon the petitioner- petitioner accepted the offer and continued in service- subsequently he filed a writ petition challenging the order which was dismissed-

held, that petitioner has no cause as he was appointed temporarily and no rights were conferred upon him- appeal dismissed.

Title: Bhagi Rath Sharma Vs. State of HP and others (D.B.) Page-1373

Constitution of India, 1950- Article 226- Petitioner was regularized as work charge Fitter Grade-II and was regularized against the said post - respondent issued a notice calling upon petitioner to exercise option, whether he wanted to be regularized as Beldar or Mechanic Grade-II - petitioner was never asked whether he wanted to be regularized on the post against which he was working and was regularized i.e. Fitter Grade-II- it was contended that petitioner was wrongly placed in the cadre of Fitter Grade-II, and notice was issued on detection of the mistake - however, the notice does not state that petitioner was wrongly placed in the cadre of Fitter Grade- II by mistake- notice was issued without giving an opportunity of hearing to the petitioner- notice quashed with liberty reserved to the respondent to pass appropriate order after affording the opportunity of hearing to the petitioner.

Title: The State of H.P. and others Vs. Shankar Lal (D.B.) Page-1089

Constitution of India, 1950- Article 226- Petitioner was working as a Technician and was Non Matriculate- he sought pay parity with the Technicians who were matriculates- respondent contended that there were two different categories of technicians, one of matriculates and the other one of non matriculates- writ petition was allowed by a Single Judge- held, that pay parity can be claimed when the functions, responsibilities and the duties are similar- hence, order passed by the Single Judge set aside.

Title: Himachal Pradesh State Electronics Development Corporation Ltd. Vs. Vijay Sikka (D.B.) Page-813

Constitution of India, 1950- Article 226- Petitioner was working as an extra department agent on behalf of respondent - respondent notified vacancy relating to the cadre of postman- petitioner appeared in the examination and qualified- respondent did not depute the petitioner and other selected persons for training- this mistake was brought to the notice of the department who found that petitioner and other selected persons had not qualified and only one candidate 'N' had qualified who was already deputed for training- petitioner contended that department had wrongly held without hearing him that marks were not correctly recorded and there are some interpolations and mistakes on the face of the record- Tribunal held that no opportunity of hearing was required and mistakes were apparent on the face of the record – held, that mere selection does not create any indefeasible right to claim appointment- Competent Authority can reject the recommendation - a selected candidate cannot plead violation of the principle of natural justice- appeal dismissed.

Title: Rajinder Kumar Vs. Union of India and others (D.B.) Page-1357

Constitution of India, 1950- Article 226- Petitioner, a registered society, claimed that drivers and conductors of the society are harassed at the instance of the Regional Manager, H.R.T.C- respondent No. 6 is deputing conductor to check the papers of the bus of the society – respondent stated in the reply that direction had been issued to stop checking papers of buses- petitioner relied upon news paper clipping in support of its plea- held, that news item is in the nature of hearsay secondary evidence and does not have any evidentiary value- however, it was admitted in the letter written by respondent that employees of the HRTC had been deployed at the Bus Stand to check over timing and route permit – further held that employees of the HRTC have not been conferred with any jurisdiction or Authority

to check the documents - respondent No. 6 and its employees restrained from checking papers of the vehicle of the private bus operators.

Title: Private Bus Operator Welfare Society Vs. State of H.P. and others Page-1350

Constitution of India, 1950- Article 226- Petitioner, respondent no. 6 and others appeared for the post of DPE- respondent No. 6 was selected - petitioner claimed that he had superior merit vis-à-vis respondent No. 6 and he was wrongly ignored- process of appointment had started on 10.5.2007 and notification was issued on 27.5.2008- the norms laid down in the notification could not have been applied retrospectively for awarding the marks- notification dated 10.5.2007 was applicable- Interview Committee had awarded the marks as per this notification and there is no infirmity in the marks awarded by the Interview Committee- petition dismissed.

Title: Dinesh Kumar Vs. State of Himachal Pradesh and others Page-747

Constitution of India, 1950- Article 226- Petitioner's father retired on 30.09.2003 and passed away on 10.10.2003- request of the petitioner for employment on compensatory ground declined-order of denial challenged by way of writ petition-held, that the case of the petitioner does not fulfill the requirements laid down in the policy framed in the year 1990- request rightly denied- petition dismissed.

Title: Jagat Pal Vs. Himachal Pradesh State Electricity Board Page-905

Constitution of India, 1950- Article 226- Policy on compassionate appointment provides that if the dependent of the employee is minor on the date of the death, the offer of the appointment would be kept open till the eldest son/un-married daughter attains the age of 21 years- thus, cause of action will arise on the day when the claim is presented by filing an application for appointment on compassionate grounds- the date of the death of the employee is not to be taken into consideration while seeing the applicability of the policy- similarly, the date on which application comes for consideration before the Competent Authority is also of no importance as the applicants cannot be made to suffer for the inaction on the part of the Authorities.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226- Respondent was engaged as a fitter- he sustained injuries and was permitted to join his service- he was retrenched subsequently- he raised an industrial dispute – Labour Court dismissed the petition- workman filed a writ petition which was allowed and his termination was declared illegal- order in the writ petition was challenged in the appeal- Labour Court returned the findings on the basis of evidence – it is not the case that Labour Court had taken into account inadmissible evidence or had returned findings without any basis- held, that findings of fact reached by the Tribunal as a result of appreciation of evidence cannot be questioned in Writ proceedings- employee had not even joined the service despite the order in his favour- employer had specifically averred that employee had voluntarily left the services which was not denied specifically- held that award was passed by Labour Court rightly and the Writ Court had wrongly set the same aside- petition allowed.

Title: M/s Krishna Paper Board Industries Vs. Rakam Singh and another (D.B.)
Page-1335

Constitution of India, 1950- Article 226- Respondents were held entitled to the benefit of Non-Executive Promotion Policy by the Central Administrative Tribunal- the applicants feeling aggrieved challenged the order by way of present petition- held that, the order passed by the Tribunal is well reasoned and requires no interference - the decision to regularize the services of the respondents was taken long back and its implementation was delayed for no fault on their part- the benefit of NEPP Scheme could not have been denied to them-writ petition dismissed.

Title: Union of India and others Vs. Sanjay Kumar and others (D.B.) Page-949

Constitution of India, 1950- Article 226- Selection and appointment of respondent No. 2 was quashed by C.A.T., Chandigarh Bench- the employer feeling aggrieved challenged this order by way of present writ – respondent No. 2 did not feel aggrieved and challenge the order- held that, the employer /petitioner has no locus standi to challenge the order quashing appointment of respondent No. 2 when respondent No. 2 had not felt aggrieved and had not challenged the same- petition dismissed.

Title: Principal, Jawahar Navodaya Vidyalaya, Kothipura Vs. Suresh Kumar and others Page-922

Constitution of India, 1950- Article 226- State Government framed a policy for providing employment assistance on compassionate grounds for the sons, daughters and near relations of those government employees who had died in harness - policy provided that compassionate appointment should be given only in a case, where the family of the deceased is left in indigent circumstances- policy was amended from time to time- Government Department had issued a letter that maximum income limit for a family of four persons was Rs. 1.50 lacs, by taking into account the amount received by the family towards family pension and other terminal benefits- clause 10(c) of the Policy provides that while making appointment on compassionate grounds the Competent Authority has to keep in mind the benefits received by the family on account of ex-gratia grant, family pension and death gratuity- no income ceiling was provided- held, that the purpose of appointment on compassionate grounds is to provide immediate assistance to the destitute family- family pension and other retiral benefits cannot be equated with the employment assistance- grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground – instructions issued by the Department cannot amount to amendment of the policy- hence, the denial of the employment assistance to the dependents of the deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226- The dependent of the employee who died in harness cannot make a claim for appointment after considerably long period- the employment on compassionate ground is not a vested right which can be exercised at any time- Clause-8 of the policy provides the time limit of three years for making the application and in case of minor, the date of attaining the age of 21 years by the eldest son/un-married daughter- held that clause is reasonable.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226- The dependents of a deceased employee cannot claim the appointment on compassionate ground as a matter of right- their claim can be considered only in accordance with the policy framed by the Government- the discretion has

been conferred upon the authority to offer the appointment and to see whether a person is to be appointed against a Class-IV or Class-III post or on daily wage basis –when a person had accepted the offer of appointment and had joined without any demur; he is precluded from claiming that he should have been appointed on higher post or should have been given appointment on regular basis- therefore, offer of appointment on contract basis is legal.
Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-840

Constitution of India, 1950- Article 226- The husband of petitioner No. 1 and father of petitioner No. 2 died in service in 2007 - petitioner No. 1 applied for appointment on compassionate ground and her case was approved subject to the condition that she would have to pass matriculation examination within 2 years-she failed to do so hence her case was rejected-thereafter petitioner No. 2 applied and her case was also rejected on the ground that the case of the petitioner No. 1 stands already rejected- held that, since the petitioner No. 1 did not fulfill the minimum education qualification as prescribed under the rules her case was rightly rejected by the committee - the case of the petitioner No. 2 was rightly not considered-petition dismissed.
Title: Taro Devi and another Vs. Union of India and others Page-891

Constitution of India, 1950- Article 226- Tribunal directed that petitioner no. 2 is entitled for regularization as Driller subject to availability of post- reliance was placed upon judgment of High Court in case titled **Sohan Lal and another versus State of Himachal Pradesh and another CWP No.939 of 1996** decided on 08.08.1996- held, that matter was clearly covered by judgment of High Court in **Sohan Lal and another Vs. State of H.P. & another** and there was no infirmity in the order passed by Tribunal.
Title: State of H.P. and another Vs. Inder Singh (D.B.) Page-1304

Constitution of India, 1950- Article 226- Tribunal had conferred work-charge status upon the employees on completion of 10 years of service- employer contended that in absence of work-charge establishment, no direction for conferring the status could have been given by the Tribunal- held, that employer had conceded before the Tribunal that work-charge status was required to be conferred upon the employees- parties are bound by pleading subject to the amendment- there is no infirmity in the order passed by Tribunal- petition dismissed.
Title: Himachal Pradesh Housing and Urban Development Authority and another Vs. Roshan Lal (D.B.) Page-1325

Constitution of India, 1950- Article 226- Writ Court directed to consider the case of writ petitioner for regular appointment – an appeal preferred against this order- held, that since the Writ Court had only directed to consider the case of the writ petitioner for appointment on regular basis, therefore, no rights have been determined- Appeal is without merits, and is dismissed.
Title: Chairman-cum-Deputy Commissioner and another Vs. Seema Mehta (D.B.)
Page-930

Constitution of India, 1950- Article 226- Writ Court had directed the respondent to frame the scheme to provide promotional avenues to the petitioner and similarly situated persons- held, that State can be directed to consider framing of policy or scheme and a direction cannot be issued to the State to frame scheme- order modified and the State directed to consider the framing of policy within a period of 12 weeks.
Title: H.P. Khadi & Village Industries Board Vs. Haria Ram and others (D.B.) Page-1378

Constitution of India, 1950- Article 226- Writ Court had quashed the decision passed by Secretary (MPP & Power) and had relegated the parties to the Civil Court, which is also seized of the matter- no findings were recorded regarding the validity or otherwise of the order made by the Board Level Disputes Settlement Committee- a civil suit is pending between the parties and Civil Court had to determine all the issues- appeal dismissed.

Title: M/s Arsh Casting Pvt. Ltd. Vs. H.P. State Electricity Board and others (D.B.)

Page-1232

Contempt of Courts Act, 1971- Section 10- Petitioner contended that respondent had not complied with the direction of the Court- however, record shows that petitioner was not party to the writ petition and, therefore, she could not have preferred the writ petition- petition dismissed.

Title: Jyoti Bala Vs. S.K.B.S. Negi and another (D.B.) Page-1330

'H'

H.P. Land Revenue Act, 1954- Section 16- An application for partition was filed which was allowed- land was being partitioned by metes and bounds- application was filed stating that the valuable land located adjacent to the road was not partitioned- Assistant Collector First Grade ordered that undivided land be also distributed in accordance with the share holding in the undivided estate – Finance Commissioner held that the order directing the inclusion of undivided road side land amounted to the review of the order which could not have been carried out without obtaining sanction from higher officials, however, he directed Assistant Collector First Grade to afford opportunity to all affected parties and to carry out the amendment in the mode of partition- Assistant Collector First Grade refused to carry out partition on the ground that he had no power of review- held, that when the order was passed by the Financial Commissioner directing the Assistant Collector First Grade to carry out partition of the un-partitioned land after hearing all the parties, a permission was granted to review the order and Assistant collector First Grade had wrongly held that he had no jurisdiction to review the order.

Title: Banti Devi & others Vs. Pohlo Ram & others (D.B.) Page-1224

H.P. Land Revenue Act, 1954- Section 38- Plaintiffs were shown to be owners of the suit land in the copy of jamabandi for the year 1991-1992- defendants were shown to be non-occupancy tenants on the payment of the rent- 'D' and others were shown to be owners and 'R' was shown to be tenant in the jamabandi for the year 1967-68- an entry was made vide mutation that 'D' had sold the suit land in favour of 'V'- 'R' admitted on oath that he had relinquished his tenancy right in favour of 'D' and others and 'D' had sold the suit land in favour of the plaintiffs- entry was changed during settlement in favour of the defendants- neither rent receipt nor any other documentary evidence was filed regarding payment of rent by the defendants to the plaintiffs - it was also not proved that any notice was issued to the plaintiffs before changing the entry- entry had been changed without following due process of law.

Title: Karam Chand (dead through LRs) & ors. Vs. Vijay Kumar and another

Page-919

H.P. Urban Rent Control Act, 1987- Section 14- A petition for eviction of the tenant was filed on the ground that tenant is in arrears of rent- Rent Controller held the tenant to be in arrears of rent @ Rs. 5,000/- per annum- Appellate Authority held the tenant to be in

arrears of rent @ Rs. 12,000/- per annum- initially rate of rent was Rs. 700/- per annum which was enhanced to Rs. 5,000/- per annum and subsequently rent was enhanced to Rs.12,000/- per annum- tenant also admitted that he had paid Rs. 12,000/- per annum as rent- Appellate Authority had rightly determined the tenant to be in arrears of rent @ Rs. 12,000/- per annum.

Title: Udho Ram Vs. Jitender Kumar Page-1059

H.P. Urban Rent Control Act, 1987- Section 24 (5)- Landlord sought eviction of tenant on various grounds including bona fide requirement- petition allowed by Trial Court and appeal dismissed by Appellate Authority- Revision against the orders- held that, the power of revision cannot be equated with the appellate jurisdiction - further held that the landlord is best judge of his bona fide needs – the courts below had rightly appreciated the facts and had come to the right conclusion that the landlady had the bonafide requirement of the accommodation – revision without merits and dismissed.

Title: Sham Lal (dead), through LRs Vs. Smt. Rama Sharma Page- 1041

H.P. Urban Rent Control Act, 1987- Section 24 (5)- Rent petition on the change of user by the tenant and making additions and alterations by fixing wooden racks in the shop allowed by the Rent Controller- Appellate Authority reversed the decision- the order of Appellate Authority challenged in Revision- it was proved on record that the premises was rented to run a typing institute and was converted to run a dhaba by the tenant by changing its user- however, it does not automatically result in eviction- mere change of user from one commercial activity to another in the absence of any covenant to the contrary would ordinarily be not a ground for claiming eviction unless any injury or prejudice is caused to the land lord- mere fixing of wooden racks in the shop with the help of nails etc. would not amount to alterations which lead to the impairment in the value and utility of the building- Revision Petition dismissed.

Title: Sain Ram Jhingta Vs. Surinder Singh Page-1027

Himachal Pradesh Municipal Corporation Act, 1994- Section 253- A show cause notice was issued by the Commissioner, M.C. Shimla calling upon the respondent to show cause as to why unauthorized construction be not demolished- respondent filed a reply that construction was made strictly in accordance with the plan sanctioned by M.C. Shimla- J.E. was asked to submit a report who stated that area was approved for residential purposes and not for commercial purposes – respondent is using the premises for commercial purposes- Commissioner passed an order directing the removal/demolition of unauthorized shops- respondent filed an appeal in which it was held that report submitted by J.E. is not per se admissible – opportunity of examination should have been given to the respondent and the Commissioner had committed procedural illegality by passing the order- held, that Commissioner while exercising the power under Section 253 of the Act does not function as a Court and provisions of the Evidence Act are not applicable to the inquiries conducted by him- he exercises quasi judicial power and not administrative/ministerial power- he has to follow the principle of natural justice – provisions of Oaths Act, 1969 are not applicable to the proceedings- there is no question of examination or cross-examination of witnesses – reasonable opportunity means that party must know the issue and the material relied against it and an opportunity must be given to the party to prove its case- respondent never sought any opportunity of cross-examination- no grievance was raised in an appeal that opportunity of cross examination was not afforded- Commission had asked J.E. to submit a status report- respondent could have got her own report prepared and placed it on record,

which was not done - therefore, order passed by Appellate Authority was contrary to settled principles of law and the same is set aside.

Title: Municipal Corporation Shimla through its Commissioner Vs. Savitri Devi Page-1137

Hindu Succession Act, 1956- Section 22- Plaintiff sought declaration claiming his preferential rights to purchase the suit property– suit contested on the plea of maintainability – Trial Court dismissed the suit but the first Appellate Court partly decreed the same- in regular second appeal held, that some of the High Courts were of the view that the Hindu Succession Act cannot be made applicable to agricultural lands whereas some of the High Courts took the contrary view- Supreme Court in one case held that property was not qualified by agricultural use or otherwise- the interpretation was given by Hon'ble Apex Court while construing the provisions of Hindu Women's Rights to Property Act, 1937- further held that question involved is of great importance and is likely to come up repeatedly before the Courts; hence, the matter is required to be referred to larger bench- matter ordered to be placed before Hon'ble Chief Justice for consideration and Constitution of larger bench.

Title: Roshan Lal Versus Pritam Singh & others Page-1168

'I'

Indian Evidence Act, 1872- Section 45- Plaintiff filed a civil suit in which the defendant set up a Will stated to have been executed by 'V'- defendants examined an attesting witness to prove the execution of the Will- plaintiff filed an application for sending the signature of the testator for comparison with the admitted signatures- application was dismissed by the Trial Court- held, that specific mode and manner of proof of valid and due execution of testamentary disposition ousts the applicability of section 45 of the Indian Evidence Act- when the witness of the Will has deposed about its valid execution and his testimony has remained un-shattered, the application for comparison of the signatures cannot be allowed.

Title: Anshul Singhal & another Vs. Vinod Kumar & Others Page-793

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- Accused 'V' had quarreled with the deceased - dead body was found on the next day, when the police went to his house - Accused 'V' fled away but accused 'J' was apprehended - room was found splattered with blood- accused 'J' led the police to the place where he had concealed his blood stained Kurta and Paijama- accused 'V' was arrested and he got recovered spring leaf, mattress and Karchhi- chappals of the deceased were recovered from the house of the accused- post mortem examination found multiple injuries- death was caused due to the injuries sustained on the head, which could have been caused by Kamani-patta- deceased had given beating to accused 'V' which was duly proved on record- PW-8 had heard cries coming from the house of the accused- signs of dragging of the body from the house of the accused to the road were found- it was duly established on record that accused 'V' had committed murder and accused 'J' had assisted him in destroying the dead body- appeal dismissed.

Title: Vipan Kumar Vs. The State of Himachal Pradesh (D.B.) Page-1216

Indian Penal Code, 1860- Section 302 and 307- PW-6 'R' and PW-12 'S' were sleeping when they heard the cries- PW-6 ran towards the spot- PW-12 followed him- PW-12 heard the cries of PW-6 and when he reached at the spot, he found PW-6 in an injured condition- accused was inside the room having one blood stained Khukari in his hand – accused tried

to run away on which PW-12 bolted the door from outside – PW-6 told PW-12 that accused had given Khukari blow to him and 'V' and the accused had killed 'P'- prosecution witnesses had corroborated the testimonies of each other- there was no contradiction in their cross-examination- Khukari was duly identified by the witnesses- medical evidence also corroborated the testimonies of eye-witnesses- accused had taken a plea of insanity but the medical evidence shows that accused was examined much prior to the incident- there is no evidence that accused suffered from the insanity on the date of incident- subsequent medical examination of the accused will also not make any difference – held that plea of insanity was not established and the accused was rightly convicted.

Title: Bhupesh Kumar @ Kaka @ Tinku Vs. State of H.P. (D.B.) Page-956

Indian Penal Code, 1860- Section 302- Appellants along with one co-accused and the deceased were consuming liquor in rented room of the co-accused- a quarrel took place in which accused 'V' hit the deceased with a bottle and accused 'H' hit the deceased with a pressure cooker on the head - deceased succumbed to the injuries- both accused 'H' and 'V' were convicted of the commission of offences punishable under Section 302/34 of IPC - appeals preferred by accused 'H' and 'V' against their conviction and sentence- held, that accused 'H' and 'V' had no intention to kill the deceased but they definitely had the knowledge that injuries inflicted by them on the head of the deceased would result in his death- no motive attributed to both the accused to kill the deceased- absconding from the spot after occurrence does not prove the intention as the instinct of self-preservation is uppermost in the mind of an ordinary man- no previous enmity established between the accused and the deceased- sudden fight took place during the drinks being consumed by the deceased and the accused- both the accused convicted of the commission of offence punishable under Section 304 (Part-II).

Title: Harpal Singh Negi alias Pal Vs. State of H.P . (D.B.) Page-777

Indian Penal Code, 1860- Section 302- Deceased had gone to market to fetch nails but had not returned-the body of the deceased with face smeared with blood was found in the fields in a nearby village by his father and a stone of about 20kg was found placed on the stomach-complainant, the father of deceased suspected the role of accused in this murder as on the date of occurrence son of the accused was going with the deceased and the accused did not allow any person to mix-up with his son- 'H' and 'K' also saw the manner in which the deceased was murdered by the accused-held that, the motive attributed to the accused for killing the deceased is unbelievable- witness H exhibited abnormal conduct by not disclosing the incident witnessed by him from 18-12-2011 to 22-12-2011despite of the fact that he knew the father of deceased well-his further admission that village was very near to the spot and one call could attract the attention of the villagers and still he did not inform the villagers makes his conduct abnormal-witness K had not identified the accused but had merely tried to identify the stones and clothes-he referred to the assailant as a person having long beard and hair and wearing black clothes- his admission that the inhabitants of the village wear black and shabby clothes makes the case doubtful-his version that he met his father and 2-3 other persons and told them about this brawl is also not acceptable- had it been so, other persons and the father of this witness would have informed the police- his conduct is thus also abnormal-neither the version of the eye-witnesses nor the alleged motive of the accused is believable and the accused entitled to benefit of doubt- appeal accepted - conviction and sentence set aside.

Title: Suli Ram Vs. State of Himachal Pradesh (D.B.) Page-935

Indian Penal Code, 1860- Section 342 and 376- **Prevention of Children from Sexual Offences Act, 2012 -** Section 4- Accused allured the prosecutrix from Sarkaghat to Hamirpur on the pretext of purchasing cheaper school bags and raped her in his room- prosecutrix narrated the incident to her mother on return- prosecutrix was aged 16 years 8 month on the date of incident - Medical Officer found abrasion and did not rule out the possibility of sexual assault – mere absence of injuries on the person of the victim is no reason to disbelieve her testimony- consent of minor is immaterial – testimony of prosecutrix was satisfactory- there is no major contradiction in her testimony- held, that in all these circumstances, prosecution has proved its case beyond reasonable doubt- accused convicted.

Title: Sunny Vs. State of H.P. Page-1205

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act 2012-** Section 8- Prosecutrix aged 6 years was called by the accused to old dilapidated structure of HPPWD and was raped – prosecutrix was taken by PW-1 and PW-7- Prosecutrix had corroborated the prosecution version and had denied that she was tutored- PW-1 had seen the prosecutrix bleeding – Medical Officer had also noticed blood on the person of the prosecutrix- prosecution witnesses had supported the prosecution version- there were no major contradictions in their testimonies- accused did not adduce any evidence to rebut the mental state to be presumed under POCSO Act- held, that accused was rightly convicted by the trial Court.

Title: Aman alias Ram son of Shri Ramesh Kumar Vs. State of Himachal Pradesh Page-1244

Indian Penal Code, 1860- Section 376, 506, 323 & 201 - **Protection of Children from Sexual Offences Act 2012-** section 6 - Prosecutrix an orphan, aged about 9-10 years residing in the Kutia of the accused was subjected to vaginal penetrative assault by the accused- the prosecutrix was also beaten up and threatened to be killed in case she disclosed this fact to anyone- the prosecutrix disclosed the occurrence in the school-she categorically spoke about the incident in the court- the medical officer also stated categorically that the victim was sexually assaulted- held that the prosecution has conclusively proved the guilt of the accused- sentence imposed by the trial court proper- appeal dismissed.

Title: Prem Bahadur alias Digamber Nath Vs. State of H.P. (D.B.) Page-932

Indian Penal Code, 1860- Section 377 and 506- Accused was the headmaster of school- he used to show pornographic movies to the victims and to commit unnatural acts with them- he also used to threaten the victims – there were contradictions in the testimonies of the prosecution witnesses – material witnesses were not examined by the prosecution- matter was not reported promptly- no injuries were found on the person of the victims- held, that prosecution had failed to prove its case beyond reasonable doubt- accused was rightly acquitted. Title: State of H.P. Vs. Manoj Kumar (D.B.) Page-788

Indian Penal Code, 1860- Section 498-A & 306**- Indian Evidence Act, 1872-** Section 113-A- wife committed suicide within seven years of marriage and left a suicide note- her husband was tried and acquitted by the trial court-appeal against acquittal- held that, F.I.R lodged by the brother of the deceased does not speak of dowry demands-the allegations of dowry demand made by the brother of the deceased before the court for the first time

amounts to embellishment-the mother of deceased also levelled new allegations on oath that the accused had demanded Rs. 2 lacs from her daughter and he was also disputing the paternity of the child-such facts were not recorded in her statement -mere generalized attribution of an incriminatory role of the accused not enough to draw an inference of cruelty- the suicide note also not ascribing incriminating role to the accused- trial court had rightly appreciated the evidence and had rightly acquitted the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Salesh Sood alias Shalu (D.B.) Page-766

Indian Penal Code, 1860- Section 498-A, 302 and 201 read with Section 34- Deceased was married to accused 'A' – accused started maltreating the deceased on the pretext of not bringing anything from her paternal home- accused demanded 5 lacs but the deceased could only bring Rs. 1 lakh- accused 'A' also deserted the deceased after she gave birth to a daughter- deceased committed suicide by hanging herself from the ceiling fan in her matrimonial home - prosecution witnesses had specifically deposed about demand of dowry and the maltreatment - Medical Officer specifically stated that deceased had died due to strangulation leading to asphyxia and death- no fracture of thyroid bone was detected which is common in case of suicide- this clearly shows that deceased had not committed suicide but was murdered- accused 'A' had sustained injuries which were not explained - ropes were recovered at the instance of accused- murder was committed inside the house and the accused was bound to explain the circumstances leading to the death which they had not done- minor contradictions after the lapse of time are not sufficient to doubt the prosecution case - all the links in the chain of circumstances were proved- trial Court had rightly convicted the accused- appeal dismissed.

Title: Ashwani Kumar son of Dina Nath Vs. State of H.P. (D.B.) Page-1305

Indian Succession Act, 1925- Section 63- Plaintiff claimed that deceased 'R' had executed a Will in his favour and he is owner in possession of the suit land- defendants denied the execution of the Will and claimed that Will was forged- it was duly proved on record that 'S' was the legally wedded wife of the deceased and the defendants No. 3 and 4 were sons of the deceased- Will shows that testator was unmarried- it was not established as to how the propounder of the Will is related to the deceased and what services were rendered by him to the deceased- PW-6 is resident of different village and his presence at the spot is doubtful- plaintiff has failed to remove suspicious circumstances surrounding the Will.

Title: Bhagat Ram Vs. Khushi Ram and others Page-1105

'L'

Limitation Act, 1963- Article 63- Plaintiff filed a civil suit seeking declaration that he had become the owner by way of adverse possession- held, that plaintiff cannot seek declaration that his adverse possession had matured into ownership and he had become owner by way of adverse possession.

Title: Mulkh Raj and another Vs. Mast Ram and others Page-1134

Limitation Act, 1963- Section 5- The Appellate Court condoned the delay of 27 days in filing of the appeal subject to payment of cost of Rs.1000/- - held, that delay of short duration or few days calls for a liberal delineation- there is no infirmity in condoning the delay- revision dismissed.

Title: Ashwani Kumar & ors. Vs. M/s Kehar Winge Agency & ors Page-927

Motor Vehicles Act, 1988- Section 140- Tribunal had dismissed the application under Section 140 of Motor Vehicles Act- held, that while deciding the application under Section 140 the principle of no fault liability has to be kept into consideration- order set aside and the case remanded to the Tribunal to decide the application afresh.

Title: Laxmi Thakur & another Vs. Parvati Devi & others Page-1270

Motor Vehicles Act, 1988- Section 149- Appellant/insurer challenged the award on the ground of collusion between the claimant and the insured – held, that insurer has not led any evidence to discharge the onus; and evidence led by claimant/injured has remained unrebutted- plea that there was collusion between the claimant/injured and owner/insured-cum- driver, was not taken in the reply, hence, the same cannot be entertained for the first time in appeal – appeal dismissed.

Title: Oriental Insurance Company Vs. Rajender Kumar and another Page-1002

Motor Vehicles Act, 1988- Section 149- Award challenged by the Insurer on the grounds that driver of the offending vehicle did not have valid and effective driving licence, and secondly, amount awarded is excessive- held, that no evidence was led by the Insurer to prove that Insured/Owner had not taken all necessary steps before engaging the driver- no evidence was led by the Insurer to prove that the driver of the offending vehicle was not having valid and effective driving licence- further held, that Tribunal had fallen in error in deducting 1/3rd amount towards personal expenses, whereas, deduction should have been 1/4th amount in view of settled law- award modified accordingly.

Title: United India Insurance Company Limited Vs. Balbir Kaur & others Page-1302

Motor Vehicles Act, 1988- Section 149- Claimant had sustained injuries in a motor vehicle accident involving a tractor and a motor cycle- owner and driver of the truck were not impleaded as parties before the Tribunal- it was contended that claimants could not have filed the claim petition without impleading the owner and driver of the tractor as parties and the claim petition was not maintainable- held, that in case of accident, claimants can file a claim petition against one of joint tortfeasors and claim compensation from them – it would be open for the joint tortfeasor to file the claim against the other and to seek compensation.

Title: United India Insurance Company Vs. Sohan Singh & others Page-1291

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that deceased was travelling in the truck along with goods- owner and driver did not deny this fact- insurer did not lead any evidence to prove that deceased was travelling as a gratuitous passenger- held, that Tribunal had wrongly held that the deceased was a gratuitous passenger - appeal allowed and insurer held liable to pay compensation.

Title: Naresh Kumar Mahant Vs. Oriental Insurance Company Limited & others Page-994

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that he was travelling in the vehicle as labourer and was having goods in his possession- this fact was not denied- hence, plea of the insurer that claimant was a gratuitous passenger cannot be accepted.

Title: Deep Chand Vs. Udey Singh & others Page-967

Motor Vehicles Act, 1988- Section 149- Claimant specifically averred in the claim petition that he and his partner had hired the vehicle for carrying their agricultural produce- owner admitted in the reply that claimant was travelling in the vehicle as a gratuitous passenger- held, that Tribunal had rightly held that the claimant to be a gratuitous passenger.

Title: Noop Singh and another Vs. Sobha Ram and another Page-1282

Motor Vehicles Act, 1988- Section 149- Claimant was travelling in an Ambassador car which met with an accident in which claimant sustained injury- insurer had not led any evidence to show that owner had committed breach of the terms and conditions of the insurance policy- the sitting capacity of the vehicle was 5 and the risk of the claimant was covered- held, that Insurance Company was rightly held liable to pay compensation.

Title: The National Insurance Company Vs. Mohinder Paul & another Page-1278

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the truck as labourer who was doing the job of loading or unloading lime stones, sand, bricks and bajri etc. - this fact was not denied by the owner and the driver- sitting capacity of the vehicle was '5+1' meaning that risk of 5 person was covered, thus, risk of the deceased is also covered- held, that plea of the insurer that deceased was a gratuitous passenger cannot be accepted.

Title: Oriental Insurance Company Vs. Sushila and others Page-1004

Motor Vehicles Act, 1988- Section 149- Insured challenged the award on the ground that vehicle was insured at the relevant time but Insurance Policy could not be produced before the Court- an application is also filed to place the insurance policy on record- application allowed by the Court and the policy taken on record- held, that policy shows that vehicle was insured at the time of accident and, therefore, Insurer has to indemnify the award- appeal disposed of accordingly.

Title: Naresh Pal Singh Vs. Rahul Katoch and others Page-1276

Motor Vehicles Act, 1988- Section 149- Insured challenged the awards, wherein, insured was given right to recovery by the Tribunal holding that offending vehicle was being driven without any route permit of the area where accident had occurred- held, that insurer has failed to prove that cause of accident was the geographical condition prevailing in the area where vehicle was being plied at the time of accident without any route permit- further held, that insurer has even failed to prove that it was one of the conditions contained in the insurance agreement that vehicle could not be plied in the area other than the one mentioned in the route permit- insurer has failed to prove any breach on the part of the owner – held that insurer is liable to satisfy the awards.

Title: Ketal Singh Vs. Narinder Kumar and others Page-1263

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award claiming that accident is not proved to be outcome of rash and negligent driving by the offending driver- held, that enough evidence has been led by the claimants on record to prove rashness and negligence of offending driver which was not rebutted by the insurer- further held, that age of the deceased was 40 years and multiplier of '13' was applicable but the Tribunal has fallen in error while applying multiplier of '16'- Tribunal has further fallen in error by awarding interest @ 12% per annum whereas, it should have been 7.5% per annum- award modified accordingly.

Title: United India Insurance co. Ltd. Vs. Bimla Devi and others Page-1295

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award and pleaded that it was wrongly saddled with liability as claimant/injured was travelling in the offending vehicle as a gratuitous passenger – held, that evidence on record proves that claimant had hired the vehicle - Insurance Policy shows that it covered risk of three person i.e. one driver and two passengers - in view of this, Insurance Company was rightly saddled with liability- appeal dismissed.

Title: United India Insurance Company Vs. Leelan Devi and others Page-1297

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that driver was not driving the offending vehicle and the Tribunal has fallen in error in saddling it with liability – held, that appellant/insurer has not led any evidence to discharge the onus- Tribunal has rightly appreciated the evidence to hold that driver of the offending vehicle was driving the vehicle rashly and negligently- beaten law of the land is that in welfare legislation, procedural wrangles and tangles have no role to play and strict proof of rashness and negligence is not required- appeal dismissed.

Title: The New India Assurance Co. Ltd. Vs. Bori Devi and others Page-998

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that driver was not having valid licence- held, that driver was possessing driving licence to drive light motor vehicle and it did not require endorsement to drive passenger vehicle and secondly, driver possessing learner's licence to drive the vehicle was competent to drive the offending vehicle- Tribunal has rightly held that driver was having valid and effective driving licence- appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Tara Devi and others Page-1005

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident and the claimant was travelling in the vehicle as a gratuitous passenger- Insurer did not lead any evidence to prove that driver did not have a valid driving licence or that claimant was travelling as a gratuitous passenger- the onus to prove these facts was upon the insured and in absence of evidence, insured was rightly saddled with the liability.

Title: The New India Assurance Company Vs. Anoop Kumar & others Page-1280

Motor Vehicles Act, 1988- Section 149- Insurer questioned the award on the ground that owner had committed willful breach of the terms and conditions of the Insurance policy and the Insurer was wrongly saddled with the liability- held, that Insurer has failed to plead and prove that vehicle was being driven in contravention of the terms and conditions of the Insurance Policy- Insurer also failed to show from the Insurance Policy that driving the vehicle without any fitness certificate would amount to breach of the terms and conditions of the insurance policy- appeal dismissed.

Title: Parveen Kumar Vs. Sunil Kumar and another Page-1284

Motor Vehicles Act, 1988- Section 149- Tribunal awarded compensation of Rs. 10,40,000/- saddling the owner and driver with the liability- the insurer was exonerated – owner and driver challenged the award- held, that driver was possessing a valid and effective driving licence- deceased is admitted by owner and driver to be carrying his domestic articles in the vehicle- insurance policy discloses that risk of third party including driver was covered- Tribunal fell in error while exonerating Insurance Company- further held, that

Tribunal had wrongly applied multiplier of '17' in place of '16' and also fell in error in assessing annual income of the deceased to be Rs.91,000/-, when salary of deceased was taken as Rs.7,000/- his annual income should have been Rs.7,000 x 12= Rs.84,000/-- 1/3rd amount was to be deducted and, thus, dependency comes to Rs.56,000/-- appeal allowed and the compensation amount determined to be Rs.9,29,999/- - Insurer directed to deposit the entire amount in the Registry.

Title: Mukesh Bhardwaj & Ors. Vs. Anju Bhardwaj and others Page-983

Motor Vehicles Act, 1988- Section 157- Insurer contended that the route permit was not transferred in the name of the transferee and the transfer was not brought to its notice- held, that the fact that Transfer was not brought to the notice of the Insurer is not sufficient to exonerate the insurer from the liability- non- transfer of the route permit in the name of the transferee cannot be said to be violation of the terms and conditions of the insurance policy – Tribunal had wrongly held that insured had committed breach of the terms and conditions of the insurance policy and had wrongly granted right of recovery to the insurer.

Title: United India Insurance Company Ltd. Vs. Simlo Devi and others

Page-1299

Motor Vehicles Act, 1988- Section 166- Appellant challenged the award claiming that it was wrongly saddled with liability – held that claimant/injured has proved that offending driver was driving the offending vehicle rashly and negligently– in this situation appellant was rightly saddled with liability– appeal dismissed.

Title: M/S Suriba Industries and others Vs. Shri Labh Singh Page-982

Motor Vehicles Act, 1988- Section 166- Claim Petition dismissed by the Tribunal holding that claimants had failed to prove rash and negligent driving by the driver of the truck which collided against the bridge and damaged the same- held, that claimants have failed to plead and prove that Truck was being driven at high speed or in rash and negligent manner - further, held that evidence suggests that the driver was crossing the bridge with normal speed and the bridge collapsed - claim petition rightly dismissed by the Tribunal- appeal also dismissed.

Title: Union of India & others Vs. M/s Kinnaur Federation & others Page- 1288

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 20% disability- Tribunal assessed monthly income of the claimant as Rs. 3,000/- per month- applying multiplier of '13' amount of Rs. 93,600/- was awarded towards diminishing of future prospects - Rs. 46,158/- were awarded towards medical expenses- Rs. 10,000/- were awarded towards attendant compensation - Rs. 10,800/- were awarded towards conveyance charges and Rs. 20,000/- were awarded towards Pain and suffering- held, that Tribunal had rightly assessed the compensation- appeal dismissed.

Title: Uttam Saini Vs. Avrosh Kumar alias Sonu & another Page-1062

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries on his left, arm which was crushed- Medical Officer proved that claimant had sustained 40% permanent disability – he has placed on record medical bills to the extent of Rs.18,000/-- he will have to undergo treatment for the injuries sustained in the accident in future as well - Rs.50,000/- awarded towards future medical treatment and Rs.18,000/- awarded towards actual medical expenses, Rs.20,000/- awarded for conveyance charges, Rs.30,000/-

awarded towards attendant charges- minimum income of the claimant can be taken as Rs.6,000/- per month by guess work and considering the disability of 40%, loss of income will be at least Rs.2,400/- per month- age of the claimant is 6 years and multiplier of '13' is applicable, thus, amount of Rs. 2400x12x13= Rs. 3,74,400/- awarded towards loss of income- Rs.50,000/- awarded towards pain and suffering and Rs.50,000/- awarded for loss of amenities of life- total amount of Rs. 5,92,000/- (Rs.3,74,000/- + Rs.50,000/- +Rs. 20,000+Rs.30,000/-+ Rs.50000/-+Rs.50,000/-+Rs.18000/-) along with interest @ 7.5 % per annum awarded as compensation.

Title: Master Arsh Vs. The HRTC and another Page- 1271

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident- he had not led any evidence to prove that driver of the truck had driven the same rashly and negligently- FIR was lodged against the claimant and challan was presented against him- therefore, his plea that accident was caused due to the rashness and negligence of the driver of the truck cannot be accepted- Tribunal had rightly held that claimant was not entitled for any compensation

Title: Sanjay Kumar Vs. Davinder Kumar & others Page-1287

Motor Vehicles Act, 1988- Section 166- Claimant has questioned the award on the ground of adequacy of compensation- held, that claimant was 39 years of age and had suffered permanent disability to the extent of 45% rendering him physically handicapped- Tribunal had fallen in error in not awarding the compensation under the head 'loss of amenities'- claimant held entitled to Rs. 50,000/- under the head 'loss of amenities of life' - Rs.50,000/- awarded under the head 'pain and suffering for future' and Rs.50,000/- further awarded under the head 'loss of future income'- appeal allowed and insurer directed to deposit the entire amount.

Title: Oriental Insurance co. Ltd. Vs. Om Prakash Sahni and others Page-999

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that income of the deceased was not less than Rs. 50,000/- per month and that deceased was government contractor and horticulturist – Tribunal had assessed income of the deceased as Rs.12,000/- per month on the basis of documents placed before it but had wrongly deducted 1/3rd amount of the income towards personal expenses, whereas, 1/4th amount was to be deducted towards personal expenses- claimants have lost dependency of Rs.9,000/- per month- age of the deceased was 51 years – multiplier of '9' was applicable, thus, amount of Rs. 9,000 x 12 x 9= Rs.9,72,000/- was awarded under the head loss of dependency, Rs.10,000/ each awarded under the head loss of consortium, loss of estate, love and affection and funeral expenses, thus, total amount of Rs.10,12,000/- awarded with interest @ 7.5% per annum as compensation.

Title: Gian Vati & others Vs. Pushpa Devi & another Page-1256

Motor Vehicles Act, 1988- Section 166- Claimant sustained injuries in his right ankle joint in a motor vehicle accident- Medical Officer testified that owner had sustained 20% permanent disability- his income can be taken as Rs. 5,000/- per month by guess work - he has suffered 20% permanent disability; therefore, loss of income would be Rs. 2,000/- per month- claimant was 34 years of age- multiplier of '11' is applicable- thus, claimant is entitled to Rs. 2000x12x11=Rs.2,64,000/-- amount of Rs.50,000/- each awarded under the head 'pain and suffering' and loss of amenities of life, Rs.12,000/- awarded for medical

treatment, Rs.3,000/- awarded as attendant charges, Rs.10,000/- awarded under the head loss of income and, thus, total amount of Rs.3,89,000/- awarded as compensation.

Title: Master Arsh Vs. The HRTC and another Page-1271

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was earning Rs. 10,000/- per month from the tuitions- he was also having income from the orchard- applying guess work, income of the deceased cannot be less than Rs. 6,500/- per month from tuitions- 1/3rd amount is to be deducted towards personal expenses and loss of dependency can be taken as Rs. 4334/- per month, say Rs. 4500/- - age of the deceased was 36 years and multiplier of '15' is applicable, thus, compensation of Rs. 8,10,000/- (Rs. 4500 x 12 x 15) awarded towards loss of dependency.

Title: Pushp Lata and others Vs. Bajaj Allianz General Insurance Co. and another Page-1411

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver of the truck/original respondent No. 2 had driven the vehicle in a rash and negligent manner and had hit the scooter- driver of the scooter died in the accident - an FIR was registered against the deceased and was closed as untraced- therefore, an inference cannot be drawn that accident was the outcome of rash and negligent driving on the part of truck driver- appeal dismissed.

Title: Vikram Chand and another Vs. Bidhi Chand and others Page-1064

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that respondent No. 2 was driving the jeep in a rash and negligent manner and hit the motor cycle- driver of motor cycle died in the accident- Tribunal held that deceased, 16 years of the age, did not have driving licence, an FIR registered against the driver of the jeep was cancelled and the driver of the jeep was not driving the vehicle in a rash and negligent manner- there is no infirmity in the judgment- appeal dismissed.

Title: Sanjogita Devi & another Vs. Krishna Sood & others Page-1039

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that sole bread earner died in the road accident while driving the car belonging to 'R'- claimants were not required to prove that deceased was employed by 'R' as driver- they were only required to prove that deceased had lost his life in the motor vehicle accident which was duly proved- deceased was driving the vehicle and cannot be said to be a gratuitous passenger- therefore, insured was rightly held liable to pay compensation.

Title: Bajaj Allianz General Insurance Company Limited and another Vs. Sumila Devi and others Page-1254

Motor Vehicles Act, 1988- Section 166- Compensation in the sum of Rs.1,39,500/- along with interest @ 7.5% per annum was awarded from the date of petition in favour of claimants- record shows that Tribunal had awarded meager amount but the claimants had not questioned the same- therefore, appeal dismissed.

Title: Himachal Road Transport Corporation and another Vs. Krishan Kumar and others Page-1398

Motor Vehicles Act, 1988- Section 166- Deceased was 13 years of age at the time of accident- multiplier of '15' is applicable- an amount of Rs.3,60,000/- (Rs.24,000X15) awarded under the head 'loss of dependency'- Rs.10,000/- each awarded under the heads

'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses' - total compensation of Rs. 4 lacs awarded.

Title: United India Insurance Co. Ltd. Vs. Reena Devi & others Page-1061

Motor Vehicles Act, 1988- Section 166- Deceased was 25 years of age- Tribunal had applied multiplier of '17'- held, that multiplier of '15' is applicable and compensation of Rs. 24,000/-x15 = Rs. 3,60,000/- + Rs. 65000/-= Rs. 4,25,000/- along with interest @7.5% awarded from the date of claim petition till its realization.

Title: The New India Assurance Company Ltd. Vs. Cheeno alias Manisha and others Page-1401

Motor Vehicles Act, 1988- Section 166- Deceased was 29 years of age- Tribunal wrongly applied multiplier of '17' in place of '16' and also fell in error in assessing annual income of the deceased to be Rs. 91,000/-, when salary of deceased was taken as Rs. 7,000/- his annual income should have been Rs. 7,000 x 12= Rs. 84,000/-- 1/3rd amount was to be deducted and, thus, dependency comes to Rs. 56,000/-- appeal allowed and the compensation amount determined to be Rs. 9,29,999/- - Insurer directed to deposit the entire amount in the Registry.

Title: Mukesh Bhardwaj & Ors. Vs. Anju Bhardwaj and others Page-983

Motor Vehicles Act, 1988- Section 166- Deceased was a business man- by guess work it can be estimated that he was earning Rs. 6,000/- per month- he was a bachelor- half of the amount is to be deducted towards personal expenses- he was aged 26 years and multiplier of '16' is applicable- thus, claimants are entitled to a sum of Rs. 3000x12x16= Rs. 5,76,000/- Rs. 10,000/- each awarded under the head "loss of estate", "love and affection" and "funeral expenses" - thus claimants are entitled total compensation of Rs. 6,06,000/-, with interest @7.5% per annum from the date of claim petition till its realization.

Title: Promila Sharma Vs. The New India Assurance Co. Ltd. And others Page-1406

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife- her husband was deprived of his matrimonial home- son has lost love and affection- minimum amount of Rs. 4,500/- per month will be required for engaging a labourer for maintaining house hold and performing domestic functions- thus, claimants have sustained loss of Rs.4,500/- per month – after deducting 1/3rd amount towards personal expenses, loss of dependency is Rs. 3,000/- per month- age of the deceased was 26 years at the time of accident- multiplier of '14' would be applicable- thus, claimants are entitled to Rs. 3,000 x 12 x 14 = Rs. 5,04,000/- sum of Rs. 10,000/- each awarded under the head loss of estate, funeral expenses, Loss of consortium and loss of love and affection- total compensation of Rs. 5,44,000/- awarded along with interest.

Title: Master Arsh Vs. The HRTC and another Page- 1271

Motor Vehicles Act, 1988- Section 166- Deceased was aged 45 years – Tribunal had applied multiplier of '12', whereas multiplier of '13' will be applicable- claimants pleaded that deceased was earning Rs. 7,000/- per month- owner stated that deceased was getting Rs. 3,900/- per month as salary and Rs. 60/- per day which means that deceased was getting Rs. 5700/- per month- 1/5th amount is deducted towards personal expenses- thus, claimants have lost the dependency to the extent of Rs. 4600/- per month and they are

entitled in the sum of Rs. 7,17,600/- (4600 x 12 x 13) – a sum of Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

Title: Kanso Devi and others Vs. Laxman Singh & another Page-1399

Motor Vehicles Act, 1988- Section 166- Driver of the vehicle was competent to drive the light motor vehicle – the vehicle in question was also a light motor vehicle – it was contended that driving licence did not bear the endorsement- held, that driver having a driving licence to drive light motor vehicle is not required to have endorsement of PSV and the plea of the Insurance Company that driver did not have a valid driving licence cannot be accepted.

Title: New India Assurance Company Ltd. Vs. Gayatri Devi and others Page-1403

Motor Vehicles Act, 1988- Section 166- Driver was earning Rs. 4,000/- per month as salary and he was getting Rs. 100/- per day as daily allowance- therefore, income of the deceased was Rs. 7,000/- per month - after deducting 1/3rd amount, loss of dependency is Rs. 4600/- per month- the age of the deceased was 41 years and multiplier of '12' is applicable- therefore, compensation of Rs. 7,17,600/- (Rs. 4600 x 12 x 13) awarded towards loss of income.

Title: New India Assurance Company Ltd. Vs. Gayatri Devi and others Page-1403

Motor Vehicles Act, 1988- Section 166- Learned Counsel for the respondent No. 3 stated that he was under the instruction to settle the claim by paying Rs. 3,50,000/- in lump sum- while claimants sought an amount of Rs. 5,00,000/- as compensation - keeping in view the age of the deceased and the time spent by the claimants, amount of Rs. 4,00,000/- awarded in lump sum.

Title: D.S. Mankotia & another Vs. Subhash Chand & others Page-967

Motor Vehicles Act, 1988- Section 166- Salary of deceased is proved to be Rs. 6,000/- per month and by way of guess work Tribunal found that claimants had lost service of deceased in the orchard -loss was assessed to be Rs. 3,000/- per month- claimants have lost source of dependency to the tune of Rs.3,000+Rs.4,500/-= Rs.7,500/- Applying the multiplier of 15, compensation of Rs. 13,50,000/-(Rs. 7500x12x15) along with interest awarded.

Title: Sunita and others Vs. Vinay Nanda and others Page-1058

Motor Vehicles Act, 1988- Section 166- The insurer challenged the award on the ground that the compensation granted is excessive – held that insurer has not led any evidence and the claimant has led enough evidence to establish the fact that his vehicle was totally damaged in the accident- vehicle was purchased in the year 2000 and accident took place in the year 2003- Rs. 6,00,000/- with interest was rightly awarded as compensation- appeal dismissed.

Title: Sh. Prakash Versus Sh. Vinay Nanda and others Page-1008

Motor Vehicles Act, 1988- Section 166- The Tribunal dismissed the claim petition holding that the driver was not proved to be driving the offending scooter – on feeling aggrieved, claimants filed appeal – held that, no evidence was led by claimants to prove that alleged driver was driving scooter at the relevant time- alleged driver is deaf and dumb and statement of one police constable to the effect that offending driver by way of gesture stated

that he was driving scooter is not sufficient–claim petition rightly dismissed by the Tribunal – appeal also dismissed.
Title: Asgar Ali and others Versus Shri Imran Khan and another Page-953

Motor Vehicles Act, 1988- Section 166- Tribunal had taken the notional income of the deceased as Rs. 15,000/- per annum- multiplier of '15' is applicable, thus, claimants are entitled to Rs. 15000 x 15 = Rs. 2,25,000/-, along with interest- claimants are also held entitled to Rs. 10,000/- as litigation expenses.
Title: Chaman Lal Vs. Rukmi Devi and others Page-964

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimant had not proved the rashness and negligence of the driver – held, that it was duly proved on record that driver was driving the vehicle in a rash and negligent manner- he had not taken any precaution - he had not kept in mind the fact that somebody would have been crossing the road or somebody may abruptly appear in front of the vehicle and had not taken due care while applying brakes abruptly- claimant had sustained 30% permanent disability – his monthly income was Rs. 8,319/- as per salary certificate- amount of Rs. 50,000/- each awarded towards pain and suffering and loss of income and Rs. 20,000/- awarded under the head treatment charges.
Title: Kishan Singh (dead) through Jasvinder Singh and others Vs. Rasheed Khan and others Page-1267

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimants had failed to prove rash and negligent driving of the driver- claimants had specifically averred that driver had driven the vehicle rashly and negligently- claimants had also examined the witnesses to prove as to how the accident had taken place – Tribunal had decided the claim petition as if it was a civil suit- witnesses of the respondent stated that accident was outcome of sudden tyre bursting - held, that tyre bursting is an example of rash and negligent driving - had the driver taken due care and caution, he would have managed the speed of the vehicle and avoided the accident causing the death of the deceased.
Title: Promila Sharma Vs. The New India Assurance Co. Ltd. And others
Page-1406

Motor Vehicles Act, 1988- Section 166- Tribunal held that deceased was driving the vehicle rashly and negligently - evidence shows that vehicle was being driven by the deceased rashly and negligently at the time of the accident – no evidence was led to show that driver of other vehicle was driving the vehicle in a rash and negligent manner- appeal dismissed.
Title: Sunita Sharma and others Vs. HRTC and another Page-1413

Motor Vehicles Act, 1988 - Section 169- Claimant specifically pleaded that driver had driven the vehicle in a rash and negligent manner and had hit the car with the motorcycle being driven by the claimant causing injury to him- an FIR was also registered against the driver, however, he was acquitted after giving him a benefit of doubt - held, that findings recorded in the criminal case cannot be a ground to defeat the rights of the claimant – acquittal of driver in a criminal case is no ground to dismiss the claim petition- Tribunal has to record prima facie finding regarding the negligence- appeal allowed and the case remanded.
Title: Rajinder Kumar Vs. Anup Verma & another Page-1017

Motor Vehicles Act, 1988- Section 169- Claimants filed a claim petition pleading that they became victims of a motor vehicle accident caused by driver of the bus- Tribunal held that claimants had failed to prove the rashness and negligence on the part of the driver of the bus - held that claim petitions are to be determined on the touchstone of preponderance of probabilities and not beyond the reasonable doubts- PW-3 had specifically stated that driver of the bus hit the same with motorcycle- however, his testimony was disbelieved on the basis of FIR- however, final report was filed before the Court by the police in the FIR against the driver of the bus, which clearly shows that police had also found on the basis of investigation that the bus was being driven in a rash and negligent manner- deceased was earning not less than Rs. 6,000/- per month – 1/4th amount to be deducted towards his personal expense - claimants have lost source of dependency to the extent of Rs. 4,500/- per month- multiplier of '15' is to be applied and the claimants will be entitled to Rs. 8,10,000/-.

Title: Kaushlya Devi and other Vs. Dev Raj and others Page-978

Motor Vehicles Act, 1988 - Section 169- It was contended that driver of the bus was acquitted in the criminal case and the Tribunal had wrongly held that driver of the bus was driving the vehicle rashly and negligently – held, that a criminal case has to be proved beyond reasonable doubt, while a claim petition has to be proved summarily - respondent cannot be absolved of the liability on the ground that driver had been acquitted by the Criminal Court- claimants had led sufficient evidence to prove the rashness and negligence of the driver of the bus- while driver was unable to dislodge the evidence led by the petitioner- hence, driver of the bus was rightly held negligent.

Title: Jagdish Chand and another Vs. Meena Devi and another Page-969

Motor Vehicles Act, 1988 - Section 169- Matter was listed for evidence of the petitioner on 2.5.2015- no witness was present and the petitioner was asked to produce the evidence on self responsibility - two witnesses were present on 20.7.2015- Tribunal declined to grant adjournment and closed the evidence of the petitioner- held, that Tribunal should have rendered all assistance for summoning the witnesses- Tribunal had not recorded any finding that petitioner had deliberately delayed the outcome of the claim petition- hence, order passed by Tribunal set aside and Tribunal directed to afford one opportunity to the petitioner and to provide all assistance for summoning the witnesses.

Title: Girja Nand Vs. Sumeer Kashypa & ors. Page-1260

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded the interest @ 12% per annum- held, that rate of interest should be awarded as per the prevailing rate- hence, rate of interest reduced from 12% per annum to 7.5% per annum from the date of the claim petition.

Title: National Insurance Company Ltd. Vs. Smriti Verma & others

Page-996

'N'

N.D.P.S. Act, 1985- Section 18 & 20- Accused was traveling in a bus, which was checked by the police during a routine naaka-370gm charas and 90 gm opium was recovered on his personal search –the police witnesses gave contradictory versions regarding the time when they left the police station and regarding the fact whether the accused alone was searched or some other passenger was searched besides the accused or not - Police witnesses were not able to remember the vehicle in which they had travelled to the place of naaka- the person who carried the rukka to police station and the one who lodged the FIR not examined in the

court - None of the police witnesses stated that the scales were being carried by the police-investigating officer was also silent about it- thus, the arrangement of scales and weights remains unexplained- all these facts make the prosecution case highly doubtful-accused acquitted.

Title: Dhabe Ram Vs. State of Himachal Pradesh Page-895

N.D.P.S. Act, 1985- Section 20- Accused intercepted by police with a bag carrying 2.900 k.g. charas during day time- convicted and sentenced by the Trial Court- alleged recovery of charas was made from the accused during broad day light - independent witnesses were available in the immediate locality but were not associated –held that omission to associate independent witnesses by the Investigating Officer creates doubt about the genuineness of prosecution story - two buses were also stopped nearby the dhaba and passengers were having lunch there- plea that the passengers had refused to be associated as witnesses is unsustainable on the face of it as Investigation Officer had not recorded the names of those witnesses and he had not taken any action against them - thus the prosecution case is not established beyond doubts for aforesaid reasons – appeal allowed and accused acquitted.

Title: Narayan Singh Vs. State of H.P. (D.B.) Page-988

N.D.P.S. Act, 1985 - Section 20- Accused was apprehended with the bag- bag was checked and was found to be containing 1.150 grams of charas- independent witness did not support the prosecution version- testimonies of police officials are contradictory- PW-13 admitted that accused was told that his personal search can be conducted in the presence of gazetted officer, police or Magistrate- there is no provision of search before police official- this amounted to violation of Section 50- no entry was made in the Malkhana register regarding the taking out of the case property for production before the Court or re-depositing the same- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted.

Title: Tej Ram Vs. State of H.P. (D.B.) Page-1078

N.D.P.S. Act, 1985- Section 20- Accused was found with a carry bag which on search was found to be containing 2.9 kgs. of charas in it - it was admitted by prosecution witnesses that many shops were located in the vicinity- accused was apprehended on the highway, however, no incumbent of the vehicle plying on the highway was associated, which shows that independent witnesses were not joined deliberately – held, that prosecution case was not proved beyond reasonable doubt- accused acquitted.

Title: Narayan Singh Vs. State of H.P. (D.B.) Page-988

N.D.P.S. Act, 1985- Section 20- Accused while carrying red-gray coloured bag was apprehended by the police on suspicion-11kg 50gm charas was recovered from the bag-personal search of the accused was conducted and consent memo was prepared- no independent witness was associated- held that, the accused was given a third option also to be searched before the police officer- accused should be apprised of his right to be searched either before magistrate or the Gazetted Officer- there is non-compliance of mandatory provision contained in Section 50(1) of ND& PS Act- conviction and sentence of the accused liable to be set aside- appeal allowed.

Title: Surat Singh Vs. State of H.P. (D.B.) Page-943

N.D.P.S. Act, 1985- Section 20- Police team saw the accused carrying a red coloured bag- accused tried to hide the same and flee away from the spot but he was apprehended on suspicion- two persons riding the scooter came per chance on the spot and the bag was searched in their presence – 215 grams of charas was found in the bag- two police officials were not examined and two police witnesses contradicted each other materially on the colour of the bag and shape of the charas - charas produced in court neither in shape of charas nor marbles as spoken by witnesses- witnesses failed to identify case property in court-witnesses contradicted each other as to where the statements of witnesses were recorded-no explanation on the record as to why the police party was moving in the dark night without the provision of light-no explanation about the means of transport used by the official who brought the rukka to the police station- guilt of the accused not established beyond doubts- conviction and sentence set aside.

Title: Kartik Singh Vs. State of Himachal Pradesh Page-974

N.D.P.S. Act, 1985- Section 50- consent memo reveals that the accused is an illiterate and has put his thumb mark on the same- No documentary or ocular material available on the record to show that the memo was read over and explained to the accused- compliance of section 50 not established. Title: Dhabe Ram Vs. State of Himachal Pradesh Page-895

'P'

Prevention of Corruption Act, 1988- Sections 7, 13 (1) (d) and 13(2)- Accused demanded bribe of Rs. 1,000/- for preparing Fard Mouka Kabja in a partition case - accused were apprehended with the currency notes- hand wash turned pink when it was mixed with sodium carbonate- complainant and prosecution witnesses had not supported the prosecution- PW-5 has also demolished the prosecution case - name of PW-8 was not mentioned in the daily diary – sanction order was approved by examining the reader and not by examining the Deputy Commissioner – held, that accused were rightly acquitted.

Title: State of H.P. Vs. Bidhi Chand son of Shri Shiv Ram and another Page-1046

Protection of Children from Sexual Offences Act, 2012- Section 6- **Indian Penal Code, 1860-** Section 376(2i)- Prosecutrix complained of pain in her private part- she revealed on inquiry that accused had touched her private part with his private part- Medical Officer found the injuries on the person of the prosecutrix and did not rule out the possibility of sexual assault- presence of prosecutrix was admitted by the defence witness – considering the age of the accused, sentence reduced to four years rigorous imprisonment along with fine of Rs. 5,000/-.

Title: Bakshi Ram Vs. State of H.P. (D.B.) Page-1389

'S'

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Section 18 (1) - Debt Recovery- Tribunal refused to waive off the requirement of 25% of the notice amount on the ground that it had no discretion to reduce the amount- held, that condition of deposit of 25% of the amount is mandatory and without depositing the same appeal cannot be filed- therefore, there is no infirmity in the order passed by Tribunal- petition dismissed.

Title: M/s Amy Agro Pvt. Ltd. Vs. State Bank of Patiala and others Page-1331

Specific Relief Act, 1963- Section 5- Suit premises was made available to the defendant on licence for providing canteen facility to the employees and award staff of the plaintiff-

defendant was not permitted to sell the food articles to the outsiders but was to supply the same to the employees and award staff– no rent was to be paid for the premises- licence of the defendant was revoked w.e.f. 30.09.2001- however, defendant did not remove his belongings and started serving the food to the outsiders- defendant pleaded that licence was granted for one year which was never renewed or extended and he is in adverse possession of the premises – suit of the plaintiff was decreed by the trial Court for possession - it was duly proved on record that canteen was given to the defendant for the benefit of the Award staff- services of Award staff were dispensed with which led to automatic revocation of the licence - no rent was payable; therefore, provisions of H.P. Urban Rent Control Act are not applicable- defendant had failed to prove the plea of adverse possession- hence, suit was rightly decreed for the possession.

Title: Kali Charan Vs. ICICI Bank Page-906

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit that he is owner in possession of the suit land- defendants got their possession recorded as tenant during settlement in collusion with the settlement staff and they are not in possession- defendants claimed that they are tenants at Will over the suit land since 1977- copy of jamabandi for the year 1967-68 shows that Khasra Nos. 370 and 376 were recorded in the ownership and possession of the plaintiff while Khasra No. 377 was recorded in the tenancy of 'C'- defendants claimed the exchange but had failed to prove the same- they had not specified the date on which tenancy was exchanged with the suit land- revenue record was not produced to prove the exchange- defendants have not produced any material on record to show that entries were made on the basis of some order passed by the Competent Authority- defendants have also not produced any evidence to show that they had paid any rent to the owner- entries in the Missal Hakiyat Bandobast Jadid is not sufficient to prove the exchange.

Title: Harjesh Singh and others Vs. Vijay Kumar and others Page-902

Specific Relief Act, 1963- Section 34- Plaintiff was recorded as non-occupancy tenant of the suit land - his name was deleted during settlement and the names of the defendants were recorded as non-occupancy tenants- defendant admitted in cross examination that plaintiff was in possession of the suit land but claimed that 'K' had got the land resumed in the year 1969 – however, no record was filed to prove this fact- no evidence was led to prove that plaintiff was summoned by issuing notice in Form L.R.-VII- defendant failed to prove that tenancy was relinquished in accordance with law- provisions of the Act were not complied with while effecting the changes – held that entries have been incorporated without any lawful order or any contract and cannot be relied upon.

Title: Harjesh Singh & ors. Vs. Roshan Lal Page-900

Specific Relief Act, 1963- Section 38- Plaintiff purchased the suit land on 3.11.1983- he fixed boundary by placing stones with cement in the year 1984- plaintiff had left one karam on both sides of the boundary, while constructing the house - defendant threatened to occupy the vacant portion of the suit land on which plaintiff filed the suit for injunction- plaintiff had proved that he was owner in possession on the basis of the sale deed and had left one karam land – defendant had not joined the demarcation and had not filed any objection to the demarcation- demarcation was conducted in accordance with the law- appeal dismissed.

Title: Ishwar Dass Prop. People Printing Press Vs. Kulbir Singh (dead through LRs. Maya Devi etc.) & ors. Page-1327

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking permanent prohibitory injunction pleading that they are joint owners in possession of the suit land- defendants are strangers and they had started construction of a link road on the suit land - suit was dismissed by the trial Court- however, judgment was modified in appeal and the defendants were directed to pay compensation after making an assessment within a period of 6 months from the date of the judgment and in default, to hand over the possession of the suit land- held, that plaintiffs could have sought injunction only if they were in possession- plaintiffs have concealed the facts that possession was taken in the year 2000- they are not entitled for discretionary relief of injunction and the civil suit for injunction could not have been filed after five years from the date of taking over possession- the discretionary relief of injunction should not have been granted to the plaintiffs when they had not come to the Court with clean hands - it was not permissible for the Court to grant the relief which was not sought by the parties.

Title: State of H.P. and others Vs. Baldev and others (D.B.) Page-1194

'W'

Workmen Compensation Act, 1923- Section 5- Petitioner was employed as a driver- he met with an accident and suffered 100% disability- accident was duly proved- petitioner was a driver and his licence was renewed after the accident- held, that disability had ceased the moment the licence was renewed - the compensation was rightly awarded by treating the disability as 27% on the basis of medical certificate.

Title: Jai Lal Vs. National Insurance Company Ltd. & another Page-1130

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Yuvaraj Ambar Mohite vs. State of Maharashtra, 2006(10) SCALE 369

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

Sikander Chander Bhushan Chauhan and others. ...Petitioners.

Versus

State of H.P. and another ...Respondents.

Cr.M.M. (O) No. 142/2015
Decided on: 21.9.2015

Code of Criminal Procedure, 1973- Section 482- Wife lodged an FIR against the husband and his relatives for the commission of offence punishable under Section 498-A of IPC – she also filed a complaint under Section 12 of Protection of Women from Domestic Violence Act- parties have entered into a compromise and, further proceedings will be abuse of process of law- petition allowed - FIR and the proceedings under Domestic Violence Act ordered to be quashed. (Para-3 to 7)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the Petitioners : Mr. G.C. Gupta, Sr, Advocate with Ms. Meera Devi, Advocate.
For the Respondents : Mr. Vivek singh Attri, Dy. A.G. for respondent No.1.
Mr. Pawan Sharma, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

Marriage between petitioner No. 1 and respondent No.2 2 was solemnized on 19.11.2011. Respondent No.2 lodged FIR against the petitioners bearing registration No. 223/12 on 30.11.2012 for offence under section 498-A of the Indian Penal Code. Respondent No.2 has also filed a complaint under section 12 of the Protection of Women from Domestic Violence Act before the court of Chief Judicial Magistrate, Shimla. The complaint under section 12 of the Act was allowed by the Chief Judicial Magistrate, Shimla and petitioner No.1 was directed to deposit a sum of Rs. 50,000/- in the court besides Rs. 7,500/- per month as maintenance and Rs. 2,500/- per month as rental of the house to be taken by respondent No.2. Petitioner filed an appeal before the learned Sessions Judge, Shimla. Proceedings arising out of FIR No. 223/2012 are pending before the trial court since 5.9.2013. The evidence till date has not been recorded.

2. The parties have arrived at a compromise whereby a sum of Rs. Five lakhs was to be paid to respondent No.2 by the petitioners. A sum of Rs. Three lakhs has already been paid to respondent No.2 by the petitioners. The balance amount of Rs. Two lakhs is to be paid when the final order is rendered in the proceedings arising out of FIR No. 223/2012 as well as appeal filed under section 29 of the Protection of Women from Domestic Violence Act. A sum of Rs. 50,000/- has also been paid as maintenance towards settlement between the parties.

3. Since now the parties have arrived at amicable settlement without any pressure, continuation of the proceedings arising out of FIR. No.223/2012 pending before the Chief Judicial Magistrate and the appeal under section 29 of the Protection of Women from Domestic Violence Act pending before the learned Sessions Judge, Shimla would be futile exercise and will misuse of process of law.

4. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675 have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.**
>
> **[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.**

5. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667 have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court**

came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this

judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

6. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58 have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual

agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.CR.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

7. Accordingly, in view of discussion and analysis made hereinabove, the petition is allowed. The proceedings arising out of FIR. No.223/2012 pending before the Chief Judicial Magistrate and the appeal under section 29 of the Protection of Women from Domestic Violence Act pending before the learned Sessions Judge, Shimla are quashed. The agreed amount be paid to respondent No.2 by the petitioners within a period of eight weeks from today. Pending application(s), if any, also stands disposed of. No costs.

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

Rajnesh .....Petitioner.

Versus

Himachal Pradesh Board of School Education, Dharamshala & another....Respondents.

CWP No. 2569 of 2015.
Decided on: 22nd September, 2015.

Constitution of India, 1950- Article 226- Petitioner appeared in Teachers Eligibility Test- petitioner contended that the answer to question No. 13 indicated as 'C' is incorrect- the annexure relied upon by the petitioner shows that the correct answer is 'D' - similarly correct answer to question No. 25 is 'D' –answer to question No. 29 is not correct and the same is ordered to be deleted- Board is directed to re-check the papers and to prepare fresh merit list. (Para-1 to 5)

For the Petitioner: Mr. Yudhbir Singh Thakur, Advocate

For Respondents No.1: Mr. Diwakar Dutt Sharma, Advocate.
For respondent No.2: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The Himachal Pradesh Board of School Education, Dharamshala invited applications from eligible aspirants for participating in the Himachal Pradesh Teachers Eligibility Test, 2014. The petitioner being eligible in all respects participated in the examination held on 7.12.2014. The assessment of merit of the candidates participating in the aforesaid test was endeavoured to be fathomed on the basis of answers meted by them to multiple choice questions appended to the writ petition as Annexure P-2. In trite the grievance of the petitioner herein is that the subject matter expert who prepared the questionnaire, had qua question No.13 formed a conclusion that the correct and apt answer to it was the one indicated at choice (c). However, the learned counsel appearing for the petitioner contends with fervour before this Court that the view besides the opinion formed by the expert in construing that the appropriate answer to question No.13 was the choice at serial No. (c) is inherently fallacious, inasmuch as even while adverting to the reply furnished to the writ petition at the instance of the Himachal Pradesh Board of School Education, Dharamashala wherein in support of its contention that the accurate answer to question No.13 is the choice existing at serial No.(c) and in canvassing so, it has relied upon Annexure R-2/1/T, yet reliance thereupon at the instance of the H.P. Board of School Education, Dharamshala is highly misplaced, as the succour drawn thereupon is wholly out of context with the phraseology of the question which exists at serial No.13 of Annexure P-2. However, before proceeding to dwell upon the vigour of the contention raised before this Court by the learned counsel for the petitioner, it is deemed fit and appropriate to extract the question existing at serial No.13 of Annexure P-2 and choices thereof which were to be ticked by the candidates participating in the apposite test. Question No.13 and their choices read as under:-

> "13. The stage in which a child can think logically about objects and events is known as:-
>
> (A) Sensory motor stage (B) Formal operation stage.
>
> (c) pre operational stage (D) concrete operation stage."

It is also necessary apart therefrom to extract hereinafter the relevant portion of Annexure R-2/1/T:-

Description (Piaget's Stages of Cognitive Development)	Age Range	
Sensori Motor	The infant progresses from reflexive instinctual action at birth to the beginning of symbolic thought. The infant constructs an understanding of the world by coordinating sensory experiences with physical actions.	Birth to 2
Preoperational	The begins to represent the world with words and images; these words and images reflect	2 to 7

	increased symbolic thinking and go beyond the connect of sensory information and physical action.	
Concrete operational	The child now can reason logically about concrete events and can mentally reverse information.	7 to 11
Formal operational	The adolescent reasons in more abstract, idealistic and logical ways	11 to 15

2. A glance at question No.13 formulated in Annexure P-2 unfolds the factum that the finer nuance of the aforesaid question, is the stage when a child can think logically about objects and events. Even, in view of the finer nuance of the question aforesaid, the accurate answer to it in the view of the expert was the choice at serial No. (C). However, the opinion of the expert of choice (C) being the accurate answer to the question aforesaid would have garnered succour only when the question occurring at serial No.13 of Annexure P-2 was couched in the phraseology of, the stage at which the child can think symbolically. However, when the phraseology of the question occurring at serial No.13 is in contradistinction to, the stage at which a child can think symbolically in event whereof, the opinion formed by the expert of the choice qua it existing at serial No. (C) would be imbued with accuracy besides, would be vidinicable, yet when the question occurring at serial No.13 of Annexure P-2 is formulated in the phraseology of, the stage a child can think logically, in face thereof even when in Annexure R-2/1/T it has been markedly portrayed that the aforesaid stage is to be construed to be the "concrete operational stage". Consequently, the argument as meted by the learned counsel appearing for the petitioner that the opinion formed by the expert that choice (C) is to be construed to be the appropriate answer to question occurring at serial No.13 in Annexure P-2 is inherently fallaciously, is to be accepted. In aftermath, this Court accepts the contention of the learned counsel for the petitioner that choice (D) to it which he ticked to be its hence purveying the answer to question No.13 was not off the mark. Sequel thereof, is that in case the petitioner herein besides, if the other examinees along with him have proceeded to mark choice (D) as the correct answer to the question occurring at serial No.13 in Annexure P-2, then all such examinees shall be awarded apposite marks besides, the H.P. Board of School Education, Dharamshala, is concomitantly enjoined to redraw or re-total the marks afforded to all those examinees who have ticked choice (C) as the correct answer to question No.13 which however is the incorrect answer to it. Hence, the Himachal Pradesh Board of School Education is directed to qua all those examinees who have ticked choice (D) as the correct answer to question No.13 which for the reasons aforesaid, is rather the accurate answer to it, redraw or retotal the marks afforded to them by the examiner concerned.

3. Moreover, the learned counsel appearing for the petitioner has also canvassed with much fervour before this Court that all the choices to question No.25 meted by the subject expert are inaccurate, except choice (D) which is rather the appropriate choice meted out therein, rendering the affording of marks, if any, by the examiner to candidates who ticked choices other than (D) to be not justifiable. The learned counsel appearing for the H.P. Board of School Education, Dharamshala has, in his reply furnished to the factum of accurate or inaccurate choices indicated qua question existing at serial No.25, therein conceded besides, acquiesced to the factum of all choices, inasmuch as (A) (B) and (C) being the inaccurate/inappropriate choices having been meted out therein. Consequently, with the acquiescence of the learned counsel appearing for the respondent-

board of choices at serial No.(A) (B) and (c) to question No.25 being the inappropriate choices, in sequel, then the ticking of choice (D) by the petitioner herein rendered it to be the accurate answer purveyed by him to question No.25 comprised in Annexure P-2. As a corollary then, with the evaluator despite the petitioner, if so having ticked choice (D) to the question occurring at serial No.25 having not qua it awarded marks to him has occasioned gross discounting on his part for the purveying of at the instance of the petitioner, an accurate answer to the question existing at serial No.25 comprised in Annexure P-2. Consequently, the respondent-board is directed to in case the petitioner herein has ticked choice (D) as the correct answer to question No.25 comprised in Annexure P-2 award marks to him besides, the respondent board shall also proceed to award marks to all those examinees who apart from the petitioner have ticked choice (D) as the correct answer to question No.25 as also shall redraw or retotal their marks. In case, the respondent-board has proceeded to award marks to candidates who have ticked choices (A), (B) and (C) to question No.25, such awarding of marks by the evaluator/examiner would not be reverable by this Court. Consequently, the respondent-board is directed to discount the awarding of marks by the evaluator/examiner to all those candidates, who have qua question No.25 ticked choices other than choice (D) besides, thereupon the respondent-board shall proceed to redraw or retotal the marks of all the examinees.

4. Lastly, the learned counsel appearing for the petitioner has contended before this Court that all the choices indicated qua question No.29 are inaccurate. The said factum stands conceded besides acquiesced to by the learned counsel appearing for the respondent-board. However, Mr. Diwakar Dutt Sharma, learned counsel appearing for the respondent-board has contended before this Court that the respondent-board yet has proceeded to award marks to all those examinees, who have ticked any of the choices proffered by the subject expert to question No.29. In case, when none of the choices to question No.29 were accurate or correct, it was not appropriate for the evaluator or the examiner of the H.P. Board of School Education to proceed to award marks to those examinees, who proceeded to tick any of the choices mentioned therein. Resultantly, the respondent-board is directed to delete question No.29 from Annexure P-2. If the examiner has proceeded to award marks to the examinees who have ticked any of the choices to question No.29 comprised in Annexure P-2, then such awarding of marks shall be concomitantly deleted by him from the mark sheets of all the candidates/examinees. Obviously, it shall be incumbent upon the respondent-board thereupon to proceed to redraw or retotal the marks of all the examinees.

5. In nutshell the writ petition is allowed. The Himachal Pradesh Board of School Education, Dharmashala is directed to award marks to the petitioner herein qua question No.13, besides also to other candidates who have ticked choice (D) as the correct answer to question No.13 of Annexure P-2. Further the respondent-board is directed to discount the marks as awarded to all the examinees who have ticked choice (c) as the accurate answer to Question No.13 of Annexure P-2, which for the reasons aforesaid is the inaccurate answer to it and thereupon the respondent-board shall proceed to redraw and retotal the marks of all the aspirants. Also the respondent Board is directed to, in the face of the aforesaid discussion, when choice (D) is the accurate answer qua question No.25, proceed to award marks to all those candidates who have ticked choice (D) as the correct answer to question No.25 and thereupon shall proceed to redraw and retotal their marks in their respective score sheets. Lastly, the respondent-board is also directed to delete question No.29 from Annexure P-2 and shall in case it has, as submitted by the learned counsel appearing for it, proceeded to award marks to the participants who have ticked any of the choices to question No.29, which are all fallicious, delete such marks from their mark sheets and thereupon shall proceed to redraw their respective score sheets besides, the respondent-

board shall redraw the merit list qua the candidates who have appeared in the relevant test. All pending applications also stand disposed of.

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

Data Ram ....Petitioner/Defendant.
Versus
Ram Dayal & another ....Respondents/plaintiffs.

CMPMO No.105 of 2015.
Decided on: 23rd September, 2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Suit listed for defendants evidence- defendant sought an amendment to written-statement to incorporate the plea that the suit property was self acquired in the hands of plaintiff – he also sought permission to correct the khasra numbers wrongly written in the written statement-prayer for amendment declined by the court holding that the defendant knew this fact from the very beginning and had not exercised due diligence at the time of filing of written statement- held, that the facts sought to be introduced were known to the defendant from the very beginning - the defendant has failed to exercise due diligence and amendment cannot be allowed at this belated stage- so far as incorporation of the khasra numbers of the suit property after consolidation in the written statement is concerned, the same is liable to be allowed being necessary to pass an executable decree- petition partly allowed. (Para 2 to 5)

For the Petitioner: Mr. Anup Rattan, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant petition is directed against the impugned order rendered on 21.01.2015 by the learned Civil Judge (Senior Division), Nalagarh, District Solan, H.P., whereby, he came to dismiss an application preferred before him by the petitioner herein/defendant before the learned trial Court, under Order 6, Rule 17 of the CPC whereby its leave was sought to incorporate in the written statement the proposed amendments which are ad verbatim reproduced hereinafter:-

> "The father of the plaintiff number 1 and husband of plaintiff No.2 had pruchased the land to the extent of his share comprised in Khata/khatauni No.27/39, khasra Nos. 50, 51, 60, 61, 78, 154, 271, 279, 342, 346, 412, 419, 458, 476, 481, 521, 517, 531, 536, 542, 550, 565, 571 and 629, kitas 24, measuring 28-06 bighas, situated in Mauza Kothi, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan, (H.P.) vide Sale Deed No.148, dated 29.01.2002, Sale Deed No.501 dated 22.04.2000, Sale deed No.497 dated 20.04.2000 and Sale Deed No.284, dated 25.02.2000. The defendant had also purchased the land to the extent of his share out of the above mentioned land vide the above mentioned Sale Deeds alongwith the father of plaintiff number and husband of plaintiff number 2. Likewise, the father of the plaintiff number 1 and husband of plaintiff number 2 had purchased the land to the extent of his share comprised in khata/khatauni No.23/33

beairng khasra Nos. 448, 484, 537 and 569, kitas 4, measuring 0-12 bighas situated in muaza Kothi, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan (H.P.) vide Sale Deed No. 19 dated 10.01.1992. The defendant had also pruchased the land to the extent of his hsare out of the above mentioned land comprised in khata/khatauni No.23/33 alongwith the father of the plaintiff number 1 and husband of plaintiff number 2 vide Sale Deed No.19 dated 10.01.1992.

That apart, the father of plaintiff number 1 and husband of plaintiff number 2 late Sh. Ram Singh, defendant's father late Sh. Ramu along Ram Saroop and Shri Hari Chand (the brother of Sh. Ram Singh and Sh. Ramu alias Ram Saroop) had jointly purchased the land some where in the year 1958, in equal shares, as comprised in Khata/Khatauni No.17/48 to 17/52, Kitas 49, measuring 37-03 bighas as per the copy of jamabandi for the year 1960-61 situated at Mauza Kothi, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan, (H.P.) qua which Mutation No.103 dated 10.01.1962 duly stands attested and sanctioned in their favour in the revenue record. Thus the land as comprised in Khata/khatauni No.24/34 of the suit land bearing khasra Nos. 63, 84, 147, 148, 149, 201, 205, 212, 282, 284, 356, 357, 360, 411, 417, 420, 431, 433, 445, 449, 479, 491, 510, 538, 541, 545, 562, 573, 576, 580, 581, 590, 620 and 626, kitas 34, measuring 36-10 bighas situated at Mauza Kothi, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan, (H.P.) came into existence after consolidation operations out of the land so purchased jointly by the above named Sh. Ram Singh, Sh. Ramu alias Ram Saroop and Sh. Hari Chand some where in the year 1958 as duly mentioned in the copy of jamabandi for the year 1961-62 in respect of Khata/Khatauni No.17/48 to 17/52 and figuring thereafter in all other subsequent jamabandis upto the carrying out of and completion of consolidation operations in the are in the late eighties. There is no other land out of which the suit land as comprised in Khata/Khatauni No.24/34 may have devolved upon the defendant and the father of the plaintiff number 1 and husband of plaintiff number 2 and other co-owners of the same in any manner whatsoever. This kind of clarification is necessary to determine the true nature and character of the suit land so as to determine the real question in controversy between the parties to this suit. Thus, under the above mentioned facts and circumstances of the case, the suit property is self acquired property of the father of the plaintiff number 1 and husband of plaintiff number 2 for all intents and purposes."

2. The application was contested by the plaintiffs/respondents herein. The leave qua the incorporation of an amendment in the written statement qua the factum of the suit property partaking the character of it being the self acquired property of the predecessor-in-interest of the plaintiffs, was, in its impugned order, declined by the learned trial Court on the strength of the factum aforesaid while being within the defendant's/petitioner's knowledge at the stage contemporaneous to the institution of the written statement at his instance to the plaint, hence his having come to seek its leave for its incorporation in his written statement at a stage when the defendant's evidence after closure of the plaintiffs' evidence was yet to commence was not only a highly belated concert on his part besides, the permission to incorporate the aforesaid fact in the written statement did not fall within the ambit of the exception, to the bar against amendment of pleadings being impermissible after the commencement of the trial, constituted in manifestation of material adduced before the learned trial Court portraying the factum that despite exercise

of due diligence, the fact as proposed to be incorporated in the written statement was not within his knowledge hence could not come to be incorporated therein at the time of its initial institution at the instance of the defendant/petitioner herein before the learned trial Court. The reason as attributed by the learned trial Court for declining leave to the defendant/petitioner herein to incorporate in his written statement the aforesaid amendment was embedded in the factum that with the defendant/petitioner herein while being aware of the nature besides, the character which the suit property partook even at the stage of his initially instituting a written statement to the plaint, as such, with his having knowledge qua the factum aforesaid at the aforesaid stage could not facilitate him, to contend with any force that despite exercise of due diligence on his part, the fact as proposed to be incorporated in the written statement with the leave of the Court was not earlier within his knowledge hence incapacitated him to initially incorporate it in the written statement instituted at his instance, to the plaint. The inference as drawn by the learned trial Court, of the defendant/petitioner herein being equipped with knowledge qua the aforesaid factum at the initial stage emanated from the material existing before the learned trial Court. The tenacity of the said material portraying the factum aforesaid has not been endeavoured to be repulsed by the counsel for the petitioner herein/defendant by adverting to cogent material, which bespeaks otherwise. Necessarily then with knowledge initially inhering in the petitioner herein qua the factum of the suit property bearing the character of its being the self acquired property of the predecessors-in-interest of the plaintiffs, defeats the propagation by the petitioner herein that despite exercise of due diligence initially on his part the factum aforesaid was neither initially garnerable nor hence earlier within his knowledge and only on its discovery subsequent to the institution of the written statement to the plaint at his instance, has necessitated its incorporation in the written statement. As a corollary then the refusal of leave to the petitioner herein/defendant to incorporate the said factum in the written statement was justifiable as well as tenable. In aftermath, the reason as meted out by the learned trial Court in its order refusing leave to the petitioner herein/defendant to incorporate in the written statement the plea of the suit property bearing the character of or its partaking the hue of its being the self acquired property of the predecessors-in-interest of the plaintiffs, especially with the said fact as emanable from the material as adduced before it, being within the knowledge of defendant/petitioner herein at the time of his initially instituting a written statement to the plaint, does not suffer from any legal frailty rather the omission on the part of the defendant/petitioner herein to, despite knowledge initially inhering in his mind qua the aforesaid fact now sought to be incorporated at a belated stage in the written statement, cannot but marshal an inference that it is impermissibly sought to be incorporated at his instance in the written statement. Obviously any deliberate omission on the part of the defendant to now incorporate the aforesaid fact in the written statement cannot rear any ground for him to contend that knowledge qua the fact aforesaid despite exercise of due diligence earlier on his part was not garnerable at his instance, hence, could not be incorporated then at his instance.

3. Further, the petitioner herein/defendant before the learned trial Court had also sought leave of the Court through the application at hand to incorporate in the written statement the khasra numbers borne by the suit property after the carrying out of consolidation operations in the area where the suit property is located. The learned counsel appearing for the respondents herein/plaintiffs before the learned trial Court has stated at the bar that khasra numbers as ascribed to the suit in the plaint pertain to the pre-consolidation era. The learned counsel appearing for the respondents herein further contends that the learned trial Court in its impugned order has given permission to the defendant/petitioner herein to produce before it the apt and germane record pertaining to both the pre-consolidation and post consolidation era, to collate the khasra numbers borne by the suit property both in the pre-consolidation and the post-consolidation era, hence, the

petition be dismissed. However, the aforesaid contention of the learned counsel appearing for the respondents herein/plaintiffs before the learned trial Court, stands to be discountenanced on the score that the incorporation with the leave of the Court, in the written statement the aforesaid ascription of khasra numbers borne by the suit property in the post consolidation era, would be leave to incorporate only those facts which are merely clarificatory in nature, besides it would be both an apt and germane material to enable the learned trial Court to render an executable decree. Necessarily then the said fact warrants incorporation in the written statement. Resultantly, permission is accorded by this Court to the petitioner herein to proceed to incorporate the fact aforesaid in the written statement.

4. For the foregoing reason, the instant petition is partly allowed. Consequently, the order impugned before this Court is interfered with to the extent it has refused to grant leave to the petitioner herein/defendant, to incorporate in the written statement the khasra numbers borne by the suit property in the post consolidation era. However, the order impugned before this Court to the extent it has refused to accord leave or permission to the petitioner herein/defendant, to incorporate in the written statement the fact of the suit property bearing the character of self acquired property in the hands of the predecessors-in-interest of the plaintiff, is upheld. In sequel, permission is granted to the petitioner herein to incorporate in the written statement the khasra numbers borne by the suit property in the post consolidation era. All pending application also stand disposed of. The parties are directed to appear before the learned trial Court on 6th October, 2015. The learned trial Court is also directed to complete the trial of the suit within six months from today.

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

RSA No. 401 of 2003
alongwith RSA No. 644/2012
Reserved on: 28.9.2015
Decided on: 29.9.2015

1. **RSA No. 401 of 2003**
   Hukam Chand. ...Appellant.
   Versus
   Jayoti Parkash. ...Respondent.
2. **RSA No. 644 of 2012**
   Hukam Chand. ...Appellant.
   Versus
   Jayoti Parkash. ...Respondent.

Code of Civil Procedure, 1908- Order 34- Plaintiff filed a suit for possession by way of redemption of the shop- plaintiff pleaded that he had mortgaged the shop with the defendant for consideration of Rs.5,000/-- defendant was requested to accept the amount but he refused- defendant pleaded that he was inducted as tenant and the deed was prepared to defeat the provisions of H.P. Urban Rent Control Act- defendant admitted the execution of the registered deed- it was duly proved that defendant was mortgagee and not a tenant- after the redemption of the mortgage, the defendant is not entitled to protection of Urban Rent Control Act- appeal dismissed. (Para-17 to 22)

Cases referred:
Om Prakash Garg vrs. Ganga Sahai and ors. AIR 1988 SC 108

Ishwar Dass Jain vrs. Sohan Lal, AIR 2000 SC 426

In both the appeals:

For the Appellant : Mr. Y.P. Sood, Advocate.

For the Respondent : Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since fate of RSA No. 644/2012 is based on the outcome of RSA No. 401/2003, as such, both the appeals were heard together and are being disposed of by a common judgment. However, in order to maintain clarity, facts of RSA No. 401/2003 have been taken into consideration.

RSA No.401/2003

2. This Regular Second Appeal is directed against the judgment and decree dated 26.6.2003 rendered by the Additional District Judge, Mandi in Civil Appeal No. 117 of 1997.

RSA No. 644/2012

3. This Regular Second Appeal is directed against the judgment and decree dated 8.6.2012 rendered by the Additional District Judge, Fast Track Court, Mandi in Civil Appeal No. 89 of 2009.

4. Appellant-plaintiff (hereinafter referred to as the 'plaintiff' for convenience sake) instituted a suit for possession by way of redemption of shop in dispute situate on the ground floor comprised in Khasra No.311, Khata Khatauni No. 318/494 (old 301/481) measuring 19.50 Sq. M. situated in Moti Bazar, Mohal Suhra/366/6, Mandi Town, District Mandi on the averments that the plaintiff mortgaged the shop in dispute with defendant on 5.2.1987 for a consideration of Rs. 5,000/-. Defendant was put in possession and it was agreed that the plaintiff is entitled to redeem the shop in dispute. Defendant was requested in September, 1992 to accept the amount and handover the possession. Defendant refused to vacate the shop despite notice dated 3.10.1992.

5. Defendant contested the suit. According to defendant, the shop in question was rented out to him in February, 1987 on a rent of Rs. 700/- per month. A sum of Rs. 22,000/- was paid to the plaintiff for inducting him as a tenant. Plaintiff in order to defeat the provisions of H.P. Urban Rent Control Act got the mortgage prepared. He signed the same as he was in dire need of shop.

6. Issues were framed by the Senior Sub Judge, Mandi. He decreed the suit on 24.9.1997. Defendant filed an appeal against the judgment and decree dated 24.9.1997 before the learned Additional District Judge. He allowed the appeal on 26.6.2003. Hence, the present appeal. It was admitted on the following substantial question of law:

> "**Whether the findings of the learned First Appellate Court below are vitiated on account of non-consideration and mis-interpretation of the material evidence and the document Ex. PW-1/D?**

7. Plaintiff had also filed Civil Suit No. 120-1 of 2002 in the court of Civil Judge (Senior Division), Mandi for recovery of Rs. 1,26,000/-. Plaintiff has averred that he has deposited a sum of Rs. 5,000/-on 22.10.1997 in the court of Senior Sub Judge after the

judgment dated 24.9.1997 rendered in Civil Suit No. 145/1993. He was entitled to Rs. 3,500/- per month towards use and occupation charges from the defendant from November, 1999 to November, 2002 amounting to Rs.1,26,000/-.

8. The suit was contested by the defendant. According to the defendant, plaintiff rented the shop in dispute @ 700/- per month in February, 1987. He has paid a sum of Rs. 22,000/- to the plaintiff to induct him as tenant.

9. Issues were framed by the Civil Judge (Senior Division), Court No.1 Mandi on 13.12.2004. He dismissed the suit on the ground that Regular Second Appeal was pending in this Court on 20.6.2009. Plaintiff filed an appeal before the Additional District Judge, Fast Track Court, Mandi. He dismissed the same on 8.6.2012. Hence, RSA No.644/2012.

10. Notice was issued in RSA 644/2012 on 27.11.2012. Both the appeals were ordered to be clubbed by the Court on 6.5.2013.

11. Mr. Y.P. Sood, learned counsel for the plaintiff, has vehemently argued that first appellate court in RSA No.401/2003 has misinterpreted Ex.PW-1/D. He has also contended that defendant was liable to pay use and occupation charges with effect from November, 1999 to November, 2002 @ Rs.3,500/- per month. He has lastly contended that the dispute between the parties before the first appellate court was whether the plaintiff was tenant or mortgagee.

12. Mr. Ajay Kumar, learned Senior Advocate, has supported the judgment and decree rendered by the first appellate court in Civil Appeal No.117 of 1997 assailed in RSA No. 401/2003 and has also supported the judgments and decrees passed by both the courts below which are assailed in RSA No. 644/2012.

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

14. Plaintiff has appeared in Civil Suit No. 145 of 1993 as PW-1. He has testified that he was owner of shop situated in Moti Bazar. He has mortgaged the same with the defendant on 5.2.1987 for a sum of Rs.5,000/-. He has proved mortgage deed Ex.PW-1/D. He has sent the notice to the defendant vide Ex.PW-1/B. He was ready and willing to pay Rs.5,000/- to the defendant.

15. PW-2 Narender Chopra has deposed that plaintiff has mortgaged the shop with the defendant. PW-3 Naginder Sharma has proved map Ex.PW-3/A and PW-3/B.

16. Defendant has appeared as DW-1. He has also admitted that the contents of document were read over to him by the Registrar and he after admitting the same to be correct put signatures on the same. DW-2 Kuber Chand has deposed that the premises were rented out to the defendant. He has also admitted his signatures on Ex.PW-1/D.

17. Plaintiff has duly proved the execution of mortgage deed Ex.PW-1/D. The shop in question was mortgaged to the defendant for a sum of Rs. 5,000/-. Defendant has admitted signatures on Ex.PW-1/D. The real controversy before the first appellate court was that whether the plaintiff was tenant or mortgagee. It is duly established from the evidence led by the parties that defendant was mortgagee and not tenant. There is no violation of the provisions of H.P. Urban Rent Control Act, 1987. Plaintiff has sent notice to the defendant for redemption of mortgage. Defendant has not led any tangible evidence to establish that he was inducted as a tenant. He has also not led any evidence that he has paid a sum of Rs. 22,000/- to the plaintiff at the time of execution of mortgagee deed Ex.PW-1/D. Learned

first appellate court erred in law by returning findings that there was violation of Indian Contract Act and section 52 of the Registration Act.

18. In the case of ***Om Prakash Garg vrs. Ganga Sahai and ors.*** reported in ***AIR 1988 SC 108,*** their lordships of the Hon'ble Supreme Court have held that after the redemption of mortgage, tenant is not entitled to protection of Rent Act. It has been held as under:

> **"[1] After hearing learned counsel for the appellant, we are satisfied that the order passed by the High Court does not call for any interference. The appellant who claims to be a tenant of the mortgagee Narain Prasad resisted the application made by the respondent-decree-holder Ganga Sahai under Order XXI, R. 35 of the Code of Civil Procedure, 1908 pleading inter alia that being a tenant of the mortgagee he was entitled to the protection of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. That objection of his was not sustained by the Executing Court and it accordingly issued a warrant of possession in favour of the decree-holder. The appellant went up in appeal against the order of the executing Court. The Additional District Judge differed from the executing Court and held that the appellant being a tenant inducted into possession by the mortgagee was entitled to the protection of the Act and therefore could not be evicted in execution of the final decree for redemption, and further held that the respondent was only entitled to symbolical possession. Aggrieved, the respondent preferred an appeal to the High Court. By the order under appeal, a learned single Judge following the decision of this Court in M/s. Sachalmal Parasram v. Mst. Ratanbai, AIR 1972 SC 637 held that the lease was not an act of prudent management on the part of the mortgagee Narain Prasad within the meaning of S. 76(a) of the Transfer of Property Act, 1882 and therefore the alleged lease could not subsist after the extinction of the mortgage by the passing of the final decree for redemption and thus the appellant could not take advantage of the Act as there was no subsisting lease in his favour. After hearing the learned counsel, we are not persuaded to take a different view than the one reached by the High Court."**

19. Their lordships in the case of ***Ishwar Dass Jain vrs. Sohan Lal,*** reported in ***AIR 2000 SC 426,*** have dealt in detail Sections 34, 65 and 92 of the Indian Evidence Act. It has been held as follows:

> **".....The facts of the case of Ishwar Dass Jain were that the plaintiff had mortgaged the entire shop and his 5/6th share therein and gave possession of the whole shop to the defendant for Rs. 1,000/ -. He filed a suit for redemption and recovery of possession from the defendant. The mortgage deed stated that on redemption possession had to be delivered back to the mortgagor. On 1.2.1981 the plaintiff demanded production of the deed and possession on redemption. The defendant did not comply. The defence put up by the defendant was that there was no relationship of mortgagor and mortgagee between the parties, but that the relationship was as landlord and tenant. It was also alleged by the defendant that plaintiff was a man of substance and very rich and there was indeed no occasion to mortgage the same for a petty sum. Their Lordships have framed the following points for consideration:**

(1) Whether the High Court can interfere under Section 100, CPC (as mentioned in 1976) with the findings of fact arrived at by the lower appellate Court if vital evidence which could have led to a different conclusion was omitted or if inadmissible evidence was relied upon which if omitted, could have led to a different conclusion?

(2) Whether on the facts of the case, the mortgage was proved by the plaintiff by production of a certified copy of the deed?

(3) Whether Section 92(1) of the Evidence Act could be a bar for proving a document to be a sham document?

(4) Whether the Exs. D2 to D5 were only extracts from account books and could not be treated as account books for purposes of Section 34 of the Evidence Act and were not admissible?

(5) Whether the lower Courts had omitted vital evidence from consideration?

(6) Whether the mortgagee who got possession of the entire property under the deed of mortgage could be permitted to deny the title of the mortgagor either wholly or partly?

(7) What relief?

[12] Their Lordships of the Hon'ble Supreme Court have held as under:

The point here is whether oral evidence is admissible under Section 92(1) of the Evidence Act to prove that a document though executed was a sham document and whether that would amount to varying or contradicting the terms of the document. The plea of the defendant in the written statement was that mortgage deed though true was a sham document not intended to be acted upon and that it was executed only as a collateral security. It was pleaded that the plaintiff demanded that a mortgage deed be executed by defendant as "collateral security in order to guarantee that the shop will be vacated by the defendant whenever demanded by the plaintiff" and that this was done to circumvent the rent control law. It was said that the alleged transaction of mortgage was a sham transaction, executed only with aforesaid object. The consideration of Rs. 1,000/- "was only in the nature of a collateral security or 'pagri'." The plaintiff was and is a rich man and there was no occasion for him to mortgage his property. It was further pleaded:

The plaintiff thus demanded Rs. 1,000/- from the defendant by way of security and asked the defendant to thumbmark some writing to arm the plaintiff with a right to get the shop vacated according to his sweet will. The defendant who was in dire necessity of the shop, had to agree on the said condition put forward by the plaintiff."

But the question is whether on the facts of this case, the reason given by the defendant in his evidence for treating the mortgage as a sham document, can be accepted.

The reason given by the defendant appears to us rather curious. One can understand a debtor incurring a debt and executing a deed as collateral security. There is no such situation here. Further, if it is a deed of collateral security by defendant, then the defendant would have

had to execute a deed in favour of the plaintiff and not vice-versa. Here the plaintiff-owner has mortgaged his shop to the defendant, as security. The plea and evidence of collateral security offered by the defendant appears to us not to fit into a situation where the plaintiff has executed the mortgage. Obviously, if the plaintiff wanted to secure something by way of an additional security from the defendant, the normal course would have been to ask the defendant to give such a security and to for the plaintiff to execute a mortgage. Thus the reason mentioned and evidence given by the defendant as to why a sham document was executed falls to the ground.

Now under Section 34 of the Evidence Act, entries in "account books" regularly kept in the course of business are admissible though they by themselves cannot create any liability. Section 34 reads as follows:

Section 34. Entries in books of account when relevant.-Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

It will be noticed that sanctity is attached in the law of evidence to books of account if the books are indeed "account books i.e. in original and if they show, on their face, that they are kept in the "regular course of business". Such sanctity, in our opinion, cannot attach to private extracts of alleged account books where the original accounts are not filed into Court. This is because, from the extracts, it cannot be discovered whether accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page numbering. Hence, if the original books have not been produced, it is not possible to know whether the entries relating to payment of rent are entries made in the regular course of business.

The judgments of all the three Courts therefore are set aside. The suit is decreed for redemption as follows. The appellants are entitled to redeem the usufructary mortgage and get possession of the suit shop from the defendant, if the appellants deposit in the trial Court, within three months from today, the sum of Rs. 1,000/- There is no need to deposit any interest inasmuch as according to the deed, the defendant was to be in possession and interest was to be set-off against the occupation of the shop. We direct that on such deposit of Rs. 1,000/-, the defendant will produce the mortgage deed into Court for cancellation. In case he does not produce the deed, within the said period, it will be deemed that the mortgage is cancelled. On such deposit of Rs. 1,000/- as aforesaid, the defendant shall restore possession to the appellants. On such restoration of possession, defendant shall be entitled to withdraw the sum of Rs. 1,000/-. In case the defendant does not surrender possession as aforesaid, it will be open to the appellants to seek possession by way of execution."

20. The substantial question of law is answered accordingly.

21. Accordingly, RSA No. 401/2003 is allowed. Judgment and decree dated 26.6.2003 passed by the Additional District Judge; Mandi in Civil Appeal No.117 of 1997 is

set aside. Judgment and decree dated 24.9.1997 passed by the Senior Sub Judge in Civil Suit No. 145 of 1993 is restored. Since a sum of Rs. 5,000/- stands deposited with the trial court, defendant is directed to vacate the shop in question and handover its possession to the plaintiff on or before 31.12.2015.

22. In RSA No. 644 of 2012, both the courts below have dismissed the suit preferred by the plaintiff on the ground that RSA No. 401/2003 was pending before this Court. Both the courts below have not returned any findings whether the defendant was liable to pay use and occupation charges amounting to Rs. 1,26,000/-. The plaintiff has not led any evidence that rent of the shop in question could be Rs. 3,500/- per month. However, the Court can take judicial notice of the fact that the shop in question is situated in Moti Bazar, Mandi, the rent could not be less than Rs. 2,000/. Thus, the defendant is liable to pay rent @ Rs. 2,000/- per month with effect from November, 1999 to November, 2002 = Rs. 74,000/-. In view of the fact that judgment passed by the first appellate court in Civil Appeal 117 of 1997 is set aside, the judgments and decrees rendered by both the courts below assailed in RSA No. 644 of 2012 are liable to be set aside. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Dinesh Kumar. ...Petitioner.

Versus

State of Himachal Pradesh and others. ...Respondents.

CWP No. 3195 of 2010.
Reserved on:16.9.2015.
Date of decision: 30.9.2015.

Constitution of India, 1950- Article 226- Petitioner, respondent no. 6 and others appeared for the post of DPE- respondent No. 6 was selected - petitioner claimed that he had superior merit vis-à-vis respondent No. 6 and he was wrongly ignored- process of appointment had started on 10.5.2007 and notification was issued on 27.5.2008- the norms laid down in the notification could not have been applied retrospectively for awarding the marks- notification dated 10.5.2007 was applicable- Interview Committee had awarded the marks as per this notification and there is no infirmity in the marks awarded by the Interview Committee- petition dismissed. (Para-7 to 9)

Case referred:
Kailash Chand Sharma vs. State of Rajasthan, (2002) 6 Supreme Court Cases 562

For the petitioner: Mr. Gaurav Gautam, Advocate.

For the respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondents No.1 to 3 and 5.
Mr. Lalit K. Sharma, Advocate, for respondent No.4.
Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates, for respondent No.6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

A vacancy of DPE arose in Government Senior Secondary School, Jaddu Kuljar. The PTA Committee of the school concerned resolved to fill the vacancy aforesaid. Applications were invited from the eligible candidates. The petitioner along with other eligible candidates applied for being considered for selection for the aforesaid post/ vacancy. Interviews for selecting the most meritorious candidate amongst the competing aspirants were held by the duly constituted committee on 10.5.2007. Respondent No.6 having been awarded the highest marks by the selection committee concerned constituted him to be the most meritorious candidate amongst all the candidates, who participated in the interview for being considered to be selected to the post of DPE in the school concerned. The respondent No.6 being the most meritorious candidate amongst the candidates interviewed by the interviewing committee concerned sequelled his having come to be appointed as DPE (on PTA basis) in Government Senior Secondary School, Jaddu Kuljar. The petitioner herein filed a complaint before the Inquiry Committee, Ghumarwin headed by the SDM, Ghumarwin assailing therein the selection and appointment of the respondent No.6 as DPE in Government Senior Secondary School, Jaddu Kuljar. In the complaint filed by the petitioner herein before the aforesaid committee, it was alleged therein that the interviewing committee concerned had ignored the superior merit of the petitioner herein vis-a-vis respondent No.6, hence, had acted arbitrarily as well as discriminatorily vis-à-vis the petitioner herein. The inquiry committee headed by the SDM, Ghumarwin while being seized of the complaint filed by the petitioner herein, challenging the selection and appointment of the respondent No.6 as DPE in the school concerned, proceeded to scan as well as evaluate the marks allotted by the interviewing committee concerned, to both the petitioner herein and to the respondent No.6 herein. The Inquiry Committee on scanning as well as evaluating the marks accorded to the petitioner herein and to the respondent No.6, by the interviewing committee concerned, discerned therefrom that the interviewing committee concerned in transgression of the purported apposite instructions regulating besides governing the awarding of marks to the petitioner herein and to the respondent No.6 herein, hence, had overlooked the superior merit of the petitioner herein vis-à-vis the respondent No.6 and had proceeded to, hence allot lesser marks to the petitioner herein qua his superior/higher educational qualifications than the one which were ordained to be meted qua them in consonance with the purported apposite instructions. In sequel the Chairman of the inquiry committee under his rendition comprised in annexure P-2 concluded that the selection of the respondent No.6 herein by the Interviewing committee concerned was not liable to be upheld, besides it prepared a result-sheet awarding marks therein to the petitioner herein besides to the respondent No.6 herein, as also to one Rekha Kumari on the anvil of the notification of 27.5.2008 issued by the respondents No.1 to 3 and 5.

2. The respondent No.6 herein standing aggrieved by the rendition of the inquiry committee headed by the SDM, Ghumarwin comprised in annexure P-2 took to assail it by filing an appeal before the Additional District Magistrate, Bilaspur. The Additional District Magistrate, Bilaspur reversed and set aside the findings recorded in annexure P-2 under his rendition comprised in annexure P-3. The core ground which prevailed upon the Additional District Magistrate, Bilaspur while reversing the findings and conclusions recorded in annexure P-2 was anvilled upon the factum of the authority which rendered annexure P-2 having founded its conclusions qua the interviewing committee concerned which awarded marks to the competing aspirants under various heads of educational qualifications possessed by each of them in the interview held for selecting

amongst them, the candidate possessing the superior most merit for recommendation for appointment to the post of DPE in the school concerned, having detracted from the criterion/norms governing and regulating the awarding of marks to them solely by sheer mis-application to the method, manner and quantum of awarding of marks to the competing aspirants under each head of educational qualifications possessed by each of the candidates, the notification of 27.5.2008. However, given the fact that the process for selection from amongst the eligible aspirants who had applied for being selected to the post of DPE in the school concerned, the candidate possessing superior most merit, having commenced on 10.5.2007, then naturally the rules besides the notification governing the quantum of marks to be awarded by the interviewing committee concerned to each of the candidates for theirs possessing the educational qualifications, as in force then rather governed besides regulated the quantum of marks to be awarded by the interviewing committee concerned to the competing aspirants qua each of the heads of the educational qualifications possessed by each of them. In other words, the norms or the notification in force at the time contemporaneous to the holding of interviews by the interviewing committee concerned for selecting a suitable candidate for recommendation for appointment to the post of DPE in the school concerned, regulated or governed the awarding of quantum of marks by the interviewing committee concerned to each of the aspirants qua each of the heads of educational qualifications possessed by each of them. In sequel, the Additional District Magistrate, Bilaspur in his rendition comprised in Annexure P-3 while reversing the findings and conclusions recorded by the SDM, Ghumarwin, who headed the inquiry Committee for deciding the complaint preferred by the petitioner herein, challenging the appointment of respondent No.6 herein, concluded that the criteria applied besides adopted by the duly constituted interviewing committee for selecting from amongst the competing aspirants the most meritorious candidates for being recommended for appointment to the post of DPE in the school concerned, was both reverable besides sustainable.

3. The petitioner herein is aggrieved by the rendition of the Additional District Magistrate, Bilaspur, comprised in annexure P-3. Consequently, he preferred a civil writ petition before this court wherein he challenged the rendition of the Additional District Magistrate, Bilaspur comprised in annexure P-3.

4. The learned Single Judge of this Court while deciding the writ petition preferred before this court at the instance of the petitioner herein, assailing the rendition of the Additional District Magistrate, Bilaspur, comprised in annexure P-3 for reasons as meted out therein, concluded that the impugned Annexure P-3 was unsustainable. The prime reason as meted out by the learned Single Judge for reversing the findings and conclusions recorded in annexure P-3 by the Additional District Magistrate, Bilaspur were anvilled upon the factum that with the latter having in paragraph 5 extracted hereinafter, recited therein the norms/criterion as applicable for the awarding of or allotment of marks to the competing candidates by the interviewing committee concerned, had remained oblivious besides overlooked the factum of 10% marks being awardable to the petitioner herein for his possessing the educational qualification of M.Phill. Since the petitioner herein possessed the aforesaid educational qualification at the time contemporaneous to his having applied for being selected and appointed to the post concerned, hence, it was held that the interviewing committee concerned in derogation thereof having allotted to him only 2.6 marks, whereas in consonance thereto he was entitled for an award of 6.5 marks by the interviewing committee concerned especially when 6.5 marks comprised 10% of the marks allocable to him for his possessing at the time contemporaneous to his having applied for his being considered to be selected and appointed to the post of DPE in the school concerned, the aforesaid apposite educational qualification. In sequel with compliance having been not meted out by the interviewing committee concerned to the mandate elucidated in paragraph

5 of Annexure P-3, the learned Single Judge concluded that there was gross under allocation of marks to the petitioner herein by the interviewing committee concerned qua the aforesaid apposite educational qualification possessed by him. Consequently, the learned Single Judge of this Court quashed and set aside annexure P-3.

"The criterion elucidated in paragraph 5 of annexure P-3 stands hereinafter extracted:-

i) Basic qualification Plus 2 or graduation	**35%**
ii) Professional education i.e. B. P.Ed or BPE	**30%**
iii) Higher Education i.e. M.P.Ed.	**10%**
iv) M. Phill/Ph.D	**10%**
v) Interview	**10 marks**
vi) Local dialects	**5 marks**

	Total: 100 marks
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5. The decision rendered by the learned Single Judge in CWP No.3195 of 2010 was concerted to be reviewed by the respondent No.6 by his filing a Review Petition. However, the said Review Petition stood dismissed. Consequently, the respondent No.6 standing aggrieved by the rendition of the learned Single Judge of this Court of 20.12.2012, took to assail it by filing a Letters Patent Appeal before a Division Bench of this Court. The Principal Division Bench of this Court while deciding LPA No.23 of 2013 on 17th June, 2013, as had arisen from a decision rendered on 20.12.2012 by the learned Single Judge of this Court in CWP No.3195 of 2010, set aside the rendition of the learned Single Judge of this Court, besides the matter was remanded to the learned Single Judge for rendering a re-adjudication upon CWP No.3195 of 2010.

6. Even though in impugned annexure P-3, the Additional District Magistrate, Bilaspur has in the paragraphs preceding to and succeeding paragraph 5 delineated therein in extenso the apposite norms/criterion in force at the time contemporaneous to the holding of interviews of the competing aspirants by the interviewing committee concerned for selecting amongst them a suitable candidate for recommendation for appointment to the post of DPE in the school concerned and theirs while governing and regulating the method besides the quantum of marks allocable by the interviewing committee concerned to each of the aspirants for theirs possessing each of the academic qualifications, rendered their adoption by the interviewing committee concerned for awarding marks to the competing aspirants in consonance therewith to be vindicable. The Additional District Magistrate, Bilaspur while precedingly having held that the norms as comprised in the notification of 27.5.2008 were inapplicable besides did not govern the method of besides did not regulate the quantum of marks allocable by the interviewing committee concerned to the competing aspirants, for theirs possessing each/any of the educational qualifications, rather when no retrospectivity in operation has been given to the notification of 27.5.2008, the application of the latter notification by the SDM, Ghumarwin in his rendition comprised in annexure P-2, to the method of awarding of marks or quantum of their allocation to each of the competing aspirants for theirs possessing any or all of the educational qualifications was hence, held by him to render its application by the SDM, Ghumarwin in his rendition comprised in annexure P-2 to vitiate it with an aura of legality. Moreover, it was impliedly held that the norms prevalent at the time contemporaneous to the initiation of process by the respondents for selecting a suitable candidate for recommendation for appointment to the post of DPE in the school concerned inasmuch as the ones in operation or in vogue

besides in prevalence on 10.5.2007, when the process for filling up the post of DPE was initiated and as applied by the interviewing committee concerned were the ones which governed, regulated, besides the prescriptions therein carrying legal force as such rendered the reliance placed upon them by the interviewing committee concerned to be sustainable. As such given the factum that the process for selection of a suitable aspirant for recommendation for appointment to the post of DPE in the school concerned commenced on 10.5.2007, obviously, then the norms though extracted in paragraph 5 of the impugned annexure came into force subsequent to the initiation of process by the respondents for selection for recommendation for appointment of a suitable aspirant to the post of DPE in the school concerned, as such when they could not be given retrospectivity in operation for regulating the allocation of marks by the interviewing committee concerned to each of the competing aspirants for theirs possessing each of the academic qualifications enumerated therein. Resultantly, the Additional District Magistrate, Bilaspur having formed a conclusion about the untenability of operation of norms/criterion of 27.5.2008 to the period preceding it when the process for selecting for recommendation for appointment of a DPE in the school concerned commenced, it appears that his having extracted in paragraph 5 the criterion/norms of 27.5.2008 and hence, held them to be regulating the allocation of quantum of marks by the interviewing committee concerned to each of the competing aspirants qua each of the heads of academic qualifications possessed by them, though yet his in the paragraph succeeding it concluded that in the result-sheet prepared by the interviewing committee concerned qua each of the competing candidates, the allocation of marks to them in consonance therewith was not suffering from any infirmity, renders the extraction in paragraph 5 of the impugned annexure the norms of 27.5.2008 and reliance thereto by him to have arisen from sheer inadvertence. In other words, as a matter of fact, the Additional District Magistrate, Bilaspur in his impugned annexure comprised in annexure P-3 in paragraph 5 had inadvertently extracted the norms/criterion governing the allocation of quantum of marks by the interviewing committee concerned to each of the competing aspirants for theirs possessing each or all of the academic qualifications enumerated therein which were rather the norms, which had rather come into force on 27.5.2008 and which were in annexure P-3, precedingly concluded by him to be not applicable to the stage contemporaneous to the initiation of process by the respondents for selecting for recommendation for appointment of a suitable candidate to the post of DPE in the school concerned, which process rather stood commenced besides stood initiated at a time prior to the coming into force of the norms of 27.5.2008, hence for reiteration were unavailable for invocation or attraction by the interviewing committee concerned for inconsonance thereto awarding marks to the competing aspirants who stood interviewed by it. Nonetheless, the extraction by the Additional District Magistrate, Bilaspur in paragraph 5 of annexure P-3 the norms enshrined in the notification of 27.5.2008 and theirs governing the allocation of quantum of marks by the interviewing committee concerned to the competing aspirants for theirs possessing all or any of the heads of educational qualifications besides obviously also appears to have arisen from sheer inadvertence especially when in the paragraph succeeding it he has not denounced or frowned upon the manner in which the quantum of marks by the interviewing committee concerned stood allocated to the petitioner herein or to the respondent No.6 herein, rather when in the concluding paragraph of impugned annexure P-3 he has approbated the manner in which the interviewing committee concerned allocated marks to the competing aspirants for theirs possessing each, any or all of the educational qualifications enunciated therein, marks the fact of his in tandem with the findings recorded in the impugned annexure preceding paragraph 5 thereto concluded that the allocation of or awarding of marks by the interviewing committee to the competing aspirants inclusive of the petitioner herein and the respondent No.6 was in consonance with the norms/criterion in force then besides were the

ones legally, appositely or tenably applicable to the stage contemporaneous to the initiation of process for selecting a suitable candidate for recommendation for appointment to the post of DPE in the school concerned. It appears that the extraction by sheer inadvertence in paragraph 5 of annexure P-3 of the norms of 27.5.2008 by the Additional District Magistrate, Bilaspur and theirs governing besides regulating the allocation of or the awarding of marks by the interviewing committee concerned to the competing aspirants for theirs possessing all or any educational qualifications prescribed therein has led the learned Single Judge of this Court to, while adverting to Seriatim No.4 of the norms extracted in paragraph 5 of the impugned annexure, wherein 10% marks were allocable to the petitioner herein for his possessing M.Phill/Ph.D and in consonance therewith the interviewing committee concerned having not allotted marks to the petitioner herein, conclude that the impugned annexure P-3 is unsustainable. In case the learned Single Judge of this Court while deciding the instant Civil Writ Petition had read the impugned annexure P-3 in a wholesome and harmonious manner and not in a fragmentary manner, as he did, it would not have sprouted any mis-application to the stage contemporaneous to the holding of interview of the competing aspirants by the interviewing committee concerned for selecting amongst them the most suitable aspirant for recommendation for appointment to the post of DPE in the school concerned, the norms of 27.5.2008 which had operation in prospectivity and not any operation in retrospectivity as has been untenably foisted to them.

7. However, even if the Additional District Magistrate, Bilaspur in impugned annexure P-3 by gross inadvertence has extracted the norms of 27.5.2008, wherein though 10% marks were allocable to the petitioner for his possessing M.Phil degree, which percentum of marks having not come to be allotted to him, constrained the learned Single Judge of this Court to interfere with the impugned annexure P-3. Nonetheless, the reflection by sheer inadvertence of norms of 27.5.2008 in the impugned annexure P-3 would not render amenable to interference by this Court the awarding of marks by the interviewing committee concerned to each of the competing aspirants for theirs possessing each of the academic qualifications, unless such allocation or awarding of marks as personified in annexure P-4 by the interviewing committee concerned to each of the competing aspirants for theirs possessing each/any or all of the academic qualifications manifested therein, is palpably in dire transgression of the norms/criterion then in force. For testing the factum, whether the norms applied by the interviewing committee concerned while awarding marks to the competing aspirants were in force then or had acquired a binding legal effect arising from their holding legal efficacy in contemporanity with the initiation of process by the respondents for selecting a suitable candidate amongst the competing aspirants for recommendation for appointment to the post of DPE in the school concerned, it is necessary to advert to the factum displayed in annexure R-4/1. Evidently, the criterion/norms enshrined in annexure R-4/1 came into force in 2006. The process for selecting by the interviewing committee concerned a suitable aspirant possessing the superior most merit amongst the aspirants interviewed by it for his being recommended for appointment to the post of DPE commenced in 2007, hence, when the norms comprised in annexure R-4/1 had legal force till 10.5.2007, more so when it stood replaced only by the subsequent norms on 27.5.2008, in face thereof any reliance placed upon the norms of 27.5.2008 by the SDM, Ghumarwin in his rendition comprised in annexure P-2, was wholly ill-founded besides misconceived. Resultantly, then the norms/criterion prescribed in annexure R-4/1 held sway on 10.5.2007, when the interviewing committee concerned held interviews for selecting the most meritorious candidates for his recommendation for appointment to the post of DPE in the school concerned. Now it is to be gauged whether the command or mandate of annexure R-4/1 which held legal sway in contemporanity with the initiation of process by the respondents for selecting and appointing the most meritorious candidate to the post of DPE in the school concerned, has been given effect to by the interviewing committee

concerned, a perusal of annexure P-4 the tally-sheet drawn up by the interviewing committee concerned qua the candidates interviewed by it, is imperative. Annexure P-4 pronounces the fact that in consonance with the prescriptions in annexure R-4/1 the interviewing committee concerned had in annexure P-4 drawn up the heads whereunder marks had come to be allotted to the competing aspirants, by it. For reiteration, a perusal of annexure P-4 unfolds the factum that the interviewing committee concerned reserved 35% of the total allocable marks for each of the competing aspirants for theirs possessing the basic qualification of 10+2/graduation for the post concerned. It also reserved 30% marks for allocation to each of the competing aspirants for theirs possessing professional education for the post i.e. B.PEd or B.PE. 10% marks were reserved for allocation for higher education i.e. M.Ped. 4% marks were reserved for any candidate possessing M.Phill degree. 10 marks were reserved for Ph.d. degree, 10 marks were reserved for subject experience and 5 marks were reserved for local dialects. Hence, the reservation of marks in annexure P-4 by the interviewing committee concerned, which interviewed the competing aspirants for selection/appointment for the post of DPE in the school concerned is in consonance with the prescription in annexure R-4/1. In sequel the allocation of marks in annexure P-4 by the interviewing committee concerned to the competing aspirants does not suffer from any legal frailty. The prescription in annexure R-4/1 which is the PTA policy of 2006 stands extracted hereinafter:-

"Under the PTA policy 2006 for the appointment of D.P.E. on the P.T.A. basis, the following criteria was adopted by the P.T.A. committee of G.S.S.S. Jaddu Kulzar, District Bilaspur. The criteria is also shown in result sheet of D.P.E.

Academic Examination Criteria		Percentage
(1)	Basic qualification for the post i.e. +2 or graduation	35%
(2)	Professional education for the post i.e. B. PEd or B.PE	30%
(3)	Higher education i.e. M.Ped.	10%
(4) (a)	M. Phill (of the total percentage)	4%
	(b) Ph. D.	10 (10 marks if Ph.D completed by the candidate)
Interview		
(5)	Subject exper./ M.M.	10
(6)	Local dialects	05
	Total	100"

For reiteration the prescriptions therein, given the fact that the process for filling up the post of DPE in the school concerned was initiated/commenced in the year 2007, hence, rendering the prescriptions in annexure R-4/1 to be acquiring force, for regulating in consonance therewith the allocation of marks by the interviewing committee concerned to the competing aspirants for theirs possessing each of the academic qualifications elucidated therein, obviously then the allocation of marks by the interviewing committee concerned in consonance therewith cannot come to be faulted on any count. An accentuated vigor to the factum of the interviewing committee concerned having in consonance with annexure R-4/1 allocated marks to the competing candidates for theirs possessing educational qualifications

or any of the educational qualification as enshrined therein is borne out by manifestation in the tally sheet/marksheet prepared by the interview committee concerned comprised in annexure P-4. Moreover, the norms of 27.5.2008 as mis-applied by the learned Single Judge of this Court while reversing the findings and conclusions arrived at by the Additional District Magistrate, Bilaspur had prospectivity in operation and not retrospectivity in operation, as has been imputed to them by the learned Single Judge while reversing the findings and conclusions recorded by the Additional District Magistrate, Bilaspur merely on the score of the latter in paragraph 5 by sheer inadvertence having extracted the norms of 27.5.2008 yet in discordance therewith the interviewing committee concerned in annexure P-4 having not meted out to the aspirants, marks qua each head of the academic qualifications possessed by each of them constrained the learned Single Judge of this Court to interfere with the findings recorded in annexure P-3, whereas for the reasons as attributed hereinabove the said reflection in paragraph 5 of the impugned order of norms of 27.5.2008 is by sheer inadvertence and would not, when the order comprised in annexure P-3 is read in its entirety and not fragmentarily besides in isolation with the findings contrary to it precedingly and succeedingly recorded therein, render amenable to any interference, besides would not oust the awarding or allocation of marks in annexure P-4 by the interviewing committee concerned to the competing aspirants especially when allocation of marks therein by the interviewing committee concerned to the competing aspirants for theirs possessing each of the educational qualification as enshrined therein, is in consonance with besides stands encompassed within the domain of prescriptions expostulated in annexure R-4/1 reciting the norms then in force. Consequently, the allocation of marks under annexure P-4 while being in consonance with the norms governing besides applicable to the quantum of marks allocable by the interviewing committee concerned to the competing aspirants for theirs possessing each, any or all of the educational qualifications as enunciated therein, does not suffer from any legal frailty nor can the allocation of marks under annexure P-4 to the competing aspirants by the interviewing committee concerned in any manner be construed to be constituting any misdemeanor on its part.

8. Amplifyingly rather scuttling of the allocation of marks under annexure P-4 by the interviewing committee concerned to the competing aspirants would beget infraction of the mandate of the PTA policy of 2006, which when in vogue at the time contemporaneous to the initiation or commencement of process by the respondents for selecting a suitable candidate for appointment to the post of DPE in the school concerned and entailed upon the interviewing committee concerned to in compliance with the prescriptions therein adopt the method, manner besides the quantum of allocation of marks to the competing aspirants for theirs possessing each, any or all of the educational qualifications enshrined therein, for facilitating it to select amongst them the candidate possessing the superior most merit for recommendation by it, for his being appointed to the post of DPE in the school concerned, which compliance for the reasons aforesaid having been meted out by the interviewing committee concerned while allocating marks under annexure P-4 to the competing aspirants, rather spurs this Court to, with aplomb revere besides uphold the manifestations in annexure R-4/1.

9. The Principal Division Bench of this Court while deciding LPA No.23 of 2013 on 17th June, 2013 has underlined in paragraph 5 thereof that even though there is a prescription in the apposite criteria, which has been held by this Court to be applicable to the stage contemporaneous to the holding of interviews by the interviewing committee concerned for selecting amongst the interviewed candidates, the candidate possessing the superior most merit, for his being recommended for appointment to the post of DPE in the school concerned, of 35% marks being allocable to basic qualification for the post i.e. 10+2

or graduation, 30% being allocable to professional education i.e. B. PED or B.PE, 10% being allocable for higher education i.e. M.Ped, 4% marks being allocable for M. Phill and 10 marks being allocable for Ph.D and 10 marks being allocable for subject experience and 5 marks being allocable for local dialects. Hence, when qua some of the heads of academic qualifications possessed by the competing aspirants there is a mandate therein to the interviewing committee concerned to allocate the optimum allocable percentum to the competing aspirants, yet the optimum percentum of marks allocable to the competing aspirants are not compatible with the maximum marks inasmuch as 100 being awardable to them by the interviewing committee concerned. In sequel, it was observed in paragraph 5 of the decision of the Principal Division Bench of this Court that the optimum allocable percentum of marks qua some of the heads of educational qualifications possessed by the competing aspirants, is not compatible to the actual optimum awardable marks under such heads, hence, an incongruity exists vis-à-vis the optimum percentum of marks under such head of educational qualifications qua which marks in percentum are earmarked for allocation to them vis-à-vis the optimum awardable marks to them under such heads. Naturally then it was observed that the optimum allocable percentum of marks under such heads of educational qualifications cannot ultimately constitute such optimum awardable precentum of marks qua them to beget theirs totaling 100 marks, the latter constituting the maximum marks awardable to the candidates appearing in the interview concerned. However, to the considered mind of this Court anomaly if any as may exist gets subsumed besides gets submerged in the factum that if any of the competing aspirants under certain heads of educational qualification qua which optimum allocable marks are upto a prescribed percentum thereof, possesses the fullest marks in the heads aforesaid, then adequate fullest marks in percentum in commensuration thereof would come to be meted to him. In other words, if any of the aspirant scores in each of the relevant educational heads of the score-sheet, the fullest or the optimum marks, then in commensuration thereto he would be awarded or allocated marks in percentum not beyond, but yet upto the maximum percentum thereof as prescribed under such educational head. In that event, the acquisition of the fullest percentum of marks by any of the aspirants under each of such heads qua which award in percentum is prescribed in annxure R-4/1 would obvisously beget allocation to him marks in equivalence thereof. In other words awarding of 35% marks which is the fullest percentum or the fullest marks under such head/heads of educational qualification qua which awarding of marks in percentum has been enshrined in the apposite instructions would constitute the optimum awarding of marks under such head/heads. Necessarily then if an aspirant has in his +2 qualification or in his graduation has obtained the fullest marks in the score-sheet of the apposite examination, he would be awarded the fullest percentum of marks as enshrined qua it in Annexure R-4/1. Likewise qua other educational qualifications qua which allocation in percentum has been mandated in Annexure R-4/1, the acquisition by him of the fullest marks in the score sheet/tally sheet of the apposite educational qualifications would render him fit to obtain the highest or the optimum percentum prescribed in annexure R-4/1. Consequently, the factor of awarding of marks percentum wise under any of the head/heads of educational qualification manifested in annexure R-4/1, is not to be construed to be constituting their awarding to any of the competing aspirants to the post of DPE in the school concerned, to be suffering from any ambiguity or any anomaly merely on the score of the apposite criterion while prescribing the awarding of marks to any of the aspirants in percentum in commensuration to the marks obtained by him in the score sheet/tally sheet of the apposite educational qualifications which he possesses, not meeting the target of the maximum/optimum marks awardable in the interview concerned to the competing aspirants being not upto 100.

10. The learned counsel appearing for the petitioner herein has relied upon a judgment of the Hon'ble Apex Court in **Kailash Chand Sharma** vs. **State of Rajasthan**,

reported in (2002) 6 Supreme Court Cases 562, wherein at paragraph 31 which stands extracted hereinafter:-

> **"31. The two grounds pleaded in justification of preferential treatment accorded to rural area candidates found favour with the Division Bench of the High Court in Baljit Kaur's case (1992 WLR Raj. P.83) and Arvind Kumar Gochar's case (decided on 6.4.94). Shri Rajeev Dhawan appearing for the selected candidates who have filed SLP No. 10780/2001, did his best to support the impugned circular mainly on the second ground, namely, better familiarity with the local dialects. The learned counsel contends that when the teachers are being recruited to serve in Gram Panchayat areas falling within the concerned Panchyat Samiti, those hailing from the particular district and the rural areas of that district are better suited to teach the students within that district and the Panchyat areas comprised therein. He submits that the local candidates can get themselves better assimilated into the local environment and will be in a better position to interact with the students at primary level. Stress is laid on the fact that though the language/mother tongue is the same, the dialects varies from district to district and even within the district. By facilitating selection of local candidates to serve the Panchyat run schools, the State has not introduced any discrimination on the ground of residence but acted in furtherance of the goal to impart education. Such candidates will be more effective as primary school teachers and more suitable for the job. It is therefore contended that the classification is grounded on considerations having nexus with the object sought to be achieved and is not merely related to residence. We find it difficult to accept this contention, though plausible it is. We feel that undue accent is being laid on the dialects theory without factual foundation. The assertion that dialects and nuances of the spoken language varies from district to district is not based upon empirical study or survey conducted by the State.**
>
> **Not even specific particulars are given in this regard. The stand in the counter affidavit (extracted supra) is that "each zone has its distinct language". If that is correct, the Zila Parishad should have mentioned in the notification that the candidates should know particular language to become eligible for consideration. We are inclined to think that reference has been made in the counter to 'language' instead of 'dialects' rather inadvertently. As seen from the previous sentence, the words dialects and language are used as interchangeable expressions, without perhaps understanding the distinction between the two. We therefore take it that what is meant to be conveyed in the counter is that each Zone has a distinct dialects or vernacular and therefore local candidates of the district would be in a better position to teach and interact with the students. In such a case, the State Government should have identified the zones in which vernacular dissimilarities exist and the speech and dialects vary. That could only be done on the basis of scientific study and collection of relevant data. It is nobody's case that such an exercise was done. In any case, if these differences exist zone-wise or region-wise, there could possibly be no justification for giving weightage to the candidates on the basis of residence in a district. The candidates belonging to that zone, irrespective of the fact whether they belong to x, y or z district of the zone could very well be familiar with the allegedly different dialects peculiar to that zone. The argument further breaks down, if tested from the stand point of award of bonus marks to the rural candidates. Can it be said reasonably that candidates who have settled down in the towns will not be familiar with the dialects of that district?**

Can we reasonably proceed on the assumption that rural area candidate are more familiar with the dialects of the district rather than the town area candidates of the same district? The answer to both the questions in our view cannot but be in the negative. To prefer the educated people residing in villages over those residing in towns big or small of the same district, on the mere supposition that the former (rural candidates) will be able to teach the rural students better would only amount to creating an artificial distinction having no legitimate connection to the object sought to be achieved. It would then be a case of discrimination based primarily on residence which is proscribed by Art. 16(2).”

Wherein the Hon’ble Apex Court has held that any reservation of 5 marks for allocation amongst the competing aspirants on the ground of his being a resident of a rural area of a district would tantamount to discrimination based primarily on residence, which would infract the mandate of Article 16(2) of the Constitution of India. The counsel contends that in the apposite guidelines, the respondents having reserved 5 marks for being allocated to candidates possessing proficiency in local dialects tantamounts to discrimination amongst the competing aspirants on the anvil primarily of residence. Hence, the reservation of 5 marks on the score aforesaid in the apposite guidelines in force at the time contemporaneous to the holding of interviews by the interview committee concerned for selection amongst them the most meritorious candidate for recommendation for appointment to the post of DPE in the school concerned, too suffers from the vice of discrimination anvilled primarily on residence besides infracts the mandate of Article 16(2) of the Constitution of India.

11. The counsel for the petitioner contends that given the pronouncement in the hereinabove extracted paragraph of the verdict of the Hon’ble Apex Court, that the distinctivity in dialects and speeches existing in different zones should have been borne out in a scientific study carried out by the respondents and such study unearthing data qua distincivity in speech and dialects prevailing in different zones or areas rather would have provided a firm legal bedrock to the prescription in the apposite guidelines of 5 marks being reserved for allocation to the competing aspirants for theirs possessing proficiency in local dialects. He contends that when no material is forthcoming on the part of the respondents that preceding theirs reserving 5 marks in the apposite guidelines for allocation to the competing aspirants for theirs possessing proficiency in local dialects, they had conducted any scientific study. In sequel with no material in this regard having emanated the prescription of 5 marks in the apposite guidelines for theirs being allocable to candidates possessing proficiency in local dialects besides any allocation under the aforesaid head constitutes contravention of the mandate of the Hon’ble Apex Court comprised in paragraph 31 of its judgment which stands extracted hereinabove.

12. Before testing, whether the mandate of the Hon’ble Apex Court constituted in the hereinabove extracted paragraph is applicable to the facts at hand, it is necessary to bear in mind that in the judgment relied upon by the learned counsel for the petitioner there was a prescription therein of 5 marks being reserved for allocation to the residents of rural areas of district. The said reservation of 5 marks for there allocation or awarding to candidates, who were residents of rural areas of district, was held by the Hon’ble Apex Court to be a discrimination not anchored upon any reasonable classification founded upon any intelligible differentia having a nexus with the object sought to be achieved besides it was held that it tantamounted to discrimination based primarily on residence which infringed the mandate of Article 16(2) of the Constitution of India. However, in the instant case in distinctivity to the judgment relied upon by the counsel for the petitioner wherein 5 marks

were reserved for allocation to residents of rural areas of district, in the instant case in the apposite guidelines there is a reservation of 5 marks for allocation to those competing aspirants who possess proficiency in local dialects. The marked distinctivity inter se the head qua which 5 marks had been reserved for allocation to the competing aspirants in the judgment relied by the learned counsel for the petitioner vis-a-vis the apt head/factual matrix of the case at hand, naturally constrains this Court to not accept the contention of the learned counsel for the petitioner herein that the reservation of 5 marks in the apposite guidelines for their allocation to candidates possessing proficiency in local dialects is to be construed to be constituting a head analogous to "residents of rural areas of a district", reservation of marks whereunder in the judgment relied upon by the learned counsel for the petitioner constrained the Hon'ble Apex Court to hold that it being a reservation based primarily on residence hence infracted the constitutional mandate enshrined in Article 16(2) of the Constitution of India, rather concomitantly with a marked distinctivity inter se, the head of reservation of marks in the case relied upon by the learned counsel for the petitioner inasmuch as therein the head of reservation of five marks for allocation to the competing aspirants therein stands constituted or encapsulated in the phraseology "residents of rural areas of district" vis-a-vis the head of proficiency in local dialects qua which head 5 marks have been reserved for allocation to such candidates who possess proficiency therein, cannot render the mandate of the Hon'ble Apex court comprised in the hereinabove extracted relevant paragraph of its judgment, to be applicable to the relevant head of proficiency in local dialects enunciated in the apposite guidelines, for proficiency whereof there is a prescription therein of an optimum of five marks being allocable to any of the competing aspirants nor also it can be said that the said reservation of 5 marks under the apposite guidelines under the aforesaid head is not anvilled upon any intelligible differentia having no nexus with the object sought to be achieved, besides it cannot be said that it is a discrimination primarily based on residence, hence, infracting the mandate of Article 16(2) of the Constitution of India. Contrarily in the relevant paragraph 31 of the judgment of the Hon'ble Apex Court, it having been held that even if dis-similarities or distinctivities in speech exist such distinctivities in speech should stand constituted in a data complied by a scientific study carried out by the Government concerned for foisting constitutional validity to the prescription of marks to the competing aspirants to the post concerned, for theirs possessing proficiency in local dialects. Even if there is no material forthcoming from the records produced by the respondents that they had carried out a scientific study qua the dis-similarities in speeches and dialects prevailing in the different areas/zones in the State of Himachal Pradesh in commensuration thereof, they prepared any relevant data qua dis-similarities in speeches and dialects prevailing in various zones/areas in the State of Himachal Pradesh and such studies also comprising the area where a suitable aspirant was to be selected to be appointed as DPE on PTA basis in the school concerned whereas such data manifesting the distinctivity in dialect prevailing in the apposite area would have hence validated the prescription in the apposite guidelines of 5 marks being allocable to candidates possessing proficiency in local dialects. Nonetheless when the duly constituted interviewing committee concerned for interviewing candidates appearing before it for being considered for selection by it to the post concerned comprised of the Pradhan as well as the Secretary of the PTA concerned, besides the Principal of the school concerned they are presumed to be hence possessing the necessary expertise to gauge as well as test the proficiency in the local dialect of the competing aspirants to the post of DPE, besides they are to be also presumed to be well acquainted with the finer and subtle nuances of the accent of the dialect spoken in the area where a suitable candidate was to be selected for appointment as DPE, especially when no material has been placed on record before this Court to dislodge the said presumption. Obviously then their expertise to assess the ability besides the proficiency of the competing aspirants to with flair communicate with the students in the

finer and subtle nuances of the accent of the local dialect prevailing in the area where the school concerned is situated, cannot warrantedly be construed to be wanting in any respect. In sequel when they proceeded to award marks to the petitioner as well as to the respondent No.6 in consonance to theirs testing their proficiency besides ability to communicate in local dialects, the said awarding of marks by the interviewing committee concerned under the head local dialects, while being the subjective assessment of experts qua the said facet cannot be subjected to any interference by this court. Even otherwise, the school where the students were to be imparted education by the selected aspirant, is located in a rural area where the imparting of education to the students in a local dialect would be both desirable besides necessary, as it would beget satisfactory results inasmuch as of ensuring percolation in the minds of the students, the transmission to them of knowledge in the subject concerned. The said holistic object prevailing in the mind of the rule makers, besides it being the predominant factor for incorporation by them in the apposite guidelines, a prescription for the awarding of 5 marks by the interviewing committee concerned to the competing aspirants for proficiency in local dialects, naturally when the aforesaid prescription in the apposite guidelines stand anvilled upon an intelligible differentia besides it has a nexus with the object sought to be achieved, inasmuch as the holistic object of ensuring percolation in the minds of students, who belong to rural backgrounds and who can comprehend to the fullest transmission to them, the dissemination of enlightenment by the teachers concerned only when purveyed in the local dialect.

13. For the foregoing reasons, I find no merit in the petition, which is accordingly dismissed. No costs.

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

Nand Lal alias Lumcha Ram .....Petitioner.

Versus

Master Kamal & anr. .....Respondents.

CRMMO No. 284 of 2015.
Decided on: 30.9.2015.

Code of Criminal Procedure, 1973- Section 125- Petitioner filed a petition seeking maintenance for herself and her children - respondent denied the paternity of the children and claimed that he was married to 'B' and not the petitioner- petition was dismissed by the Magistrate- revision was allowed by the Additional Sessions Judge-II, Shimla- petitioner had proved her marriage- a Civil Suit filed by respondent against the petitioner that she was not his legally wedded wife was dismissed- respondent has not placed any document on record to show that he was married to 'B' and not to the petitioner- direction was issued to the respondent to appear before the Medical Board for DNA profiling - adverse inference was rightly drawn against him- petition dismissed. (Para-7 to 12)

Cases referred:

Chilukuri Venkateswhwarlu vrs. Chilukuri Venkatanarayana, AIR 1954 SC 176
Sharda vrs. Dharmpal, (2003) 4 SCC 493
Banarsi Dass vrs. Teeku Dutta (Mrs) and another, (2005) 4 SCC 449

For the petitioner: Mr. Anupinder Rohal, Advocate, vice cousnel.
For the respondents: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the judgment dated 2.6.2015, rendered by the learned Addl. Sessions Judge-II, Shimla in Criminal Revision No. RBT 12-S/10 of 2014/11.

2. Key facts, necessary for the adjudication of this petition are that respondents No. 1 & 2 have filed petition under Section 125 Cr.P.C. through their natural guardian, mother before the JMIC(5), Shimla on 16.10.2004 seeking monthly maintenance. According to the averments made in the petition, the marriage between Smt. Meena Devi and the petitioner Sh. Nand Lal was solemnized in the year 1998 according to local custom. The relation between the parties remained cordial for about 3 months. Thereafter, the petitioner started ill-treating Smt. Meena Devi. She was forced to leave her matrimonial house. She also filed an application before the Gram Panchayat, Baldian seeking maintenance. The petitioner has failed to maintain his children.

3. The averments made in the petition were denied. According to the petitioner, the children were born out of the loins of one Sh. Hem Dass. She had illicit relations with Sh. Hem Dass. It was admitted that Smt. Meena Devi had filed maintenance petition against him before the Gram Panchayat Baldian. He was married to one Smt. Batti Devi.

4. The learned JMIC (V), Shimla dismissed the petition on 28.7.2010. The respondents filed revision petition before the learned Addl. Sessions Judge-II, Shimla. The learned Addl. Sessions Judge-II, Shimla, allowed the same on 2.6.2015. Hence, this petition.

5. AW-1 Yash Pal, has proved certificates AW-1/A and AW-1/B, issued by Principal, Government Primary School, Mashobra, wherein it is certified that as per the admission withdrawal register, Sh. Nand Lal is recorded as father of the respondents. AW-2 Ashok Kumar has proved the salary certificate of the respondent vide Ext. AW-2/A. AW-3 Meena Devi has reiterated the averments made in the petition. She did not know Hem Dass. She denied the suggestion that Smt. Batti Devi was the legally wedded wife of the petitioner for the last 28 years.

6. The petitioner as appeared as RW-1. According to him, he was married with Batti Devi in the year 1980. He denied the factum of marriage with Smt. Meena Devi. He had no relations with her. He also admitted in cross-examination that he filed Civil Suit against Meena Devi to the effect that she was not his legally wedded wife. RW-2 Prem Dass and RW-3 Ghanshyam have stated that Batti Devi was wife of the petitioner. He had no relations with Meena Devi.

7. The mother of the respondents has duly proved her marriage status and long co-habitation with the petitioner. The civil suit filed by the petitioner against Meena Devi to the effect that she was not legally wedded wife has already been dismissed. The petitioner has not placed any tangible evidence on record that he was married to Batti Devi. In Ext. AW-1/A and AW-1/B, the name of the father has been recorded as Nand Lal.

8. An application under Section 391 Cr.P.C. bearing Cr.M.P. No. 261-S/4 of 2013 was filed before the Court seeking necessary directions for conducting the DNA

profiling of Nand Lal and Meena Devi. The direction was issued to the petitioner to appear before the Medical Board to be constituted by the IGMC, Shimla for DNA profiling. The petitioner did not appear before the Medical Board on 24.3.2015. The learned Addl. Sessions Judge-II, Shimla, has rightly drawn adverse inference against the petitioner. 9.

Their lordships of the Hon'ble Supreme Court in the case of ***Chilukuri Venkateswhwarlu vrs. Chilukuri Venkatanarayana,*** reported in ***AIR 1954 SC 176,*** have held that the presumption, which Section 112 contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the Section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. It has been held as follows:

> "4. It may be stated at the outset that the presumption which section 112 of the Indian Evidence Act contemplates is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access -between the parties to the marriage at a time when, according to the ordinary course of nature the husband could have been the father of the child. Access and non-access again connote, as has been held by the Privy Council (1), existence and non-existence of opportunities for marital intercourse. It is conceded by Mr. Somayya, who appeared on behalf of the plaintiff appellant, that non- access could be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by (1) Vide Karapaya v. Mayandy. 12 Rang 243. evidence, either direct or circumstantial, which is relevant to the issue under the provisions of theIndian Evidence Act, though as the presumption of legitimacy is highly favoured by law it is necessary that proof of non-access must be clear and satisfactory. Mr. Somayya has also not contended seriously before us that the principle of English common law (1), according to which neither a husband nor a wife is permitted to 'give evidence of non-access after marriage to bastardise a child born in lawful wedlock, applies to legitimacy proceeding in India. No such rule is to be found anywhere in the Indian Evidence Act and it may be noted that the old common law doctrine has itself been abrogated in England by the provision of section 7 of the Matrimonial Cause Act, 1950 (2).
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> 10. In our opinion, the learned judges of the High Court approached the facts of the case from a wrong standpoint altogether and their conclusions are based for the most part upon surmises and speculations and not what was actually proved by the evidence. There is no warrant, we think, for holding that the documents Exs. P-5 and P-6 were in the nature of a separation agreement. Such an inference not only goes against the tenor or the express terms of the documents but is not borne out even by the evidence of the mediators through whose mediation the documents were brought into being or of the persons who were admittedly present at the time when the documents were executed and signed the same as attesting witnesses. Exhibit P-5, as stated already, simply mentions the fact of the third marriage of defendant No. 1 and the institution of a suit for maintenance by his second wife.
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> There is nothing in this document which even impliedly suggests that in consideration of receiving an allowance of Rs. 100 a year, the wife agreed to reside separately from her husband. So far as Ex. P-6 is concerned, the gift is expressly stated to be an affec- tionate gift by the husband to the wife

and it clearly indicates that it was the intention of the parties that the wife should reside there, and delivery of possession of the house was given to the wife on the very same day that the document was executed. We do not think that there is any justification for holding that these recitals were false and were not intended to be operative. D. W. 8, who is one of the attesting witnesses to the documents and was examined on behalf of defendant No. 1, says in his deposition that the documents were read over to the executant and he executed them after consenting to the recitals. P.W. 5, who was one of the mediators, says that defendant No. 2 used to live in the mud-terraced house after compromise.

Unless there is cogent evidence to the contrary-and apparently there is no such evidence in the present case-we should certainly presume that, the document Ex. P-6 was acted upon and that the possession of the mud-terraced house was actually given to defendant No. 2 in accordance with its terms. The High Court, in its judgment, records a rather curious finding on this point.

> "It may be,"' thus the judgment runs, "that even down to Ex. D-3 one may presume that in the very house allotted to her by Ex. P-6 she lived, so that up to the date of Ex. D-3 it may be that there is no impossibility of cohabitation between the parties. The real trouble arises with reference to the state of affairs after Ex. D-3. We find in Ex. D- 1 1 which - is the plaint in O.S. No. 326 of 1944 filed by the present first defendant against the present second defendant for a cancellation of Exs. P-5 and P-6 that he makes a definite allegation therein that from the time that the plaintiff married his third wife there has not been any bodily connection between him and the defendant."

The learned judges, in our opinion, misdirected themselves in allowing these statements made by the husband himself in the suit instituted by him nearly two years after the material period, to influence their decision in regard to the effect of Ex. P-6. Defendant No. 1 definitely admits that his second wife was perfectly chaste at the time when the sum of Rs. 100 was given to her on 5th of October, 1942, and the receipt Ex. D-3 was taken. There is not a scrap of evidence to show that there was any bitterness of feelings between the parties at that time. There could be no doubt that the feelings of the husband were changed and had become extremely bitter towards the plaintiff's mother before he filed the suit for cancellation of the deeds in July, 1944; but the statements made by the husband in the plaint in that suit were made long after the dispute arose between the parties, no matter whatever the reason might be which gave rise to the dispute.

In our opinion, the subsequent conduct of defendant No. 1 or the statements made by him in the suit of 1944 could not be regarded as part of the res gestae and were not admissible as evidence against the plaintiff. The ,defendant No. 1 could not certainly constitute himself an agent of the plaintiff for the purpose of making admissions against the interest of the latter. If the story. of defendant No. 1 that the wife went to Eddanapudi and lived there an immoral life is disbelieved, as it has been disbelieved by the High Court, the conclusion becomes irresistible that she did reside at the mud-terraced house as alleged by her and this is fully borne out by the

terms of the document Ex. P-6. There is no evidence of any unnatural conduct on the part of defendant No. 1 towards the plaintiffs mother at about the time when the plaintiff was conceived.

We do not consider it unreasonable, much less unnatural, if the father of defendant No. 2 alone took her to the hospital at Chirala at the time of her delivery and himself bore all the hospital expenses; nor is it a matter to be surprised at if defendant No. 2 after delivery stayed for several months with her infant child in her father's house. Apparently for some reason or other, the husband took up an unnatural attitude, but this was a subsequent event and whether he had really any grievance against his wife, or his unnatural behaviour was due to the instigation of his third wife, it is not necessary for us to investi- gate. On the evidence, as it stands, we are clearly of opinion that the defendant No. 1 did not succeed in proving that there was no opportunity for intercourse between him and defendant No. 2 at the time when the plaintiff was conceived. He rested his whole case upon the allegation of unchastity of the plaintiff's mother and of the plaintiff being born as the result of fornication. While rejecting that story, the High Court, in our opinion, erred in holding that there was no opportunity for access between the parties at the material period, relying mainly upon what the husband himself said and did much after the estrangement of feelings took place between the parties, no matter whatever that was due to. In our opinion, on the evidence in the record thefindings of the High Court cannot possibly stand. The result is that the appeal 'is allowed, the judgment and decree of the High Court are set aside and those of the trial judge restored. The plaintiff will have his costs of all the 'courts."

10. Their lordships of the Hon'ble Supreme Court in the case of ***Sharda vrs. Dharmpal,*** reported in ***(2003) 4 SCC 493,*** have held that the Hindu Marriage Act or any other law governing the field does not contain any express provision empowering the Court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself to a medical examination, however, that does not preclude a Court from passing such an order. Their lordships have further held that the primary duty of the Court is to see that truth is arrived at. Thus, the Civil Court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 CPC to pass all orders for doing complete justice to the parties to the suit. Under Section 75 (e) and Order 26 Rule 10-A CPC the Civil Court has the requisite power to issue a direction to hold a scientific, technical or expert investigation. It has been held as follows:

"17. The Hindu Marriage Act or any other law governing the field do not contain any express provision empowering the Court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself to a medical examination. However, in our opinion, this does not preclude a court from passing such an order. We may, however, notice that such provisions have expressly been inserted in England by way of Sections 22 and 23 of the Family Law Reform Act, 1987 on the recommendations of the Law Commission. Sections 23 is to the following terms:

"23. Provisions as to scientific tests (1) For Sub-sections (1) and (2) of Section 20 of the Family Law Reform Act, 1969 (power of court to require use of blood tests) there shall be substituted the following subsections -

> (1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction -
>
> (a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and
>
> (b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;
>
> and the court may at any time revoke or vary a direction previously given by it under this subsection."
>
> 32. Yet again the primary duty of a Court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protection under Article 20 of the Constitution of India. Thus, the Civil Court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.
>
> 33. Discretionary power under Section 151 of Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.
>
> 34. In certain cases medical examination by the experts in the field may not only found to be leading to truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.
>
> 35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.
>
> 36. In matrimonial disputes, the court has also a conciliatory role to play-even for the said purpose if may require expert advice.
>
> 37. Under Section 75(e) of Code of Civil Procedure and Order 26 Rule 10A the Civil Court has the requisite power to issue a direction to hold a scientific, technical or expert investigation."

11. Their lordships of the Hon'ble Supreme Court in the case of ***Banarsi Dass vrs. Teeku Dutta (Mrs) and another,*** reported in ***(2005) 4 SCC 449,*** though have held that conclusiveness of presumption under S. 112, could not be rebutted by DNA test, the proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption. Their lordships have also put a caveat that DNA test is not to be directed as a matter of routine. It is to be directed only in deserving cases. It has been held as follows:

> "13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modem scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look

hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. (See Kamti Devi (Smt.) and Anr. v. Poshi Ram (2001 (5) SCC 311).

14. The main object of a Succession Certificate is to facilitate collection of debts on succession and afford protection to parties paying debts to representatives of deceased persons. All that the Succession Certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A Succession Certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a Certificate under the Act, or is compelled by the decree of a Court to pay it to the person, he is lawfully discharged. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so chooses, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive. This is not a correct view. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in Goutam Kundu's case (supra). Present case does not fall to that category. High Court's judgment does not suffer from any infirmity. We, therefore, uphold it. It is made clear that we have not expressed any opinion on the merits of the case relating to succession application."

12. In the instant case, the direction was rightly issued whereby the petitioner was directed to be present before the Medical Board but he has not appeared before the Medical Board. There is no illegality or perversity in the order passed by the learned Addl. Sessions Judge-II, Shimla dated 2.6.2015.

13. Accordingly, there is no merit in this petition and the same is dismissed.

September 30, 2015.

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

State of Himachal Pradesh .....Appellant.
Versus
Salesh Sood alias Shalu .....Respondent.

Cr. Appeal No. 226 of 2010.
Reserved on: 11.09.2015.
Date of Decision: 30th September, 2015.

Indian Penal Code, 1860- Section 498-A & 306**- Indian Evidence Act, 1872-** Section 113-A- wife committed suicide within seven years of marriage and left a suicide note- her husband was tried and acquitted by the trial court-appeal against acquittal- held that, F.I.R lodged by the brother of the deceased does not speak of dowry demands-the allegations of dowry demand made by the brother of the deceased before the court for the first time amounts to embellishment-the mother of deceased also levelled new allegations on oath that the accused had demanded Rs. 2 lacs from her daughter and he was also disputing the paternity of the child-such facts were not recorded in her statement -mere generalized attribution of an incriminatory role of the accused not enough to draw an inference of cruelty- the suicide note also not ascribing incriminating role to the accused- trial court had rightly appreciated the evidence and had rightly acquitted the accused- appeal dismissed.
(Para 12 to 18)

For the Appellant: Mr. P. M. Negi, Deputy Advocate General.
For the Respondent: Mr. Anup Chitkara and Ms. Mehak Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of Himachal Pradesh against the judgment of the learned Sessions Judge, Kullu, H.P. rendered on 01.09.2009 in Sessions Trial No. 27 of 2008, whereby, the learned trial Court acquitted the accused/respondent of the charge of his having allegedly committed offences punishable under Sections 498-A and 306 of the Indian Penal Code.

2. The brief facts of the case are that on 5.3.2008, at about 8.00 p.m., some unknown person from Gandhinagar (Kullu) telephonically informed the police that one lady has committed suicide by hanging. On the receipt of the telephonic information ASI Rattan Chand along with other police officials proceeded to Gandhinagar. Lateron, on 6.3.2008 Vinit Sood, PW-1 lodged an FIR Ex.PW1/A with police station, Kullu alleging therein that Shilpa was his younger sister and the marriage interse his younger sister Shilpa (now deceased) and the accused was solemnized on 12.11.2007 according to Hindu rites and custom at Sultanpur. He alleged therein that on 5.3.2008 between 12 noon and 1.30 p.m., he had a talk on mobile phone with his sister Shilpa, whereby he inquired about her well being. Shilpa told that her life was lonely since he was living in a rented house at Gandhinagar. She further told that all the day she was confined within the four corners of the rented premises. She complained to her brother that she was not allowed to sit in the drawing room by accused Shalesh, her husband as she would be noticed by every passer by. The accused asked his wife to sit in the drawing room only after pasting the newspapers on

the window panes. His sister was not well with her husband. Shilpa and the accused a day before had also gone in the locality at Gandhinagar to search for a new residence. His sister had not liked the new residence as it was like the present one, upon which the accused got angry and had wordy duel with his wife. Shilpa started weeping upon which accused told her that she was free to weep as she would like and thereafter on 3.3.2008 around 9 a.m. accused went to his shop after picking up his keys which was situated just opposite to Vaishali Hotel. He returned to his house at 9.45 p.m. After returning to his house he took out the suites given to his wife by his in-laws. Shilpa under valued the suites which was not liked by the accused and he got angry and told his wife that she would be reprimanded by his mother, upon which Shipa further told her husband that it would not be a new thing as her scolding by her mother-in-law was usual. Shilpa also disclosed to her brother that she used to feel bore at home, therefore, it would be better to find out some job for her. The complainant received a phone call at about 7.30 p.m., in the evening of 5.3.2008 from mobile phone of her sister Shilpa by some unknown lady, whereby it was informed that Shilpa was not well and the complainant was asked to come along with his mother. Upon receiving this message complainant along with his friend Rupinder, PW3 proceeded to the residence of his sister at Gandhinagar, where many persons were present and the accused was seen weeping at the door. On reaching inside the premises, Shipa was found dead hanging with the frame of the door. After some time Kiran Sood, PW2 mother of the deceased also arrived at the place of occurrence. The complainant further alleged that Shilpa used to feel all alone at home and she was of sensitive nature but there was no source of entertainment at home like radio and television and for quite some time she had been keeping mum. The complainant alleged that the accused used to taunt his wife and for this reason she was constrained to commit suicide. He has confirmed suspicion that her husband's taunting has forced his sister to commit suicide. He was under the shock on the previous day because of the sudden demise of his sister, as such, he had come to the police station for lodging the report. On the basis of statement of PW-1 Vinit Sood, a case under Section 498-A and 306 of the IPC came to be registered against the accused at Police Station, Kullu. The police during the course of investigation, visited the site of occurrence and took the photographs of the spot as also done the videography of the spot. The police also prepared the inquest report and took into possession suicide note Ex.PW3/B under recovery memo Ex.PW3/C. The dead body of deceased Shilpa was subjected to postmortem examination by the Medical Officer of Regional Hospital, Kullu and the police obtained the report to this effect. The police also took into possession marriage invitation card, video camera and CD. During the course of investigation the mother of the deceased produced admitted writing of her daughter to the police which was taken into possession vide separate memo. The suicide note along with admitted writing of the deceased was also sent to the FSL, Junga for opinion. The statements of the prosecution witnesses were recorded under Section 161 of the Cr.P.C. by the Investigating Officer.

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

4. The accused was charged by the learned trial Court for his having committed offences punishable under Sections 498-A and 306 of the Indian Penal Code. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed false implication.

5. The learned trial Court on an appreciation of the evidence on record, returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Deputy Advocate General appearing for the appellant/State 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 material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended that the findings of acquittal recorded by the learned 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 marriage inter se deceased Shilpa and accused Salesh was solemnized on 12.11.2007 at Sultanpur. On 5.3.2008, at about 8.00 p.m., an unknown person from Gandhi Chowk, Kullu telephonically informed the police that a lady has committed suicide. Subsequent thereto FIR Ex.PW1/A was lodged at police station Kullu by PW-1 Vinit Sood, the brother of the deceased. Given the factum of the deceased having within 7 years of hers solemnizing marriage with the accused committed suicide by hanging, a presumption as enshrined under Section 113-A of the Indian Evidence Act of the accused having abetted the suicide of the deceased is drawable. However, before proceeding to avail against the accused the presumption enshrined in Section 113-A of the Indian Evidence Act, of his having abetted the suicide of his deceased wife, especially when uncontrovertedly the ill fated event/occurrence took place, within 7 years from the date of marriage inter se them having come to be solemnized, it is deemed apt to extract the hereinafter provisions of Section 113-A of the Indian Evidence Act.

> "113-A:- Presumption as to abetment of suicide by a married woman:-
>
> When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty, the Court may presume, having regarding to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

10. A perusal, of the afore extracted provisions of Section 113-A of the Indian Evidence Act, on unfoldment whereof, the prosecution has endeavoured to coax an inference from this Court, that with the ill-fated event having occurred within 7 years of marriage inter se the accused and the deceased having come to be solemnized the accused is to be presumed to have abetted the commission of suicide by the deceased, unravels the fact that a presumption of the accused having abetted the commission of suicide of his deceased wife would be on the anvil of the afore extracted provisions of the Indian Evidence Act drawable against him only in the event of it having come to be proved by cogent evidence that the deceased was subjected to cruelty by the accused/her husband. Necessarily, then the entire evidence on record has to be traversed through, for culling out therefrom the preeminent proven fact of the accused having subjected the deceased to cruelty, for hence sustaining the propagation of the prosecution that the presumption enshrined in Section 113-A of the Indian Evidence Act stands attracted against the accused.

11. In the endeavour to unearth, besides extricate from the testimonies of the prosecution witnesses the preeminent fact of the accused having subjected the deceased to cruelty hence his having abetted her suicide besides, for sustaining the espousal of the prosecution that the presumption enshrined in Section 113-A of the Indian Evidence Act especially when the ill-fated event occurred within seven years of the marriage inter se the deceased and the accused is invokable against the accused, a prompt advertence to the testimonies of the material prosecution witnesses, inasmuch as of PW-1 Vinit Sood, the brother of the deceased, PW-2 Smt. Kiran Sood, the mother of the deceased, PW-3 Rupender, the friend of PW-1 and PW-4 Smt. Indra Devi, the real sister of PW-2 is imperative. In the event of a close and an incisive scrutiny of the testimonies of the aforesaid witnesses, it is unearthed therefrom that they are free from the taint of improvements or embellishments arising from the fact of theirs deposing facts attributing perpetration of cruelty by the accused upon the deceased while theirs having come to record their testimonies in Court even when they omitted in their previous statements recorded in writing by the Investigating Officer to disclose the facts pronouncing upon the perpetration of cruelty by the accused upon the deceased besides, when their testimonies comprised in their examinations-in-chief vis-a-vis cross-examinations are free from the taint of inter se contradictions, as also, when they have omitted to, also intra se depose in disharmony and inconsistency qua the pivotal fact of the accused having perpetrated cruelty upon the deceased, this Court would be driven to construe their testimonies to be natural and inspiring. Concomitantly any formation of an inference by this Court of the accused being guilty of the offences for which he stood charged and tried would be a finding embedded in unshakable evidentiary material on record.

12. The testimony recorded on oath of PW-1, who authored Ex.PW1/A, the FIR lodged qua the incident, is of utmost significance for garnering therefrom whether the attribution of an incriminatory role to the accused in Ex.PW1/A stands rooted or is grooved in firm evidentiary material which when free from the taints aforesaid, would render it to be both credible and truthful for forming there upon a conclusion of the accused having committed the offences for which he came to be charged and tried. PW-1 in his deposition recorded on oath has disclosed therein that on 5.3.2008 at about 12.30 p.m. he had a conversation with his deceased sister over their respective cellular phones for about an hour. He has proceeded therein to unveil the factum that during the conversation which he had with his deceased sister, she had diclosed to him that she was leading a lonely life and was made to stay within the four corners of a single room besides was not allowed to sit in the drawing room as she would be noticed by the passers by. He has continued to depose therein that the accused permitted her to sit in the drawing room only after pasting of newspapers on the window panes. Moreover, he has also testified therein that the accused had not kept any source of entertainment like T.V., radio and transistor at his house and was in the habit of passing sarcastic remarks to her as also his taking to give a vent to his frustrations arising from his failing business by harassing and torturing her. However, there is no disclosure in Ex.PW1/A lodged at the instance of PW-1 of the accused demanding dowry from the deceased. For lack of enunciation in Ex.PW1/A of the accused demanding dowry from the deceased, no concomitant inference is drawable that hence for satiating his demand for dowry he perpetrated cruelty upon the deceased. As a corollary then with the accused never having demanded dowry from the deceased naturally then it can also be inferred that the accused never for gratifying the said demand, harassed, tortured besides, ill-treated or maltreated her. The deposition in Court of PW-1 that in a conversation which she (deceased) had with him, over their respective mobiles/cell phones, a day preceding to the lodging of the FIR, she disclosed to him the fact of hers being harassed by the accused owing to his frustrations arising from his falling business is a sheer

improvement as well as an embellishment constituted by the fact of it having remained uncommunicated in Ex. PW1/A. In aftermath, with the aforesaid fact acquiring the taint of it being an embellishment and an improvement, it loses its credibility. Naturally then no reliance can be placed upon it for concluding that the accused was taken to give vent to his frustrations arising from his falling business by torturing or harassing the deceased. In sequel, the accused cannot be construed to have meted any maltreatment or ill-treatment to the deceased nor hence he can be construed to have meted mental or physical cruelty upon the deceased which goaded or actuated the deceased to commit suicide. Moreover, with the existence of an admission in the cross-examination of PW-1 that the deceased and the accused were living happily before 5.3.2008 prods an inference that the attributions to the accused by the deceased of perpetration of ill-treatment and maltreatment upon her by the former in the conversation which she had had with PW-1 over their respective cell phones preceding the ill-fated occurrence are in their entirety bereft of veracity rather are both engineered as well as concocted.

13. Now adverting to the testimony of PW-2, the mother of the deceased, she has unfolded therein the fact that on 27.02.2008 her deceased daughter visited her house at Bhuntar and had a talk with her for about 30-45 minutes, whereafter she left to Kullu. She has continued to depose therein that she was looking physically disturbed. She was carrying a three months' pregnancy besides, she has also testified that her deceased daughter told her that the accused is disputing the paternity of the child. She deposes that the deceased also communicated to her that the accused is demanding Rs.2 lacs from her on receiving which communication from the deceased she deposes that she apprised her daughter that she is not in a position to pay the said amount and that as and when she makes a withdrawal from her GPF account, she would accede to the demand of dowry. However, the aforesaid testimony of PW-2 would acquire veracity only in the face of hers having previously also in Ex.PW11/A unfolded the facts as deposed by her in Court. Ex.PW11/A comprises the statement recorded in writing of PW-2 prior to hers proceeding to record her deposition in Court. In the event of the facts as deposed by her in Court telling upon the accused demanding dowry from her deceased daughter as also for gratifying the said demand his hence subjecting her to maltreatment or ill-treatment not finding existence or occurrence in Ex.PW11/A, then the facts aforesaid deposed by her in Court portraying the perpetration of cruelty upon the deceased by the accused would acquire the vice of an embellishment as well as an improvement hence being incredible as well as discardable. PW-2 has admitted her signatures on Ex.PW11/A. It stands also signed by the husband of PW-4. Given the factum of hers having admitted the factum of hers having signatured EX.PW11/A only after hers having admitted its contents on theirs being readover and explained her to be true. Consequently, given the factum of hers having admitted her signatures on Ex.PW11/A, renders the contents therein exculpating the incriminatory role of the accused demanding dowry from the deceased and his for gratifying the said demand subjecting her to cruelty, to be imbued with an aura of sanctity as well solemnity. Once this Court imputes credibility to the disclosure in Ex.PW11/A recorded by PW-2 of her deceased daughter having never complained to her of hers having come to be maltreated or ill-treated or hers having been subjected to cruelty by the accused, besides when there is an unfoldment therein of the deceased having a talk with PW-2 a day prior to the incident wherein the deceased communicated to PW-2 that she is free from any woes in her matrimonial home as also when in Ex.PW11/A PW-2 has voiced the factum of her daughter having voluntarily committed suicide by hanging and that she has no suspicion upon the accused, the apt ensuing inference therefrom is that the deposition on oath of PW-2 attributing therein an incriminatory role to the accused arising from the accused demanding dowry from her deceased daughter, for satiation whereof his having subjected her to

cruelty which concomitantly goaded or fomented her to commit suicide, is in dire contradiction with her previous statement comprised in Ex.PW11/A. In aftermath, for reiteration her deposition on oath is devoid of any force or vigour.

14. Even the testimony of PW-3 Rupender, the friend of PW-1 wherein he has disclosed the fact of PW-1 having, on his arriving at the house PW-1 on his hearing the news about the demise of Shilpa, communicated to him the fact of the accused harassing his deceased sister, is of no worth to the prosecution, especially when the fact of disclosure by PW-1 to PW-3 of the accused harassing his sister is bereft of with specificity qua the quantum and degree of harassment meted by the accused to the deceased. For lack of ascription with specificity by PW-1 to PW-3 of the degree, magnitude or enormity of the harassment which the accused was perpetrating upon the deceased, no conclusion can be formed from a generalized communication by PW-1 to PW-3 of his deceased sister having been harassed by the accused that it constituted perpetration of cruelty of such a degree by the accused upon the deceased which ultimately goaded the deceased to commit suicide. Moreover, when PW-3 admits that the suicide note comprised in Ex.PW3/B was taken into possession in his presence, whose recitals of exoneration of guilt of the accused, for the reasons ascribed hereinafter, are not vitiated with the vice of tutoring or doctoring rather are natural dispel the effect, if any, of attribution by PW-1 to the accused of an incriminatory role arising from his harassing his deceased sister. Even otherwise, the mere generalized attribution of an incriminatory role to the accused cannot marshal an inference of theirs constituting perpetration of mental cruelty upon the deceased by the accused rather the generalized attribution by PW-1 of harassment to the deceased are to be construed to be trivial in nature or being a part of routine every day family life.

15. Moreover, the testimony of PW-4 Smt. Indra Devi, the real sister of PW-2, who settled the matrimony of the deceased with the accused conveying the factum of a disclosure by the deceased to her, of the accused not permitting her to sit in open rather hers remaining confined within the four corners of a single room as also of the accused demanding dowry from her cannot acquire an aura of credibility, especially when there is an admission on her part that the facts as deposed by her in Court anvilled upon the purported disclosure to her by the deceased telling upon, besides pronouncing upon the perpetration of cruelty upon the deceased by the accused having not come to be previously recorded at her instance before the Investigating Officer. As a corollary then the facts aforesaid pronouncing upon the cruelty perpetrated by the accused upon the deceased when have come to be only deposed in Court, whereas, they were omitted to be divulged by PW-3 to the Investigating Officer when she proceeded to record her statement before him under Section 161 of the Cr.P.C., renders them to be stained or smeared with the taint of theirs being an improvement as well as an embellishment to which no credence can be imputed by this Court.

16. With there being palpable emanation in the testimonies of PW-3 and PW-11 of PW-2 having signed EX.PW11/A only after hers having admitted its contents on theirs being readover and explained to her, to be true, renders inefficacious besides, weakens the propagation by the prosecution comprised in the testimonies of PW-1, PW-2, PW-3 and PW-4, which even otherwise, for the reasons recorded herienabove are insufficient in probative vigour to command an inference from this Court that the accused perpetrated cruelty upon the deceased which instigated or actuated the deceased to commit suicide, ensuably then the drawing of succor by the prosecution upon the mandate of Section 113-A of the Indian Evidence Act for availing therefrom an inference of presumption of the accused, while having subjected the deceased to cruelty especially when the ill-fated occurrence took place within

seven years of the deceased and the accused having solemnized marriage, having hence abetted the suicide of the deceased, is both mis-conceived as well as ill-founded.

17. Predominantly, the preeminently efficacious evidence exonerating, besides freeing the guilt of the accused in the commission of suicide by the deceased, is constituted in the suicide note authored by the deceased comprised in Ex.PW3/B. Contents thereof in ad verbatim are reproduced hereinafter:-

> "Main apani life se kafi tang aa chuki hun, lekin isme kisi ki koi galati nahin hai. Aaj main sabko khud se ajad kar dena chahati hun kyuanki I am not a good wife, not a good daughter-in-law and even not a good house keeper. I am fed up soory everybody. I am not able to you give me pardon.
>
> I love you (s). I love you so much. So I am going with my loving baby. I know its a crime. Bechari Nattu ne to abhi koi experience nahin kiya, koi duniya nahin dekhi. Nattu hoga to shayad koi use rakh bhi le par agar gudiya hui to use koi payar nhain karega so use bhi apane sath liye ja rahi hun.
>
> I am sorry my unborn baby. I am killing you with my frustration and I am really very sorry, dear. I am really very sorry."

18. The non ascription of an incriminatory role therein to the accused tears apart the espousal by the prosecution of the accused having subjected the deceased to cruelty, hence, his having prodded and goaded the deceased to commit suicide. Even if there is a recital therein of in the event of hers delivering a female baby, it inviting the deprecation from her family members, yet such rearing of an apprehension aforesaid by her in Ex.PW3/B, cannot sustain an inference that she was subjected to a prenatal test whose result foretold that she would deliver a female child and such foretelling sequeled the accused to compel her to abort, which concerts of the accused on being resisted by the deceased, sequeled the perpetration of cruelty upon her by the accused, which fomented or actuated her to commit suicide. Necessarily then the nursing of an inference by the deceased that if she delivered a female child she would be deprecated by her family members is an apprehension not founded upon any prenatal test rather is a self-nursed apprehension nor also it can be concluded that the accused was in the know of hers carrying a female child and his hence on compelling her to abort invited resistance from the deceased which resistance sequeled perpetration of cruelty upon her by him, prodding her to commit suicide.

19. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

20. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgment is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE P. S. RANA, J.

Ashutosh Parmar ...Petitioner

Versus

State of Himachal Pradesh and others. . ...Respondents.

CWP No. 1118 of 2014
Judgment reserved on: 24.9.2015.
Date of Decision : 1.10.2015.

Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Civil Judge (Junior Division) in Himachal Pradesh and qualified the preliminary examination- however, he failed to qualify the main written (narrative) examination- petitioner assailed his non-selection on the ground that there was tempering in his answer books more particularly relating to Hindi and Criminal Law- petitioner seeks roving inquiry to re-scrutinize the entire record of selected candidates- It was not specified at whose instance cuttings were made in the answer sheets of the petitioner - the allegations are vague and based upon suspicion- Court cannot direct roving or fishing inquiry- petition without merits, hence, dismissed. (Para-3 to 14)

Cases referred:

Biswa Ranjan Sahoo and others vs. Sushanta Kumar Dinda and others (1996) 5 SCC 365
Himachal Pradesh Public Service Commission vs. Mukesh Thakur and another, (2010) 6 SCC 759,
Maharashtra State Board of Secondary and Higher Secondary Education & Anr. vs. Paritosh Bhupeshkumar Sheth & Ors.(1984) 4 SCC 27
Pramod Kumar Srivastava vs. Bihar Public Service Commission, (2004) 6 SCC 714

For the Petitioner : Mr. B.B.Vaid, Advocate.

For the Respondents : Ms. Meenakshi Sharma, Mr. Rupinder Singh, Addl. A.Gs., with Ms. Parul Negi, Dy. A.G. for respondent No.1.

Mr. Vikas Rathore, Advocate, for respondent No.2.

Mr. D.K. Khanna, Advocate, for respondent No.3.

Mr. Rahul Mahajan, Advocate, for respondent No.4.

Mr. Abhishek Sood, Advocate, for respondent No.5.

Mr. Subhash Sharma, Advocate, for respondent No.6.
Mr. Anil Gaur, Advocate, vice Mr. Trilok Jamwal, Advocate, for respondent No.7.
Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner pursuant to advertisement dated 1.2.2013 appeared in the examination conducted by the Himachal Pradesh Public Service Commission (for short 'Public Service Commission') for the post of Civil Judge (Junior Division) in Himachal Pradesh. Petitioner qualified the preliminary examination, however, failed to qualify the main written (narrative) examination and has assailed his non-selection on the ground that there was tampering in his answer books more particularly relating to Hindi and Criminal Law, which adversely affected his result and ultimately resulted in his non-selection.

2. The Public Service Commission which undertook the selection process has filed its reply and has contested the petition by raising number of objections including the plea of estoppel and maintainability on the ground that what the petitioner was seeking was revaluation of his papers which is not permissible in law. The allegation regarding interpolation and tampering of the answer books has been specifically denied. The private respondents have also filed replies on similar lines as the Public Service Commission.

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

3. At the outset, it may be observed that one of us (Justice Tarlok Singh Chauhan, J.) has already dealt with a similar issue in ***Chanchal Thakur*** vs. ***State of H.P. and others, CWP No. 10832 of 2011,*** decided on 22.5.2015. The petitioner therein had made identical allegations of interpolation and tampering in her answer books pertaining to HPAS Examination. Negating such contention, it was held:-

> *"5. Pursuant to directions passed by this Court on 15.5.2015, the original answer sheets of the petitioner was produced by the Public Service Commission. It is apparent from the bare perusal of the answer sheets, that there is overwriting and cutting on the same. But then every cutting or overwriting cannot be termed to be an interpolation of the document. It is normal that during course of checking of the examination papers, the examiner may after a relook change his mind with respect to the awarding of marks and, therefore, there is no reason to eye the same with suspicion. Any and every circumstance is not suspicious circumstance."*

4. It was further held that in absence of any allegation of malafides such plea would normally not be available and it is apt to reproduce paras 6 to 8 of the judgment, which reads thus:

> *"6. Learned counsel for the petitioner would contend that the marks of the petitioner have been malafidely been reduced. This plea is equally without force. It is more than settled that the allegations regarding malafides cannot be vaguely made and it must be specific and clear (Refer:* ***Federation of Railway Officers Association vs. Union of India*** (2003) 4 SCC 289*).*
>
> *7. The only allegation of malafide is contained in para 16 of the petition, which reads thus:*
>
> > *"16. The petitioner after having seen her answer sheet has every reason to believe that she has been deprived deliberately by the respondent Public Service Commission's casual ways of dealing with the answer sheets of Language papers of H.P.A.S. (Main)-2009."*

> *8. The aforesaid allegation is far too vague and otherwise farfetched. Moreover, the concerned examiner who has checked the papers has not been made a party, so as to afford him adequate opportunity to meet these allegations."*

Admittedly, the judgment rendered in ***Chanchal Thakur's*** case (supra), has attained finality.

5. It would further be noticed that what the petitioner in fact seeks by this petition is a roving inquiry to re-scrutinize the entire record of selected candidates, as would be clear from para 18 of the petition, the relevant extract whereof reads as under:

> *"18…….. The answer books of all the candidates and the records pertaining to all the candidates deserve to be retained as the court can scrutinize the pattern of giving the marks to other candidates and whether the petitioner has been given the similar treatment and whether justice has been done to him."*

6. Further, the petitioner appears to have presumed that the cuttings here or there in the answer sheets has been deliberately done but at whose instance, is not forthcoming. Even the allegations of malafides are delightfully vague and that apart are totally unsubstantiated as would be clear from the perusal of para 19 (b) of the petition, which reads thus:

> *"19(b). That the allotted marks of the petitioner in his Hindi paper and the Criminal law paper, have been reduced by respondent No.3 malafide and illegally. The same has been done without any right or authority since the job of the examiner cannot be undertaken by respondent No.3."*

7. Similar issue came up before the learned Division Bench of the Hon'ble Punjab and Haryana High Court in ***Neeraj Kumar*** vs. ***Registrar General of Punjab and Haryana High Court,*** CWP No. 23018 of 2014, decided on November 12, 2014. The petitioner therein was an aspirant of the Superior Judicial Service in Haryana and on the basis of the information received under the Right to Information Act, had levelled allegations regarding cutting and tampering in his answer books and had sought roving inquiry to re-scrutinize the entire record by levelling vague and unsubstantiated allegations of malafide and the Court held as follows:

> *"….The petitioner seeks a roving inquiry to re-scrutinize the entire record of selected candidates, the answer sheets of the petitioner and seeks to call for the list of marks sent by the Examiner after marking the answers and further seeks to compare the marks assigned on the answer sheets with Examiner's list. All these prayers are based on merely vague and unsubstantiated allegations of malafide. The petitioner has presumed that a cutting here or there in his answer sheets was at the behest of selected candidates. There is no specific case pleaded in the writ petition nor is there any averment made by the petitioner substantiating his claim. On vague and unsubstantiated averments, this Court cannot make a roving inquiry, which is sought for by the petitioner. Even otherwise, it is a question of fact whether the change in the marks awarded to the petitioner was on account of any malafide and whether the marks actually awarded to him were not the marks to which he was entitled. It would not be appropriate for this Court to enter into such factual controversy under Article 226 of the Constitution of India."*

8. The petitioner would then argue that he has been deliberately awarded lesser marks in the subject of Hindi. We are afraid that even this question on totally

unsubstantiated allegations is not open to judicial review. There is no material whatsoever available on record whereby this allegation could be even remotely substantiated.

9. To be fair to the learned counsel for the petitioner, he has relied upon the judgment of the Hon'ble Supreme Court in ***Biswa Ranjan Sahoo and others*** vs***. Sushanta Kumar Dinda and others (1996) 5 SCC 365*** to canvass that even in absence of malafide this Court can take an appropriate action when there is large scale interpolation and tampering of the answer sheets.

10. We have gone through the judgment and find that the same is not applicable to the facts of the instant case. Admittedly, in the aforesaid case the Tribunal after calling for the records of the selection and on perusal of the record, had noted as under:

> *"The perusal of the Answer Book of the candidates with Roll No.001078 (Umakanta Panigrahi) shows that though at Sl.No.3, in the first page of the answer book, his marks were shown as '00' it was changed to '20'. At Serial Number 11, there has been correction of the original marks to 25, the original marks appearing to be 20. This is how the total was brought to 95. In second page of the answer book though the mark given for Question No.11 B were 10, later 5 has been added by someone to make it 15. In page No.4, after the answer 1/8 written by the candidate, there could be seen some alternation to 0.8 by someone. The facing page or the Answer Book of the of candidate 001235 (Sri Biswa Ranjan Sahoo) show over writing at three places appears to have been changed to 18 and total 91 appears to have been changed to 94. It is not possible to mark out how and why answer book 001567 of candidate Rajani Kanta Guru was evaluated by different examiner and marks noted in pencil as also his signature as apparently initials on this answer book are totally different from the initials of the other examiner. There is practically no explanation coming forth as to how and why this examiner was different from this paper alone. We have perused the original tabulation which reveals that the marks obtained by the petitioner in the interview were altered and then total made of the marks obtained in the written test as well as the interview. Even for a naked eye, it appears that the marks obtained by the petitioner were originally 24 and the same reduced to 22 by subsequent correction and totally with this correction total was also brought down to 117 from 119. "*

It is after perusal of this report and taking into account the enormity and malpractices in the selection process, the Hon'ble Supreme Court held that notice and opportunity of hearing in such like case is not required to be afforded to the persons who would be ultimately affected by such selection.

11. In the instant case, it is not even the allegation of the petitioner that there has been mal-practice in the selection process. The entire edifice of the petitioner claim is based only on suspicion and, therefore, cannot be countenanced. This Court cannot direct roving or fishing inquiry and moreso, when only general and bald allegations regarding tampering with the answer-sheets have been made.

12. That apart, it would be seen that the petitioner has in fact, failed to make a grade in Hindi by nine marks and this fact in itself would have been sufficient to throw out the petition, but since it was a question of career of an individual, we still proceed to deal with all the contentions as raised in this petition.

13. In ***Himachal Pradesh Public Service Commission*** vs. ***Mukesh Thakur and another,*** reported in ***(2010) 6 SCC 759,*** it was specifically held by the Hon'ble

Supreme Court that it is not permissible for the High Court to examine the question paper and answer-sheets itself, particularly, when the commission had assessed the inter-se merit of the candidates. If there is any discrepancy in framing of the question or evaluation of the answer, it could be for all candidates appearing for the examination and not for an individual candidate.

14. At this stage, we may also note that what the petitioner in fact is seeking is revaluation of his answer-books, which again is not permissible in view of the decision of the Hon'ble Supreme Court in ***Maharashtra State Board of Secondary and Higher Secondary Education & Anr.*** vs***. Paritosh Bhupeshkumar Sheth & Ors.(1984) 4 SCC 27*** wherein the Hon'ble Supreme Court has rejected the contention that in the absence of provision for revaluation, a direction to this effect can still be issued by the Court. This view was approved, relied upon and reiterated by the Hon'ble Supreme Court in ***Pramod Kumar Srivastava*** vs***. Bihar Public Service Commission, (2004) 6 SCC 714*** and subsequently reiterated in the case of ***Mukesh Thakur*** (supra).

15. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application(s), if any, leaving the parties to bear their costs.

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

Cr. Appeal No. 22 of 2011 with Cr. Appeal No. 53 of 2011.
Reserved on: September 30, 2015.
Decided on: October 01, 2015.

1. Cr. Appeal No. 22 of 2011

Harpal Singh Negi alias Pal ……Appellant.

Versus

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

2. Cr. Appeal No. 53 of 2011

Vijay Pratap Singh Negi ……Appellant.

Versus

State of H.P. ……..Respondent.

Indian Penal Code, 1860- Section 302- Appellants along with one co-accused and the deceased were consuming liquor in rented room of the co-accused- a quarrel took place in which accused 'V' hit the deceased with a bottle and accused 'H' hit the deceased with a pressure cooker on the head - deceased succumbed to the injuries- both accused 'H' and 'V' were convicted of the commission of offences punishable under Section 302/34 of IPC - appeals preferred by accused 'H' and 'V' against their conviction and sentence- held, that accused 'H' and 'V' had no intention to kill the deceased but they definitely had the knowledge that injuries inflicted by them on the head of the deceased would result in his death- no motive attributed to both the accused to kill the deceased- absconding from the spot after occurrence does not prove the intention as the instinct of self-preservation is uppermost in the mind of an ordinary man- no previous enmity established between the accused and the deceased- sudden fight took place during the drinks being consumed by the deceased and the accused- both the accused convicted of the commission of offence punishable under Section 304 (Part-II). (Para-21 to 29)

Cases referred:
Prakash Mahadeo Godse vrs. State of Maharashtra, 1969 (3) SCC 741
Matru alias Girish Chandra vrs. The State of U.P., AIR 1971 SC 1050
Thimma vrs. The State of Mysore, AIR 1971 SC 1871
Raghubir Singh vrs. The State of U.P., AIR 1971 SC 2156
Rahman vrs. The State of U.P., AIR 1972 SC 110
Datar Singh vrs. The State of Punjab, AIR 1974 SC 1193
Ram Nath Madhoprasad and others vrs. State of Madhya Pradesh, AIR 1953 SC 420,

For the appellant(s): Mr. Anup Chitkara, Advocate in both the appeals.
For the respondent/State: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since both the appeals have arisen from a common judgment, the same were taken together for hearing and are being disposed of by a common judgment.

2. These appeals are directed against the common judgment dated 23.12.2010 rendered by the learned Addl. Sessions Judge, Shimla, H.P., in Sessions Trial No. 8-S/7 of 2009, whereby the appellants-accused (hereinafter referred to as "accused"), who were charged with and tried for offences punishable under Sections 302 and 201 IPC read with Section 34 IPC, were convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.25,000/- each for the commission of offence under Section 302 IPC. In default of payment of fine, they were further ordered to undergo simple imprisonment for one year each.

3. The case of the prosecution, in a nut shell, is that deceased Yash Pal was resident of Village Gujandli, PO Tikkar, Tehsil Rohru, Distt. Shimla, H.P. He was an agriculturist. The complainant Dharmender Chauhan (PW-1) is the younger brother of the deceased and Ravinder Kumar (PW-3) is the cousin of the complainant. On 22.11.2008, at about 10:00 AM, the deceased had gone to Tikkar in connection with some domestic work but he did not return home. Ravinder Kumar is running a shop at Tikkar. On 23.11.2008 at about 7:00 AM, when Ravinder Kumar reached Tikkar from his house in village Gujandli, he saw number of people gathered and on inquiry, he came to know that Yash Pal had been killed and his dead body was lying in the rented room of accused Narender Bhalooni in the building of one Amar Chand Deshta. Ravinder Kumar informed the complainant Dharmender Chauhan on telephone. On receiving this information, the complainant reached at Tikkar and then he alongwith Ravinder went to the room of accused Narender Bhalooni. On reaching, they found that the dead body of Yash Pal was lying on the floor in the room with the blood oozing out of his mouth and nose. The blood was also lying on the floor. By that time, the police had also received information about the murder and rapat Ext. PW-20/A was entered in the Police Station Rohru to this effect. SI/SHO Surinder Pal (PW-28) reached at the spot. He noticed that a broken bottle of Royal Stag, a pressure cooker with damaged lid and some broken glasses were lying scattered in the room. The police recorded the statement of complainant vide Ext. PW-1/A under Section 154 Cr.P.C. On the basis of the statement, FIR Ext. PW-22/A was registered against the accused on 23.11.2008. The police took photographs of the spot and prepared the site plan. The case property was taken into possession. The post mortem was got conducted on the dead body. The post mortem report is Ext. PW-24/B. During investigation, it was found that during the

night of 22.11.2008, accused and the deceased had consumed liquor in the room of accused Narender Bhalooni and while consuming liquor, some quarrel had taken place between the accused and the deceased. Accused Vijay Pratap Singh hit the deceased with a bottle and lid of pressure cooker and accused Harpal Singh hit him with the pressure cooker due to which deceased sustained various injuries and ultimately died. Accused Narender Bhalooni was arrested on 23.11.2008. The other two accused were arrested on 25.11.2008. Accused Harpal and Vijay Pratap Singh made a disclosure statement under Section 27 of the Indian Evidence Act that the clothes and shoes which they were wearing at the time of commission of offence were concealed by them in almirahs and show rack in the house of accused Vijay Pratap Singh from where they can get the same recovered vide Ext. PW-4/A and PW-4/B, respectively. The clothes and shoes of the accused were recovered. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 28 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, these appeals on behalf of the accused persons.

5. Mr. Anup Chitkara, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. AG for the State has supported the judgment of the learned trial Court dated 23.12.2010.

6. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

7. PW-1 Dharmender Chauhan deposed that the deceased was his real brother. His brother had gone to Tikkar on 22.11.2008 at about 10:00 AM in connection with some domestic work. He did not return home till night. On the next day at about 7-30 AM, he received a telephone call from his cousin Ravinder who runs a shop at Tikkar to the effect that he should come to Tikkar soon. He went to Tikkar. He came to know that his brother had been killed in the quarter of accused Narender Bhalooni. He went to the quarter of Narender alongwith other persons and saw the dead body of his brother lying on the floor in the room with blood oozing out of his mouth, nose and head. The blood was also lying on the floor. He also noticed a broken bottle of Royal Stag, a pressure cooker with damaged lid and some broken glasses lying there on the floor. His statement was recorded under Section 154 Cr.P.C. vide Ext. PW-1/A. The case property was taken into possession, including pressure cooker alongwith lid and broken bottle. In his cross-examination, he deposed that he reached Tikkar at 8:00 AM and immediately thereafter he went to the spot. At that time police and number of people had gathered there. Ravinder met him at a place 50 meters away from the spot. The building in which the room in question is situated was three storyed.

8. PW-2 Pradeep Sharma, is the material witness. According to him, he was posted as Clerk daily wages in H.P. PWD from 1.5.2006. He was residing in the house of Amar Chand Deshta as tenant. Towards left side of his room there was room of accused Narender Bhalooni. Narender Bhalooni was working as Jr. Assistant in the office of BPEO. On 22.11.2008, he came to his room from his office at about 5:30 PM and prepared his food, performed Puja and then he took his meals at about 7:30 PM. Thereafter, at about 7:30 PM, Narender Bhalooni came to his room and asked him to prepare pulao (rice) for three persons and accordingly, he prepared Pulao and at about 9:30 PM. He went to the room of Narender Bhalooni alongwith the Pulao. At that time accused Narender Bhalooni, Harpal Singh and Vijay Pratap Singh were there and they were drinking. They were also eating Salad. As soon

as he came out of kitchen of Narender Bhalooni after leaving the pressure cooker of Pulao, the deceased Yash Pal also reached there. Thereafter, he came to his room and went to sleep. On 23.11.2008 at about 6:15 AM, accused Narender Bhalooni knocked at his door and asked him to have a look at his room. He came to the room of Narender Bhalooni and saw that a dead body of Yash Pal was lying in the room. Blood was lying on the floor. He was told by Narender Bhalooni that in the evening there was a quarrel between accused Vijay Pratap and deceased Yash Pal due to which Vijay Pratap picked up a bottle and gave a blow on the head of Yash Pal while Harpal attacked Yash Pal with a pressure cooker on his head. In his cross-examination, he could not depose how many tenants were residing in the building owned by Amar Chand Deshta. He did not remember the names of tenants residing on the ground floor. His room and room of Narender Bhalooni were separated only by a wall. The police reached the spot at about 7:00 -7:30 AM. At that time, he was called by Narender Bhalooni and he had come out of his room. Till the arrival of police, he did not enter the room of Narender Bhalooni. Police officials were 4-5 in number.

9. PW-3 Ravinder Kumar deposed that he was residing in village. He used to come to his shop at Tikkar in the morning and use to go back in the evening. On 23.11.2008 at about 7:00 AM, when he reached Tikkar, he saw number of people gathered there. He came to know that Yash Pal had been killed. Thereafter, he asked Dharmender the brother of deceased Yash Pal to come to Tikkar immediately. After some time Dharmender reached there and then they went to the room of Narender Bhalooni where the dead body of Yash Pal was lying. Some people were also present there. The articles in the room were lying scattered. Blood was lying on the floor. One broken bottle was lying there. The police took photographs of the spot. In his cross-examination, he deposed that when Dharmender reached at the spot, he had no talk with him and he took him to the spot where dead body was lying. He could not tell the names of the persons who told him about the murder of Yash Pal but people were talking to each other regarding this murder. His shop is about 100 meters away from the room and at same distance is the police post. He has not informed the police.

10. PW-4 Deep Kumar deposed that on 29.11.2008, he alongwith Surinder Kumar had gone to the Police Station. They reached there at about 12:15 PM. He had gone to the Police Station for his personal work. When they reached the Police Station, the SHO was making inquiries on accused Vijay Pratap Singh. SHO called them. Accused Vijay Pratap Singh in their presence made a statement to the SHO that the clothes which he was wearing on the day of incident were kept in his house in a wooden almirah and the shoes have been kept in a rack near the gate and only he had the knowledge of the clothes and shoes and he can get those recovered. The statement was recorded vide Ext. PW-4/A. Thereafter, accused Harpal vide Ext. PW-4/B made a statement to the SHO that the clothes which he was wearing on the day of incident were kept in the house of Vijay Pratap Singh. The clothes have been kept in a wooden almirah and the shoes have been kept in a rack of the house. Thereafter, the police asked them to accompany for the recovery at about 1:30 PM. The accused and police party went in the police jeep and he alongwith Surinder followed them in the car of Surinder. They reached at Deshta Kainchi, near the house of accused Vijay Pratap. Accused Vijay Pratap led the police party to his house. When they reached near the house, accused Harpal was kept outside and accused Vijay Pratap brought one Jean pant and sweater having chain out of the almirah. Accused Vijay Pratap took out his shoes from the rack and handed over to the police. The police sealed the clothes and shoes in a cloth parcel. The police prepared recovery memo Ext. PW-4/C. Accused Harpal led them to the room inside the house and brought out the clothes i.e. Pant of black colour and shoes. In his cross-examination, he deposed that they had gone to the Police Station in connection with some personal work. Surinder had no work in the Police Station. He had

come to meet Gian Singh. Gian Singh was working in the Police Station. He did not meet Gian Singh on that day. He and Surinder went together inside the Police Station. As they reached the Police Station, the SHO told that accused Vijay Pratap Singh was intending to make statement that the clothes which he was wearing on the date of incident have been kept by him in a rack in his house. Again stated that Vijay Pratap was making the statement in his presence. It took around one hour 15 minutes to go to the house of Vijay Pratap from the Police Station. At that time his parents and his younger brother were present in the house. No statement of the family members of Vijay Pratap was recorded by the police. He signed two papers in the Police Station. He further deposed that almirah out of which the clothes were recovered was not locked. It was closed. No permission was taken by the police from the occupants of the house in question. Volunteered that the occupants i.e. father of Vijay Pratap and his mother etc. did not know when the police went inside the kitchen and when they reached in the verandah. Again stated that they had come themselves on hearing noise of persons entering their house. There were two houses situated at some distance from the house in question. One of the houses belongs to Davinder Deshta and the other belongs to Rajesh. None from these houses was called by the police.

11. PW-5 Surinder Kumar also corroborated the statement of PW-4 Deep Kumar, the manner in which the disclosure statements were made and clothes and shoes were got recovered.

12. PW-10 Dublu Ram deposed that he was sleeping in the office of SDO. Accused Pal and Chintu came to the office during night. Accused went inside the quarter of JE and might have slept there but in the morning they were not there in the quarter.

13. PW-16 Dr. Anil Kumar Verma has examined Vijay Pratap Singh and issued MLC Ext. PW-16/A. He also examined Harpal Singh and issued MLC Ext. PW-16/B.

14. PW-25 Dr. Ranveer Vardhan conducted the post mortem examination and issue report Ext. PW-25/B. The probable duration between injury and death was immediate after head injury i.e. within 2-3 minutes. According to him, the death was caused due to ante mortem head injuries. In his cross-examination, he admitted that pressure cooker Ext. P-4 is blunt weapon but its lid can be considered as sharp edged weapon. He also admitted that unbroken bottle is also a blunt weapon. He also admitted in his cross-examination that the percentage of alcohol as given in Ext. PW-25/C, the person could be termed as heavily drunk.

15. PW-27 Dr. Naresh Maitan has examined Harpal Singh Negi. He noticed following injuries on his person:

> "i). Abrasion with underlying bruise with size 5-6 centimeters. Site right side of chest latterly which was healed.
>
> ii). Abrasion on right thigh approximately 10 centimeters which is healed with scab formation.
>
> iii). Abrasion on right leg at knee joint latte rely approximately 8-10 centimeters with scab formation and healed.
>
> iv). Wound on left knee joint with overlying scab with size 3 x 1 centimeters.
>
> v) Wound on right leg (Shin) with overlying scab with size 2 x 1 centimeters."

He issued MLC Ext. PW-27/B. He also examined accused Vijay Pratap Singh and noticed following injuries on his person:

"1) Lacerated wound right thumb approximately 5-6 millimeters, margins irregular (7 shaped) with underlying base healed.

2) Lacerated wound right index finger approximately 2-3 in millimeters with on going healing process.

3) Lacerated wound approximately 6-7 millimeters left thumb with underlying base healed.

4) Bruise on left arm lower on 1/3rd medially dark brown in colour."

He has deposed that these injuries on the person of Vijay Pratap Singh were possible in scuffle with lid of pressure cooker.

16. PW-28 Insp. Surinder Pal, is the I.O. He reached the spot alongwith the police party. The statement of PW-1 Dharmender Chauhan was recorded under Section 154 Cr.P.C. vide Ext. PW-1/A. The case property was taken into possession. The disclosure statements were made by the accused Vijay Pratap Singh and Harpal Singh vide Ext. PW-4/A and PW-4/B, respectively. Spot map was also prepared. In his cross-examination, he admitted that many tenants were residing in the building in question but he could not tell the exact number thereof.

17. The case of the prosecution, precisely, is that the accused were present in the house of Narender Bhalooni. Narender Bhalooni has requested PW-2 Pradeep Sharma to cook meals for them. He was occupying tenanted room. PW-2 Pradeep Kumar went to the house of Narender Bhalooni with Pulao. He saw accused consuming liquor. He left the cooker in the kitchen. When he was coming out of the kitchen, he saw deceased Yash Pal coming to the room. The quarrel took place. Vijay Pratap Singh hit deceased with bottle on his head. Accused Harpal attacked the deceased with pressure cooker on his head. Narender Bhalooni in the morning went to the house of PW-2 Pradeep Sharma and told him to visit his room. PW-2 Pradeep Sharma, went to his room and saw the dead body of Yash Pal lying on the floor. PW-3 Ravinder Kumar informed the brother of Yash Pal deceased. Thereafter PW-1 Dharmender Chauhan also reached the spot. His statement was recorded under Section 154 Cr.P.C. vide Ext. PW-1/A and FIR was registered. The post mortem of the dead body was got conducted.

18. PW-2 Pradeep Sharma has categorically deposed in his examination-in-chief that when he went to the house of Narender Bhalooni, he saw Harpal Singh and Vijay Pratap Singh drinking. He was told by Narender Bhalooni that quarrel has taken place between Vijay Pratap Singh and Yash Pal deceased. The house occupied by PW-2 Pradeep Sharma was adjoining the house of Narender Bhalooni. It was separated only by a wall. It is intriguing to note as to why one of the co-accused Narender Bhalooni asked PW-2 Pradeep Sharma to cook meals for them, more particularly when PW-2 Pradeep Sharma has categorically stated in his examination-in-chief that he came from his office at about 5:30 PM and prepared his food, performed Puja and then he took his meals at about 7:30 PM. PW-2 Pradeep Sharma further deposed that he was called by accused Narender Bhalooni to his house. He entered the house and saw the dead body lying on the floor. The police reached the spot at about 7:00-7:30 AM. At that time, he was called by Narender Bhalooni and he had come out of his room. Till the arrival of police, he did not enter the room of Narender Bhalooni. In examination-in-chief, PW-2 Pradeep Kumar deposed that he went with Narender Bhalooni to the room where dead body of deceased was lying at 6:15 AM. However, in his cross-examination, he deposed that he has not entered the house of Narender Bhalooni till the police had come at 7-7:30 AM.

19. The recovery of clothes and shoes were made on the basis of statement made by accused vide Ext. PW-4/A and Ext. PW-4/B. The statements were made before PW-4 Deep Kumar and PW-5 Surinder Kumar.

20. The deceased has died due to ante mortem injuries as per PW-25 Dr. Ranveer Vardhan. The probable duration between injury and death was immediate. The time elapsed between death and post mortem was more than 12 hours but less than 24 hours. In his cross-examination, he admitted that pressure cooker Ext. P-4 was blunt weapon and its lid can be considered as sharp edged weapon. The case of the prosecution, precisely, is that the deceased was hit with the unbroken bottle and lid of the pressure cooker. As per the FSL report Ext. PW-25/C, the quantity of ethyl alcohol in the contents of blood of deceased was 91.88 mg% and in urine was 115.57 mg%. The accused Harpal has received 5 injuries as per MLC Ext. PW-27/B. These injuries were simple in nature caused with blunt weapon and the probable duration of the injuries was 48-72 hours. Accused Vijay Pratap Singh has received 4 injuries as per MLC Ext. PW-27/D. These injuries were also simple in nature and caused with blunt weapon and probable duration of the injuries was 48-72 hours. The prosecution has not explained the injuries received by the accused.

21. Mr. M.A.Khan, learned Addl. Advocate General for the State has argued that the accused with common intention have killed the deceased by striking his head with unbroken bottle and the lid of pressure cooker. The prosecution has not led any evidence that the accused have conspired and the act was pre-mediated or it was pre-arranged plan. The accused were drinking in the house of Narender Bhalooni when the deceased had entered the room. It is apparent from the post mortem report Ext. PW-25/B and MLCs Ext. PW-27/B and PW-27/D that a drunken brawl has taken place between the accused and deceased. The accused had no intention to kill the deceased but they definitely had the knowledge that the injuries inflicted by them on the head of deceased could result in his death, more particularly when head was struck with unbroken bottle and lid of the pressure cooker. The entire case is based on circumstantial evidence. The motive plays an important role in a case based on circumstantial evidence. The prosecution has not attributed any motive why the accused wanted to kill the deceased who had joined them for drinking in the house of Narender Bhalooni. There was no previous enmity between the accused and the deceased. The very fact that all of them were consuming liquor proves that they were known to each other intimately. The sudden fight has taken place during the drinks consumed by the deceased and the accused.

22. The other circumstance relied upon by the learned trial Court to convict the accused is that they had absconded from the spot and arrested after few days. Their lordships of the Hon'ble Supreme Court in the case of ***Prakash Mahadeo Godse vrs. State of Maharashtra,*** reported in ***1969 (3) SCC 741,*** have held that the appellant ran away and hid himself when people tried to catch hold of him does not lead to a firm conclusion that he behaved in that manner because he had a guilty mind. The instinct of self-preservation is uppermost in the mind of an ordinary man. The Courts have refused to attach much significance to abscondent evidence. It has been held as follows:

> "12. The fact that the appellant ran away and hid himself when people tried to catch hold of him does not lead to a firm conclusion that he behaved in that manner because he had a guilty mind. Even most innocent persons when suspected of grave crimes are likely to evade their arrest. The instinct of self-preservation is uppermost in the mind of an ordinary man. The Courts have refused to attach much significance to abscondent evidence."

23. Their Lordships' of the Hon'ble Supreme Court in the case of ***Matru alias Girish Chandra vrs. The State of U.P.,*** reported in ***AIR 1971 SC 1050,*** have held that absconding by itself does not necessarily lead to a definite conclusion of guilty mind. It has been held as follows:

> "15. The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime; such is the instinct of self-Preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the 'accused. In the present case the appellant was with Ram Chandra till the F.I.R. was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."

24. In the case of ***Thimma vrs. The State of Mysore,*** reported in ***AIR 1971 SC 1871,*** their Lordships' of the Hon'ble Supreme Court have held that though the conduct of accused in absconding immediately after the occurrence of the offence is relevant evidence, as indicating to some extent his guilty mind, it is not conclusive of that fact because even innocent person when suspected may be tempted to such conduct to avoid arrest. It has been held as follows:

> " 11. The trial court and the High Court have also been influenced by the fact that the appellant had absconded after September 1, 1967 when the police got suspicious of his complicity in this offence. It is true that the appellant did make himself scarce with effect from September 1, 1967 till he was arrested on September 5, 1967 and this conduct is relevant under s. 8 of. the Indian Evidence Act and might well be indicative to some extent of guilty mind. But this is not the only conclusion to which it must lead the court. Even innocent persons may, when suspected of grave crimes, be tempted to, evade arrest: such is the instinct of self- preservation in an average human being. We are, therefore, not inclined to attach much significance to this conduct on the peculiar facts and circumstances of this case."

25. Further, their Lordships' in the case of ***Raghubir Singh vrs. The State of U.P.,*** reported in ***AIR 1971 SC 2156,*** have held that the act of absconding even if proved, is normally considered a somewhat weak link in the chain of circumstances utilized for establishing the guilt of an accused person. It has been held as follows:

> "11. Shri Nuruddin Ahmad has also contended that the appellant had not absconded and the High Court was wrong in taking that into consideration. In our opinion, the act of absconding, even if proved, is normally considered a some what weak link in the chain of circumstances utilised for establishing the guilt of an accused person. If the evidence of eye-witnesses is held trustworthy then the act of absconding even if established would serve only to further fortify the satisfaction of the Court with respect to the guilt of the

accused concerned, for, even an innocent person may well try to keep out of the way it he learns of his false implication in a serious crime reported to the police. In the present case, however, we also find that the circumstance of absconding was not put to the appellant in his examination so as to enable him to offer explanation. But on the existing material on the record, in our view, even without considering the act of absconding, the evidence seems to be strong and convincing enough to establish the guilt of the accused beyond reasonable doubt."

26. The Apex Court in the case of ***Rahman vrs. The State of U.P.,*** reported in ***AIR 1972 SC 110,*** have held that absconding by itself is not conclusive either of guilt or of guilty conscience. It has been held as follows:

" 21. It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the Police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason."

27. In the case of ***Datar Singh vrs. The State of Punjab,*** reported in ***AIR 1974 SC 1193,*** their Lordships' of the Hon'ble Supreme Court have held that prosecution cannot benefit from merely suspicious circumstances that the accused did not surrender or was not traceable for nearly one year. At paragraph 30, it has been held as follows:

" 30. We do not think that the appellant needs the support of any presumption from non-production of any of these witnesses. We also do not think that the prosecution can benefit from the merely suspicious circumstance that the appellant did not surrender or was not traceable for nearly a year. Reliance was placed by the appellant's Counsel on Prakash Mahadeo Godse v. State of Maharashtra(1), to contend that conduct of the accused such as hiding after the offence, by itself, does not conclude matters. Even though the acts there were somewhat different, the same principle would apply here. In any case the super-structure of the prosecution case, based on the testimony of two alleged eye witnesses, having crumbled in the case before us, we find it impossible not to give the appellant the benefit of doubt because of circumstances which could only raise suspicion against him. Sufficient number of very significant features of evidence on record, dealt with by us above, were ignored by the High Court and the Trial Court. Hence, we were compelled to reassess the evidence for ourselves."

28. In the instant case, there was no pre-meditation or pre-arranged plan, as discussed hereinabove. It was a sudden fight and the heat of passion which resulted into quarrel after consuming liquor by accused and deceased and accused have not acted in a cruel or unusual manner. Their lordships of the Hon'ble Supreme Court in the case of ***Ram Nath Madhoprasad and others vrs. State of Madhya Pradesh,*** reported in ***AIR 1953 SC 420,*** have held that when there was no evidence whatsoever of any pre-meditation or of pre-arranged plan by the assailants of murdering the deceased the mere fact that all the accused were seen at the spot at the time of firing, could not be held sufficient to prove or even to infer a common intention. Their lordships have held as follows:

"18. The further contention of Dr. Tek Chand that the High Court was in error in holding that the provisions of Section 34 were attracted to the facts

of the case is also well founded. There is no evidence whatsoever of any premeditation or of a prearranged plan by the assailants of murdering Sunder. The conclusions of the High Court in para. 53 of its judgment seem to be based more on conjectures than on admissible material. No act or conduct on the part of the accused has been proved from which an inference of a prearranged plan to murder Sunder could be raised.

Even if it is held proved that all the appellants were seen at that spot at the time of firing this fact by itself could not be held enough to prove a common intention of the appellants to murder Sunder. It can well be that these four persons were standing together and one of them suddenly seeing Sunder fired at him. This possibility has not been eliminated by any evidence on the record. In such a situation when it would not be known who fired the fatal shot, none of such persons could be convicted of murder under Section 302, I. P. C. It seems to us that in this case the High Court failed to appreciate the true effect of the decision of the Privy Council in--'Mahbub Shah v. Emperor', AIR 1945 PC 118 (A), and its judgment in regard to the applicability of Section 34, I. P. C. has to be reversed."

29. In view of the observations and analysis made hereinabove, the appeals are partly allowed. The accused are convicted under Section 304 (part II) read with Section 34 IPC instead of Section 302 IPC read with Section 34 IPC. The accused be heard on the quantum of sentence for offence under Section 304 (part II) read with Section 34 IPC on 9.10.2015. The Registry is directed to prepare the production warrants and send the same to the concerned Superintendent of Jail for production of the accused on 9.10.2015.

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

Indian Institute of Advanced Studies ...Petitioner.

Versus

State of H.P. and Ors. ...Respondents.

CWP No.3660 of 2015.
Reserved on: 11/09/2015.
Decided on: October 01, 2015.

Constitution of India, 1950- Article 226- An antique bell gifted by the Raja of Nepal to the then Viceroy of India in 1903 was stolen from the Indian Institution of Advance Studies in April 2010-the investigation remained inconclusive- held that police had not carried out intensive and extensive investigation but had filed the untrace report after interrogating some suspects -the respondents have omitted to carry out a nationwide hunt to recover the stolen property and to nab the culprits; hence investigation handed over to CBI Shimla.

(Para 1 & 2)

For the petitioner: Mr.Ashok Sharma, Asstt.Solicitor General of India.

For the respondents: Mr.M.A.Khan, Addl.A.G. with Mr.P.M.Negi, Dy.A.G. and Mr.Ramesh Thakur, Asstt.A.G., for respondent-State.

Mr.Sandeep Sharma, Sr.Advocate with Mr.Pankaj Negi, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

An antique bell, gifted by the Raja of Nepal to the then Viceroy of India in 1903, weighing around 30 Kgs fixed to a wooden frame weighing 50-60 Kgs displayed at the verandah of the main entrance of the Indian Institute of Advance Studies, Shimla was stolen in the morning of 22nd April, 2010. The antique bell has both aesthetic as well as carried antique value. On its being stolen, the authorities concerned lodged an F.I.R. comprised in Annexure P-2 with the Police Station concerned. The police authorities concerned on initiating an investigation into the offence constituted in Annexure P-2 took to submit an untraced report comprised in Annexure P-5 before the Court concerned. Hence, the respondent No.4 prayed to the Court concerned for a closure of the case. However, the petitioner filed objections comprised in Annexure P-6 before the Court concerned against respondent No.3 seeking from the Court concerned the relief of acceptance by it of its proposal in the closure report of the stolen property being untraced, hence, investigations being ordered to be closed. The objections preferred by the petitioner herein to the proposal of respondent No.3 in his closure report submitted before the Magistrate concerned for investigating into the offence constituted in Annexure P-2 being ordered to be closed, were accepted by the Magistrate concerned who directed the respondent No.4 to carry out further investigations into the offence constituted in Annexure P-2.

2. The petitioner through the instant writ petition has prayed that given the unsatisfactory besides tardy investigation having been carried out by the respondents No.1 to 4 into the offence constituted in Annexure P-2, this Court direct that investigations being handed over to CBI. The respondents No.1 to 4 filed a detailed reply to the writ petition wherein it has been mentioned that after the Magistrate concerned having directed respondents No.1 to 4 to carry out re-investigation into the offence constituted in Annexure P-2 they have thereafter taken to interrogate persons who have been previously involved in theft cases registered at Police Station, West Shimla. Further, there is a portrayal therein that certain persons who were earlier arrested in the case, namely, Harish Verma and Kharag Singh are being interrogated. Moreover, Sushil Kumar, Dharam Pal, Lokesh and Laxmi Ram have also been disclosed in the reply filed by respondents No.1 to 4 to the writ petition to have been interrogated as they are involved in the sale and purchase of antique items. Even, one G.S.Khera, undergoing judicial detention in Central Jail, Amritsar who is depicted therein to be involved in the sale and purchase of antique items along with Harish Verma, Prem Singh Verma and Sanjeev Kumar, is being concerted to be interrogated in connection with the theft of antique bell aforesaid stolen from the precincts of the Indian Institute of Advance Studies, Shimla. An F.I.R. qua the commission of theft of an antique bell from the precincts of Indian Institute of Advance Studies was lodged in the year 2010. The respondents No.1 to 4 rather than having carried out an intensive and extensive investigation spread throughout the country by dispatching teams throughout the length and breadth of the country to nab the culprits, took to merely on suspicion interrogate Harish Verma, Sanjeev Kumar and Rajesh Kumar besides Chowkidar Kharag Singh. The efforts of respondents No.1 and 2 to recover the stolen item were unsuccessful. Consequently, belatedly on 30.4.2013 an untraced report was filed before the Judicial Magistrate concerned which was, however, on objections to it having been preferred before it by the petitioner, rejected by the learned Judicial Magistrate concerned, rather re-investigation was ordered to be carried out by the Judicial Magistrate in her renditions of

8.5.2015. Even the amplitude of re-investigation carried out by respondents No.1 to 4 into the offence constituted in Annexure P-2 is neither intensive nor extensive rather is confined to only re-interrogate the persons who previously were interrogated by the Investigating Officer concerned. The aforesaid factual matrix on record portraying the fact that since 2010 when investigations were launched in sequel to Annexure P-2 having been lodged by the petitioner herein through its authorized functionary before the Police Station concerned, the Investigating officer concerned inordinately prolonging the investigations up to 7.12.2013 yet even then his drawing a conclusion that the stolen property could not be recovered nor the culprits could be nabbed besides no clue was obtainable qua the culprits hence the filing of the closure report before the Magistrate concerned was deemed necessary. The imminent fact of the Investigating Officer concerned having consumed an inordinately long time since 2010 uptil December, 2013 when he drew satisfaction qua neither the stolen property being recoverable nor any clue qua its location being obtainable is ipso facto personificatory of lack of wherewithals with respondents No.1 to 4 to either recover the stolen property or nab the culprits. The filing of the closure report before the Court concerned by the authorities concerned is articulative of failure of investigation by respondents No.1 to 4 into the offence constituted in Annexure P-2 besides even the further investigation carried out by respondents No.1 to 4 in pursuance to the renditions comprised in Annexure P-7 of the Magistrate concerned smacks both of lack of professionalism, want of wherewithals besides theirs being yet clueless qua the location of the stolen property or the culprits who possess it especially in the face of theirs continuing to work on only qua those persons who even prior to the institution of the closure report before the Court concerned were interrogated by them. Obviously, the re-investigation by the respondents No.1 to 4 appears not to acquire any dynamism, lacks initiative as well as is bereft of any innovation. As a corollary then, when respondents No.1 to 4 have omitted to carry out a nationwide hunt to recover the stolen property besides nab the culprits necessarily then it bespeaks of slackness and indolence on their part. Naturally then, this Court deems it fit and appropriate that respondent No.5 who are possessed with all wherewithals as well as manpower to spread throughout the country to launch a nationwide hunt to locate the stolen property as well as the culprits that hence, respondent No.5 be directed to henceforth through the S.P. CBI, Shimla carry out an intensive as well as extensive investigation into the offence. The writ petition is allowed and the investigation of the case is handed over to S.P. CBI, Shimla. All records be handed over within ten days by respondents No.1 to 4 to S.P. CBI, Shimla to facilitate him to carry out the investigation into the offence constituted in Annexure P-2. Apposite status report be filed within three weeks thereafter.

3. With the aforesaid observations, the writ petition is allowed. Pending application(s), if any, shall also stand disposed of. No costs.

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

State of H.P. .....Appellant.
Versus
Manoj Kumar .....Respondent.

Cr. Appeal No.: 435 of 2009
Reserved on: 11.9.2015
Date of Decision : 01-10-2015

Indian Penal Code, 1860- Section 377 and 506- Accused was the headmaster of school- he used to show pornographic movies to the victims and to commit unnatural acts with them- he also used to threaten the victims – there were contradictions in the testimonies of the prosecution witnesses – material witnesses were not examined by the prosecution- matter was not reported promptly- no injuries were found on the person of the victims- held, that prosecution had failed to prove its case beyond reasonable doubt- accused was rightly acquitted. (Para-8 and 9)

For the Appellant: Mr. M.A Khan, Additional Advocate General with Mr. P.M Negi, Deputy Advocate General & Mr. Ramesh Thakur, Assistant Advocate General.

For the respondent: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

The instant appeal has arisen against the impugned judgment rendered on 10.4.2009 by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala whereby it while reversing the findings of conviction recorded by the learned Additional Chief Judicial Magistrate, Dehra, District Kangra, H.P, acquitted the accused for his having committed offences punishable under Sections 377 and 506 of the Indian Penal Code.

2. The brief facts of the case are that complainant Pawan Kumar was the father of two sons namely Manoj Kumar and Vinod Kumar resident of village Kanoj. On 28.04.2004 two boys namely Amit Kumar and Rishu came to the house of complainant and asked the complainant that the accused who was Head Master in Govt. Primary School, Kanol had called his son Manoj Kumar. Upon this son of complainant, Manoj Kumar started crying. Upon asking by the complainant, he told that the accused used to show him blue movies and also used to put his private part in his mouth. It was further revealed that the accused also used to put his private part in the anus of Manoj Kumar. The accused had done said immoral act for so many times. The other son of the complainant namely Vinod Kumar had also studied in the school of the accused, therefore, he was also asked by the complainant as said Vinod Kumar had stayed in the house of the accused for 10/11 days in the month of March. Vinod Kumar also told the complainant that the accused used to do the aforesaid immoral acts with him also. This fact was narrated by the complainant to his fellow villagers. Consequently, one Santosh Kumar asked his sons Puran Chand and Sanjiv Kumar about the conduct of accused/appellant. The aforesaid sons of Santosh Kumar also told him that accused had been doing aforesaid immoral acts with them also. It was also disclosed by the children that they were threatened and criminally intimidated by the accused not to disclose his aforesaid activities. As the result, the matter was reported to the police and relevant F.I.R. was registered in the Police Station Jawalamukhi District Kangra on 30.4.2004. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Sections 377/506 of Indian Penal Code to which he pleaded not guilty and claimed trial.

3. In order to prove its case, the prosecution examined as many as 12 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of

proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose to lead evidence in defence.

4. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused. On an appeal being preferred at the instance of the accused/appellant before the Learned Additional Sessions Judge, Fast Track Court, Kangra at Dharmshala, it while reversing the findings of conviction recorded by the learned Additional Chief Judicial Magistrate, Dehra, District Kangra, H.P, acquitted the accused for his having committed offences punishable under Sections 377 and 506 of the Indian Penal Code.

5. The State of H.P. is aggrieved by the judgment of acquittal, recorded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala. Shri P.M. Negi, learned Deputy Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharmshala, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondent.

6. On the other hand, the learned counsel appearing for the respondent-accused, has, with considerable force and vigour, contended that the findings of acquittal, recorded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

7. 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.

8. The complainant Pawan Kumar in the F.I.R. lodged qua the occurrence alleged therein that his two sons namely Manoj Kumar and Vinod Kumar were subjected to sodomy by the accused. The findings of acquittal recorded in favour of the accused would not stand to suffer reversal by this Court unless on a keen discernment by this Court of the evidence on record unveils that the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in its impugned judgment had grossly mis-appraised the relevant and germane evidence besides had omitted to appraise the relevant and best evidence. In the endeavour of this Court to gauge whether the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala had in the aforesaid manner committed or not a gross legal misdemeanor, it is imperative to analyze the testimonies of the prosecution witnesses**.** The complainant stepped into the witness box as PW-1. The genesis of the prosecution case is that on 28.04.2004 two boys Amit Kumar and Rishu had come to the house of the complainant and apprised him that the accused had summoned his son Manoj Kumar whereupon victim Manoj Kumar started crying and unfolded that the accused had been subjecting him to carnal intercourse besides used to insert his private part in his mouth. However, PW-3 in his deposition on oath has omitted to disclose therein the fact that when both Amit Kumar and Rishu came to the house of his father and apprised him that the accused had summoned him, he started crying whereupon there was purportedly an unfoldment by him to his father the factum of his having been subjected to carnal intercourse by the accused. With PW-3 not sustaining the version propounded by PW-1 in the F.I.R. of PW-3 having proceeded to cry when Amit Kumar and Rishu at the behest of the accused had come to the house of PW-1 his father, to summon him sequelling his then taking to purportedly communicate to PW-1 the penal misdemeanors committed upon his

person by the accused rather constrains an inference from this Court that the genesis of the prosecution version stands eroded. Amplifying vigor to the aforesaid inference is marshaled by the fact that the prosecution has omitted to examine Amit Kumar and Rishu the two boys who purportedly at the behest of the accused had visited the house of PW-1 the father of PW-3 with a request to PW-1 to send his son/victim Manoj Kumar to the house of the accused. Necessarily then the inference is that the visit of Amit Kumar and Rishu at the behest of the accused to the house of PW-1 the father of victim PW-3 with a request to the former to send the latter to his house whereupon the unfoldment of penal misdemeanors perpetrated upon PW-3 by the accused were made by PW-3 to PW-1 stands in the realm of prevarication. Furthermore, as emanable from the testimony of PW-1 that at the time contemporaneous to the ill-fated occurrence both his sons the victims of the offence were not prosecuting studies in the school where the accused was as their teacher imparting education to them rather with his testimony on oath telling/bespeaking the fact of both his sons having left the primary school where the accused was deployed as a teacher 3 to 4 years prior to the reporting of the incident renders frail the propagation by the prosecution that the accused while imparting education to the sons of PW-1 took to summon PW-3 to his house under the pretext of perpetrating penal misdemeanors upon him. Even if the prosecution has endeavoured to espouse that PW-3 was being subjected to penal misdemeanors by the accused since the past 4 years yet the factum of the victim aforesaid having remained reticent for an inordinately prolonged duration of four years besides his having not with promptitude reported the perpetration of penal misdemeanors upon his person by the accused renders the factum of the accused having perpetrated penal misdemeanors on his person since the past four years to be ridden with falsity besides renders the factom aforesaid being contrived. More so when no tenable explanation is emanating on his part for the belated lodging of a report with the authorities concerned qua penal misdemeanor perpetrated on his person by the accused. Even the deposition of PW-2 the victim, son of PW-1 though underscores the factum of his having stayed in the house of the accused for about 10 days in the month of March, 2004 during which period of stay the accused perpetrated penal misdemeanors upon his person, is ridden with gross prevarication constituted in the inherent falsity arising from the factum of the perpetration of penal misdemeanor on his person by the accused in the night of 16.3.2004 being a sequel to threatenings having been meted out to him by the accused that he would fail him in the examination in case he proceeds to report the incident to anybody whereas especially in falsification thereof there exists an admission of PW-2 of his not prosecuting studies in the school where the accused was deployed as a teacher at the time contemporaneous to the ill-fated occurrence. The inference which ensues from the evident fact of the victim PW-2 not pursuing studies in the school where the accused was deployed as a teacher at the time contemporaneous to the ill fated occurrence renders frail the efficacy of his deposition that he succumbed to the penal misdemeanor perpetrated on his person by the accused under a threat meted out by the latter to him of his eclipsing his academic career in case he divulges the incident to anybody. In sequel, the testimony of PW-2 as aptly concluded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, does not inspire confidence hence is discardable in concluding qua the guilt of the accused qua which he stood charged and tried. Manoj Kumar the other victim son of PW-1 has deposed as PW-3. He has in his testimony on oath deposed that in March, 2004 he was pursuing studies in 8th Class. Naturally then for reiteration when three years prior to 2004 he was not pursuing studies in the primary school where the accused was deployed as a teacher and assuming even if the penal misdemeanors if any perpetrated by the accused upon the person of PW-3 occurred three years prior to 2004 or assuming even if they occurred during the period when he was pursuing studies in the primary school where the accused was deployed as a teacher yet when the purported incidents of penal misdemeanor attributed by PW-3 to the accused

remained not promptly reported to the authority concerned nor when any sound and tenable explanation emanates on his part for his not promptly lodging any report qua the occurrence to the authority concerned renders the attribution by PW-3 to the accused of penal misdemeanor having been perpetrated on his person by the accused at the time preceding three years from March, 2004 when he was not pursuing studies in the primary school where the accused was deployed as a teacher to be in its entirety a concoction as well as invention besides an afterthought to which no credence can be given by this Court.

9. Furthermore, PW-4 has also proceeded to in his testimony on oath recorded before the learned trial Court attributed to the accused an inculpatory role of his having perpetrated carnal intercourse on his person inasmuch as he has with specificity deposed that the accused took to insert his private part in his mouth and also took to insert his private organ in his anus. The aforesaid penal misdemeanor deposed with specificity by PW-4 in Court had not been disclosed with compatible specificity by him to the Investigating Officer when he proceeded to record his statement before him under Section 161 Cr.P.C. inasmuch as therein he has merely stated that the accused had committed an immoral act with him. The testimony on oath of PW-4 is steeped in hyper falsity arising from the fact that the incidents of penal misdemeanor attributed to the accused by him occurred about six years prior to his unfoldment thereof at his instance. The prolonged reticence of six years on his part or his omitting to promptly lodge the report with the authority concerned with promptitude especially when no sound explanation is forthcoming for the belated communication at his instance of the penal misdemeanor perpetrated on his person by the accused fosters an inference that the belated disclosure by him of penal misdemeanor perpetrated on his person by the accused, is gripped with the vice of afterthought hence not inspiring the trust and confidence of this Court. Even though the father of PW-4 in his testimony has concerted to afford a purported explanation for the belated unfoldment to him by PW-4 qua the factum of penal misdemeanor having come to be perpetrated on his person by the accused and which explanation is embedded in the factum of PW-4 being beset with the problems of passing stools which led him to believe that he was suffering from some disease and which he thought would be redeemed by medical treatment yet when he omits to portray any cogent proof of any medical treatment having been purveyed to PW-4 rather mobilizes an inference that PW-4 in sequel to the purported perpetration of penal misdemeanor on his person by the accused was not beset with any medical problems rather PW-4 proceeded to unravel the purported misdeeds of the accused only on his having been prompted to do so by PW-1. In sequel the testimonies in their entirety of PW-4 and PW-5 are neither trust worthy nor natural hence incredible. The effect of the testimony of PW-6 the Doctor who qua the victim prepared MLCs comprised in Ext.PW-6/A, Ext.PW-6/B and Ext.PW-6/C on his having locally examined the respective anal regions of the victims and on such examination his having found them to be normal besides theirs not connoting the existence thereof in personification of use of force thereon by the accused any marks or stains of injury belies the prosecution version that the victims were subjected to sodomy by the accused for a continuous period of 3-4 years. Even if the non existence of injuries in the respective anal regions of the victims would not per-se convey that the victims were not subjected to sodomy by the accused as the non occurrence thereon of injuries would arise only in the event of the accused having introduced his penis slowly and carefully therein without using force. However, the victims do not in their respective testimonies unfold the factum that the accused while having subjected them respectively to sodomy had introduced his penis slowly and carefully in their respective anal areas/region, necessarily then the non existence of injuries in the respective anal regions of the victims cannot be attributed to a careful, slow and cautious introduction by the accused of his penis thereon. As a sequel then the lack of existence of any injury in their respective anal regions as displayed in the MLCs aforesaid prepared qua them by PW-6 is rather personificatory of the fact that the

accused did not also use any force or violence in allegedly inserting or introducing his penis in the respective anal regions of the victims. Noteworthingly the effect of the testimony of PW-6 is that it constrains this Court to conclude with aplomb that even the medical evidence omits to corroborate the testimonies of the prosecution witnesses. Consequently, the apt conclusion which is to be drawn by this Court is that the findings of acquittal recorded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala necessitate reverence by this Court.

10. In view of the above, we find no merit in this appeal, which is accordingly dismissed, and, the impugned judgment of the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala is maintained and affirmed. Records be sent back forthwith.

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

Shri Anshul Singhal & another .....Petitioners
Versus
Vinod Kumar & Others ....Respondents.

CMPMO No. 10 of 2015
Date of Decision: 5.10.2015

Indian Evidence Act, 1872- Section 45- Plaintiff filed a civil suit in which the defendant set up a Will stated to have been executed by 'V'- defendants examined an attesting witness to prove the execution of the Will- plaintiff filed an application for sending the signature of the testator for comparison with the admitted signatures- application was dismissed by the Trial Court- held, that specific mode and manner of proof of valid and due execution of testamentary disposition ousts the applicability of section 45 of the Indian Evidence Act- when the witness of the Will has deposed about its valid execution and his testimony has remained un-shattered, the application for comparison of the signatures cannot be allowed. (Para-4)

For the petitioners: Mr. Neeraj Gupta, Advocate.
For the Respondents: Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Amrita Messi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

A dispute arose inter-se the parties at lis qua succession to the estate of deceased Beerbala. The predecessor-in-interest of the defendants/respondents herein, to espouse his claim to succeed to the estate of deceased Bir Bala propounded a will purportedly executed qua her estate by her in his favour. The factum of a valid and due execution of the testamentary disposition of deceased Beerbala qua her estate in favour of the predecessor-in-interest of defendants/respondents herein was vehemently contested by the plaintiff/petitioners herein. On the pleadings of the parties, the hereinafter apt and necessary issues were struck:-

"2. *Whether deceased Smt. Bir Bala had executed a valid will in favour of deceased Sh. Kuldeep Chand, the predecessor in interest of defendants No. 1 to 6, as alleged? OPD 1 to 6.*

3. If issue No.2 is proved in affirmative, whether the Will dated 24.1.1991 is a result of fraud, as alleged? OPP"

2. The defendants/respondents herein while discharging the onus as cast upon them qua apposite issue No.2 had, in consonance with the mandate of Section 63 of the Indian Succession Act enjoining them to prove the factum of valid and due execution of the testamentary disposition of deceased Beerbala qua her estate in favour of their predecessor-in-interest by examining any one of the marginal witness to it, led into the witness box an attesting witness to it. The attesting witness to the testamentary disposition executed by the deceased testator in favour of the predecessor-in-interest of defendants/respondents herein in tandem with the statutory prescription manifested in section 63 of the Indian Succession Act, proved the factum of its due and valid execution by the deceased testator qua her estate in favour of the predecessor-in-interest of the defendants/respondents herein. The plaintiffs/petitioners herein availed of and proceeded to inexorably cross-examine the attesting witness who during the course of the recording of his examination-in-chief had proved the factum of it having come to be validly and duly executed by the deceased testator Birbala, yet even during the course of his being subjected to an exacting cross-examination by the learned counsel for the plaintiffs/petitioners herein, he remained un-shattered. However, even when the defendants/respondents herein had in the manner aforesaid discharged the onus cast upon them qua proof of issue No. 2, the plaintiffs/petitioners herein proceeded to file an application under Section 45 of Indian Evidence Act, for sending the signatures of the deceased testator occurring on her testamentary disposition for comparison with her admitted signatures as elucidated in the application at hand, to the Handwriting Expert for facilitating the rendition of an opinion thereon by the latter qua the factum whether the signatures of the deceased testator Birbala existing on her testamentary disposition executed by her qua her estate in favour of the predecessor-in-interest of the defendants/respondents herein, belong to her. The necessity of the application aforesaid at the instance of the plaintiffs/petitioners herein arose on account of the latters being enjoined to discharge the onus cast upon them by issue No. 3 which stands hereinabove extracted. The application stood rejected by the learned trial Judge.

3. The deceased Birbala was aged 75 years when she executed a testamentary disposition qua her estate in favour of the predecessor-in-interest of the defendants/respondents herein.

4. Even though the mode and manner of proof to be adduced qua the valid and due execution of the testamentary disposition of the deceased testator qua her estate in favour of the predecessor-in-interest of the defendants/respondents herein, by its propounder stands statutorily engrafted with specificity in Section 63 of the Indian Succession Act and when the mandate constituted therein enjoins upon the propounder of the will, to prove it, by examining any of the attesting witnesses to it, necessarily may be then no scope is left for any party to the lis contesting its valid and due execution to proceed to concert to, yet when the factum of its valid and due execution stands proved in consonance with the statutory prescription enshrined in Section 63 of the Indian Succession Act, in as much, as, any marginal witnesses to it, having proved its valid and due execution, erode the sanctity or solemnity of proof adduced by a marginal witness to it qua the factum of its valid and due execution, by preferment of an application under Section 45 of the

Indian Evidence Act, for eliciting an opinion from the expert qua the authenticity of the signatures borne on the testamentary disposition of the deceased testator, on his comparing the signatures of the deceased testator existing on her testamentary disposition with her admitted signatures. In other words, the specific statutory mandate prescribing a specific mode and manner of proof of valid and due execution of a testamentary disposition, ousts the applicability of section 45 of the Indian Evidence Act. Moreso, when the parties contesting the authenticity of the signatures borne on the testamentary disposition of the deceased testator had availed of an opportunity to cross-examine the attesting witness to it, who in tandem with the prescription manifested in Section 63 of the Indian Succession Act had during the course of his examination-in-chief proved the factum of its valid and due execution and who during the course of his having been subjected to a scathing cross-examination had remained un-shattered, necessarily then the elicitation of an opinion from an expert is a concert to oust the testimony on oath of an attesting witness to a testamentary disposition who in consonance with the statutory mandate of Section 63 of Indian Succession Act had proved its valid and due execution besides is an endeavor to both dilute as well as erode both the object and purpose behind the engraftment of section 63 in the Indian Succession Act. Necessarily then to preserve the mandate of section 63 of the Indian Succession Act, the endeavor of the petitioners herein to thwart its operation in the garb of the application at hand necessitates its being baulked.

5. The learned counsel for the plaintiffs/petitioners herein has with great fervor argued before this Court that when issue No.3 has been struck on the pleadings of the parties, the plaintiffs/petitioners herein were enjoined to discharge the onus qua it as cast upon them especially when it devolves upon the factum of the testamentary disposition being the outcome of fraud hence entails upon them to imperatively lead appropriate evidence, comprised in the report of a handwriting expert prepared by the latter on his comparing the signatures of the deceased testator existing on her testamentary disposition with the ones existing on the documents recited in the application at hand. However, the aforesaid submission addressed by the learned counsel for the plaintiffs/petitioners herein succumbs, in the face of the aforesaid discussion portraying the factum of the defendants/respondents herein having discharged the onus cast upon them of proving the valid and due execution of the testamentary disposition of deceased Birbala in the mode and manner as mandated in Section 63 of the Indian Succession Act, which statutorily enshrines the mode and manner of proof of valid and due execution of a testamentary disposition and which manner cannot stand derogation by adoption of the mode as concerted to be adopted by the plaintiffs/petitioners herein by resorting to institute an application under Section 45 of Indian Evidence Act. The true import and purpose of issue No.3 qua which it is open to the petitioners/plaintiffs before the learned trial Court, to adduce evidence impinges besides devolves not upon the valid and due execution of the testamentary disposition of deceased Birbala which factum stands comprised in issue No.2 and onus whereof has been discharged by the propounder by his leading into the witness box an attesting witness to it, hence his having fulfilled besides satiated the mandate of Section 63 of the Indian Succession Act prescribing with explicity the aforesaid mode and manner of proof of valid and due execution of the testamentary disposition of the deceased testator, hence disempowers the petitioners herein plaintiffs before the learned trial Court to, yet on the succeeding issue, devolving merely upon the factum of the testamentary disposition of the deceased testator being the outcome of a fraud, to in the garb of its phraseology also contest the authenticity of the signatures of deceased Birbala existing on her testamentary disposition qua her estate especially when the ambit of issue No.3 stands trammeled and confined to the domain of the petitioners herein plaintiffs before the learned trial Court being empowered only to lead evidence qua the factum of suspicious

circumstances surrounding the execution of the testamentary disposition of deceased Birbala hence, staining its execution with the taint of fraud. Now especially with the essential nuance of the phraseology of the preceding issue i.e issue No.2 having with specificity taken within its ambit the factum of its valid and due execution and proof whereof was enjoined to be adduced by the defendants/respondents herein and which onus for the reasons aforesaid has been discharged by them, as such, vindicating the submission of the learned counsel for the petitioners herein that the interpretation to be lent to the phraseology of issue No.3 is of its asking for proof from the petitioners herein qua its valid and due execution would subvert the import and essential nuance of the phraseology of issue No.3, besides would denude the effect of the distinctive phraseology in which issue No.2 is cast and which alone asks for proof on the part of its propounder qua its valid and due execution. Therefore this court holds that the essential nuance of the phraseology of issue No.3 is its asking for proof from the petitioners herein not qua the valid and due execution of testamentary disposition of deceased testator Birbala but its asking for proof from the petitioners herein only qua the suspicious circumstances Surrounding its execution. Any other interpretation to the essential nuance of the phraseology in which both issues No. 2 and 3 are cast would render them to be mutually militative. Consequently, it is open for the learned counsel for the petitioners herein plaintiffs before the learned trial Court to discharge the onus cast upon them qua issue No.3 by adducing evidence before it qua the suspicious circumstances surrounding the execution of the testamentary disposition of deceased Birbala, hence, its being stained with the vice of fraud. For reiteration, the preferment of an application under Section 45 of the Indian Evidence Act by the petitioners herein is a clever machination adopted by them to in the garb of misconstruction of the phraseology of issue No.3 adduce evidence qua its valid and due execution onus of proof whereof stands encapsulated in the phraseology of issue No. 2 and which has been for the reasons aforesaid discharged by the defendants/respondents herein. Even though this Court is constrained to record that the preferment of an application under Section 45 of the Indian Evidence Act at the instance of the petitioners herein was improper. Besides when it would not be legally sagacious to interfere with the order impugned before this Court, yet given the averments made in the reply of the defendants/respondents herein to the application at hand that the plaintiffs/petitioners herein can be directed to place on record the admitted signatures of deceased testator Birbala existing on documents if any executed by her in the year 1991. Consequently, it is deemed apt that in case the petitioners herein/plaintiffs before the learned trial Court place before it documents containing the admitted signatures of the deceased Birbala executed by her in the year 1991 then, the learned trial Judge shall proceed to order for theirs being sent to the expert concerned to enable the latter for his after comparing them with the signatures of the deceased testator existing on her testamentary disposition, render an opinion whether both belong to the deceased Birbala. In view of above the present petition stands disposed of. The parties through their learned counsel are directed to appear before the learned trial Court on 27.10.2015. Records be sent back forthwith.

It is made clear that any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

CWP No. 9048 of 2013 along with CWPs No. 9051, 9055, 7031 and 7366 of 2013 and COPCs No. 4266 & 4267 of 2013.
Judgment reserved on: 22.9.2015
Decided on 6.10. 2015

1. **CWP No. 9048 of 2013**
   Dr. Nitin ...Petitioner
   Vs
   H.P. University & anr ...Respondents.
2. **CWP No.9051 of 2013**
   Dr. Mini Pathak Dogra ....Petitioner
   Vs
   H.P.University & anr ....Respondents.
3. **CWP No.9055 of 2013**
   Dr. Madhu Bala Dadhwal ...Petitioner
   Vs
   H.P. University & anr ...Respondents.
4. **CWP No. 7031 of 2013**
   Dr.Sapna Chandel ...Petitioner
   Vs
   H.P.Universtiy & ors ....Respondents
5. **CWP No. 7366 of 2013**
   Rohit Kumar ...Petitioner
   Vs
   State of HP & ors ...Respondents.
6. **COPC No. 4266 of 2013**
   Dr. Mahender Singh ...Petitioner
   Vs
   Prof. Dr.A.D.N.Bajpai & ors ...Respondents
7. **COPC No.4267of 2013**
   Dr. Nand Lal & anr ...Petitioners
   Vs
   Prof. Dr.A.D.N.Bajpai & ors ...Respondents

Constitution of India, 1950- Article 226- H.P. University issued advertisements for filling up the posts of Assistant Professors – however, process was never completed – a writ petition was filed and it was directed that process be completed within three months- SLP filed by the University was dismissed - interviews were conducted but again process was not completed- a writ petition was filed and direction was issued to re-consider all the recommendations made by Selection Committee from time to time- Executive Council took a decision to hold fresh interviews after calling fresh applications without considering recommendations made by the Selection Committee- a writ petition was filed against this decision - University filed a reply pleading that petitioners are ineligible as they had not qualified NET/SLET/SET - petitioners admitted that they had not qualified NET/SLET/SET but contended that they were exempted as they had been awarded Ph.D. degree- UGC had resolved that all the candidates having M. Phil. degree on or before 10.7.2009, Ph.D. degree

prior to 31.12.2009 or who had registered themselves for the Ph.D. before this said date, but were awarded degree subsequently were exempted from the NET- Central Government did not agree with this resolution and insisted upon qualifying NET/SLET/SET- this direction of central govt. was upheld in ***P. Suseela & ors. Vs University Grants Commission & ors. (2015) 8 SCC 129*** – petitioners had only right to be considered for appointment but no right of appointment – since, petitioners had not qualified NET/SLET/SET, therefore, their petitions are not maintainable and are dismissed. (Para-18 to 54)

Case referred:
P. Suseela & ors Vs University Grants Commission & ors (2015) 8 SCC 129

For the Petitioners : Mr. Ranjan Sharma, Mr. Adarsh Sharma, Advocates, Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

Mr. Vikrant Thakur, Mr.Parshotam Chaudhary, Advocates.

For the Respondents : Mr. Shrawan Dogra, Senior Advocate with Mr. J.L.Bhardwaj, Advocate for respondent No.1 in CWPs No. 9048, 9051 and 9055 of 2013.

Mr. Sandeep Sharma, Senior Advocate with Mr.Prashant Sharma, Advocate, for respondent No.2 in CWPs No. 9048, 9051 and 9055 of 2013.

Mr. Shrawan Dogra, Senior Advocate with Mr. J.L.Bhardwaj, Advocate for respondents No.1 and 2 in CWP No. 7031 of 2013.

Mr. Sandeep Sharma, Senior Advocate with Mr.Prashant Sharma, Advocate, for respondent No.3 in CWP No. 7031 of 2013.

Mr.Subham Sharma, Advocate, for respondents No. 4 to 6 in CWP No. 7031 of 2013.

Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma,Addl.AGs, Mr. J.K.Verma and Mr.Vikram Thakur, Dy. AGs, for respondent No.1 in CWP No. 7366 of 2013.

Mr.Shrawan Dogra, Senior Advocate with Mr. J.L.Bhardwaj, Advocate for respondent No.2 in CWP No. 7366 of 2013.

Mr.Ankush Dass Sood, Sr. Advocate with Mr. Rakesh Sharma, Advocate, for respondent No.3 in CWP No. 7366 of 2013.

Mr.Vikrant Thakur and Mr. Parshotam Chaudhary, Advocates, for the petitioners in COPC No. 4266 of 2013.

Mr. Ankush Dass Sood, Senior Advocate with Mr. Rakesh Sharma, Advocate, for the petitioners in COPC No. 4267 of 2013.

Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Addl.AGs, Mr. J.K.Verma and Mr.Vikram Thakur, Dy. AGs, for respondents No. 1 to 4 and 10 in COPCs No. 4266 and 4267 of 2013.

Mr. Shrawan Dogra, Senior Advocate with Mr. J.L. Bhardwaj, Advocate, for respondents No. 5 to 9 and 11 to 15 in COPCs No. 4266 and 4267 of 2013.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, (J)

CWPs No. 9048, 9051, 9055 of 2013.

Since common questions of law and facts are involved in all these writ petitions, therefore, they were taken up together for disposal. With the consent of the parties, CWP No. 9048 of 2013 is taken as the lead case and facts enumerated therein form the basis of this decision.

2. Case of the petitioners is that the respondent University for filling up the posts of Assistant Professors, has been issuing successive advertisements bearing Nos.32/2006, 2/2008, 1/2010, 3/2010 and 3/2011, but every time, for one reason or the other and for extraneous reasons and in colourable exercise of powers, it is reluctant to complete the process and is more interested and keen to scuttle the same.

3. The advertisement issued in 2010 bearing Nos. 1/2010 and 3/2010 was subject matter of consideration by the learned Division Bench of this Court in CWP No. 6479 of 2011 decided on 4.1.2012 and this Court directed the University to complete the process for filling up the remaining unfilled posts in the H.P. University within three months from the date of passing of the judgment i.e. 4.1.2012.

4. The SLP filed by the University, bearing SLP (C) No.12122/2012 was dismissed by the Hon'ble Supreme Court on 23.4.2012.

5. In response to advertisement No.3/2011, some of the petitioners and other eligible candidates applied for the post of Assistant Professor and were interviewed by a duly constituted selection committee on 26.8.2012. It is averred that the University once again tried to scuttle the process of selection mid-way for extraneous reasons by taking shelter under the decision of the Executive council of the University in its meeting held on 8.4.2013, whereby it was decided to discontinue the process of selection made by the earlier selection committee.

6. Some of the candidates, who had already appeared in the interviews pursuant to the aforesaid advertisements, approached this Court by filing writ petitions bearing Nos. 2429 of 2013, 6479 of 2011, 7010 of 2012, 8095 of 2012, 9247 of 2012, 10833 of 2012 and 4024 of 2013, which were disposed of by this Court on 25.9.2013 by a common judgment whereby the decision of the Executive council taken in its meeting held on 8.4.2013 was set aside and directions were issued to reconsider all the recommendations made by the Selection committed from time to time in relation to the selection process commenced on the basis of advertisement No.3/2011.

7. On 1.11.2013, the Executive council, in compliance to the aforesaid judgment, took a decision to hold fresh interview after calling fresh candidates without considering the recommendations made by the selection committee qua eligible candidates as had been directed by this Court and the dates of interviews were fixed on 22.11.2013. It is this decision of the Executive council which has been assailed in these petitions on a number of grounds taken therein.

8. The respondent University has filed its reply wherein preliminary submission regarding the very maintainability of the petition has been raised on the ground that the petitioner(s) is ineligible in terms of the advertisement No.3/2011 as they do not possess NET/SLET/SET or qualification of Ph.D Degree as per the University Grants Commission

(Minimum Standards and Procedure for Award of Ph.D Degree) Regulations, 2009 and the amended Ordinances of the respondent University in this regard.

CWP No. 7031 of 2013

9. The petitioner claims to be fully eligible for being appointed as Assistant Professor in the Guest faculty in Sanskrit department of H.P. University and has questioned the selection of the respondents 4 to 7 on the grounds taken in the petition.

10. The respondent University in its reply has averred that the petitioner was not eligible for being appointed as Assistant Professor as she has not submitted any certificate of her qualifying NET/SLET/SET which was an essential qualification.

11. On the other hand, case of the petitioner is that the candidates who had received Ph.D degrees upto 31st December, 2009 or who had got themselves registered for Ph.D before 10.7.2009 were exempted from qualifying NET/SLET/SET. Meaning thereby, that the petitioner admittedly has not qualified NET/SLET/SET.

12. The petitioners in all the above petitions have admittedly not qualified the NET/SLET/SET but their specific case as pleaded is that the University Grants Commission (Minimum Standard and Procedure for Award of Ph.D Degree) Regulation, 2009 dated 1.6.2009, specifically provide for exemption to candidates from NET/SLET/SET who are or have been awarded a Ph.D degree in accordance with the UGC (Minimum Standard and Procedure for Award of Ph.D Degree) Regulation, 2009. It is further claimed that as per letter dated 28.8.2009, the UGC had left it to the respective Universities/colleges and institutions to decide as to whether the degree of Ph.D awarded to various candidates is in compliance to the provisions of Regulations, 2009 (supra).

13. The petitioners, in support of their claim, have placed reliance on the judgment rendered by the Allahabad High Court in Dr. Ramesh Kumar Yadav & anr Vs. University of Allahabad, Civil Misc. Writ Petition No. 45477 of 2011, decided on 6.4.2012 to canvass that they are fully eligible since they satisfy six out of eleven tests laid by the UGC which were made essential for award of Ph.D degree under the third amendment of the Regulations of 2009.

14. Whereas, on the other hand, the specific case set up by the respondent University is that since the petitioners are not eligible for appointment to the post in question as they do not possess NET/SLET/SET or qualification of Ph.D as per the guidelines laid down by the UGC and the Central Government, therefore, these petitions are not maintainable.

15. The respondent University and the private respondents have raised preliminary objection regarding maintainability of these petitions by placing reliance upon the recent judgment of the Hon'ble Supreme Court in **P. Suseela & ors** Vs **University Grants Commission & ors (2015) 8 SCC 129,** to canvass that right to be considered for appointment is not a vested right and this right is always subject to minimum eligibility conditions, and till such time the appointment is actually made, no vested right arises, and different eligibility conditions may be laid down at different times and the conditions as are applicable at the time of selection would form the basis of the selection. It is further argued that since none of the petitioners possess the essential qualification, therefore, all these petitions deserve to be dismissed.

16. Whereas, the learned counsel for petitioner would contend that in case such a course is followed, it would amount to re-opening and sitting over the judgment passed by

this court in Court in CWP No. 6479 of 2011 which in turn has been affirmed by the Hon'ble Supreme Court in SLP (C) No. 12122/2012.

17. In this background, the only question required to be determined in all these petitions is regarding the eligibility/non eligibility of the petitioners for appointments as Assistant Professors in absence of their admittedly having not qualified NET/SLET/SET.

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

18. In order to appreciate the controversy involved in these petitions, it would be necessary to refer to the relevant provisions of the University Grants Commission Act, 1956 (for short the 'Act') the regulations framed by it from time to time as also the directives issued by the Central government from time to time as have otherwise been noticed in P.Suseela's case (supra).

19. The University Grants Commission Act, 1956, was enacted by Parliament to make provision for the coordination and determination of standards in Universities being enacted under Entry 66 List I, Schedule VII to the Constitution of India. By Section 4 of the Act, a University Grants Commission is established to carry out the functions entrusted to it by Section 12 of the Act.

20. We are directly concerned in these petitions with two Sections of this Act, namely, Section 20 and 26:-

> *"**20. Directions by the Central Government**.-(1) In the discharge of its functions under this Act, the Commission shall be guided by such directions on questions of policy relating to national purposes as may be given to it by the Central Government.*
>
> *(2) If any dispute arises between the Central Government and the Commission as to whether a question is or is not a question of policy relating to national purposes, the decision of the Central Government shall be final.*
>
> ***26. Power to make regulations**.-(1) The Commission may[, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder,-*
>
> *(a) regulating the meetings of the Commission and the procedure for conducting business thereat;*
>
> *(b) regulating the manner in which and the purposes for which persons may be associated with the Commission under Section 9';*
>
> *(c) specifying the terms and conditions of service of the employees appointed by the Commission;*
>
> *(d) specifying the institutions or class of institutions which may be recognised by the Commission under clause (f) of Section2;*
>
> *(e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction;*
>
> *(f) defining the minimum standards of instruction for the grant of any degree by any University;*

(g) regulating the maintenance of standards and the co- ordination of work or facilities in Universities.

[(h) regulating the establishment of institutions referred to in clause (ccc) of Section 12 and other matters relating to such institutions;

(i) specifying the matters in respect of which fees may be charged, and scales of fees in accordance with which fees may be charged, by a college under sub-section (2) of Section 12-A;;

(j) specifying the manner in which an inquiry may be conducted under sub-section (4) of Section 12-A..

(2) No regulation shall be made under clause (a) or clause (b) or clause (c) or clause (d) [or clause (h) or clause (i) or clause (j) of sub-section (1) except with the previous approval of the Central Government.

(3) The power to make regulations conferred by this section except clause (i) and clause (j) of sub-section (1)] shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, to the regulations or any of them but no retrospective effect shall be given to any regulation so as to prejudicially affect the interests of any person to whom such regulation may be applicable."

21. In exercise of the powers conferred by Section 26(1)(e) of the said Act, the UGC framed regulations in 1982 prescribing the qualification for the teaching post of Lecturer in colleges as follows:- "M. Phil. degree or a recognized degree beyond Master's level".

22. In 1986, the Malhotra Committee was appointed by the UGC to examine various features of University and College education. It recommended that there should be certain minimum qualifications laid down for the post of Lecturer.

23. Pursuant to the said Committee report, the UGC framed regulations on 19th September, 1991 superseding the 1982 regulations and providing apart from other qualifications, clearing of the NET as a test for eligibility to become a Lecturer.

24. Vide an amendment dated 21st June, 1995, a proviso was added to the 1991 regulations by which candidates who had submitted their Ph.D. thesis or passed the M. Phil. examination on or before 31st December, 1993 were exempted from the said eligibility test for appointment to the post of Lecturer.

25. This continued till 2002, the only change made being that the exemption continued qua Ph.D. thesis holders for dates that were extended till 31st December, 2002.

26. This state of affairs continued until 2008 when the Mungekar Committee submitted its final report recommending that NET should be made a compulsory requirement for appointment of Lecturer in addition to the candidate possessing M.Phil. or Ph.D degrees.

27. On 12th November, 2008, the Department of Higher Education, Ministry of Human Resources Development, Government of India, issued a directive under Section 22 of the UGC Act providing inter alia as under:-

"UGC shall, for serving the national purpose of maintaining standards of higher education, frame appropriate regulations within a period of thirty days from the date of issue of this order prescribing that

qualifying in NET/SLET shall generally be compulsory for all persons appointed to teaching positions of Lecturer/Assistant Professor in Higher Education, and only persons who possess degree of Ph.D. after having been enrolled/ admitted to a programme notified by the Commission, after it has satisfied itself on the basis of expert opinion, as to be or have always been in conformity with the procedure of standardization of Ph.D. prescribed by it, and also that the degree of Ph.D. was awarded by a University or Institution Deemed to be University notified by the UGC as having already complied with the procedure prescribed under the regulations framed by the Commission for the purpose."

28. In pursuance of the said directive, the UGC promulgated the impugned Regulations of 2009, the 3rd Amendment of which provides as follows:-

"NET/SLET shall remain the minimum eligibility condition for recruitment and appointment of Lecturers in Universities/Colleges/ Institutions.

Provided, however, that candidates, who are or have been awarded Ph.D. Degree in compliance of the "University Grants Commission (minimum standards and procedure for award of Ph.D. Degree), Regulation 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET for recruitment and appointment of Assistant Professor or equivalent position in Universities/ Colleges/Institutions."

The proviso referred to a number of new conditions relating to the maximum number of Ph.D. students at any given point of time, stringent admission criteria for a Ph.D. degree, research papers being published, the Ph.D. thesis being evaluated by at least two experts, one of whom shall be an expert from outside the State etc.

29. This was followed by another directive dated 30th March, 2010 by the Ministry under Section 20 of the Act directing the UGC as follows:-

(i) That the UGC shall not take up specific cases for exemption from the application of the NET Regulations of 2009 after the said Regulations have come into force, for either specific persons or for a specific university/institution/college from the application of the UGC (Minimum Qualifications for appointment and career advancement of teachers in universities and colleges) 3rd Amendment Regulations, 2009 for appointment as Lecturer in universities /colleges/institutions;

(ii) That appropriate amendment to the second proviso to clause 2 of the UGC Regulations 2000 shall be made by UGC to give full effect to the policy directions issued by the Central Government dated 12th November, 2008, within 30 days from the date of issue of this direction; and

(iii) That the decision taken by the UGC in it's 468th meeting held on 23rd February, 2010 vide agenda item no. 6.04 and

6.05 to grant specific exemptions from the applicability of NET shall not be implemented as being contrary to national policy.

The above said directions shall be implemented by the UGC forthwith."

30. Pursuant to this directive, on 30th June, 2010, the UGC framed Regulations of 2010, para 3.3.1 of which states:

"3.3.1. NET/SLET/SET shall remain the minimum eligibility condition for recruitment and appointment of Assistant Professors in Universities/Colleges/Institutions.

Provided however, that candidates, who are or have been awarded a Ph.D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D. Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor equivalent positions in Universities/Colleges/ Institutions."

31. By two resolutions dated 12th August, 2010 and 27th September, 2010, the UGC opined that since the regulations were prospective in nature, all candidates having M. Phil. degree on or before 10th July, 2009 and all persons who obtained the Ph.D. degree on or before 31st December, 2009 and had registered themselves for the Ph.D. before this date, but were awarded such degree subsequently shall remain exempted from the requirement of NET for the purpose of appointment as Lecturer/Assistant Professor.

32. The Central Government, however, by letter dated 3rd November, 2010 informed the UGC that they were unable to agree with the decision of the Commission and stated that consequently a candidate seeking appointment to the post of Lecturer/Assistant Professor must fulfill the minimum qualifications prescribed by the UGC including the minimum eligibility condition of having passed the NET test.

33. Now, adverting to P.Suseela case (supra), it would be noticed that a large number of appeals were filed before the Hon'ble Supreme Court in which the judgments of four High Courts were assailed.

34. The High Court of Delhi in its judgment dated 6th December, 2010 was faced with the constitutional validity of the University Grants Commission Regulations (Minimum Qualifications Required for the Appointment And Career Advancement of Teachers in Universities and Institutions affiliated to it) (the third Amendment) Regulation 2009 under which NET/SLET is to be the minimum eligibility condition for recruitment and appointment of Lecturers in Universities/ Colleges/ Institutions. The challenge was repelled saying that the Regulations do not violate Article 14 of the Constitution of India and are, in fact, prospective inasmuch as they apply only to appointments made after the date of the notification and do not apply to appointments made prior to that date.

35. Along the lines of the Delhi High Court, the Madras and Rajasthan High Courts also repelled challenges to the aforesaid regulations vide their judgments dated 6th December, 2010 and 13th September, 2012.

36. On the other hand, the Allahabad High Court in its judgment dated 6th April, 2012 (supra) had found that the said regulations were issued pursuant to directions of the Central Government which themselves were issued outside the powers conferred by the UGC

Act and, hence, the eligibility conditions laid down would not apply to M. Phil. and Ph.D. degrees awarded prior to 31st December, 2009.

37. However, a subsequent judgment of the Allahabad High Court dated 6th January, 2014 distinguished the aforesaid judgment and upheld the self- same regulations.

38. Whereas the Union of India filed appeal against the Allahabad High Court judgment dated 6th April, 2012, the M.Phil. degree holders and Ph.D. degree holders who had not yet been appointed as Assistant Professors in any University/College/ Institution filed separate appeals against the judgment rendered by the aforesaid four High Courts before the Hon'ble Supreme Court.

39. The judgments rendered by the Delhi, Madras and Rajasthan High Courts were assailed before the Hon'ble Supreme Court on the ground that Section 26(3) expressly entitles a regulation to be prospective but so as not to prejudicially affect the interests of any person to whom such regulation may be applicable. It was argued that both under Article 14 as well as this sub- section, since all M.Phil. and Ph.D. holders had been repeatedly assured that they would be exempt from passing the NET exam if they were such holders prior to 2009, the regulations should not be so construed as to impose the burden of this examination upon them. It was further argued that under Section 26(2), regulations made in pursuance of Section 26(1) (e) and (g) do not require the previous approval of the Central Government and, therefore, the impugned regulations are bad since they follow the dictate of the Central Government which, in fact, is not required. Also, this would show that when it comes to qualifications of persons to be appointed to the teaching staff, the UGC is an expert body to whom alone such qualifications and consequently exemptions from such qualifications should be left to decide. It was also argued that there is a violation of Article 14 in that unequals have been treated equally as those who passed their M. Phil. and Ph.D. degrees prior to 2009 fell in a separate class which had an intelligible differentia from those who did not so fall as has been maintained by the UGC from time to time.

40. On the other hand, the stand of the Union of India and UGC before the Hon'ble Supreme Court was that under Section 26 regulations have to be made consistently with the Act and Section 20 is very much part of the Act. Therefore, if directions on questions of policy are made by the Central Government, regulations must necessarily be subordinate to such directions. It was also argued that if a question arises as to whether a subject matter is a question of policy relating to national purposes, the decision of the Central Government shall be final.

41. The Hon'ble Supreme Court, after considering the rival contentions, held that Section 26 enables the Commission to make regulations only if they are consistent with the UGC Act, which necessarily means that such regulations must conform to Section 20 of the Act and under Section 20 of the Act, the Central Government is given the power to give directions on questions of policy relating to national purposes which shall guide the Commission in the discharge of its functions under the Act.

42. On the aforesaid reasoning, the Hon'ble Supreme Court concluded that both the directions of 12th November, 2008 and 30th March, 2010 were directions made pertaining to questions of policy relating to national purposes inasmuch as, being based on the Mungekar Committee Report, the Central Government felt that a common uniform nationwide test should be a minimum eligibility condition for recruitment for the appointment of Lecturer/ Assistant Professors in Universities/ Colleges/ Institutions.

43. The Hon'ble Supreme Court further observed that for the obvious reason that M. Phil. Degrees or Ph.D. degrees are granted by different Universities/ Institutions

having differing standards of excellence. The objects sought to be achieved by these direction was clear that all the Lecturers in Universities/Colleges/ Institutions governed by the UGC Act should have a certain minimum standard of excellence before they are appointed as such. These directions are not only made in exercise of powers under Section 20 of the Act but are made to provide for coordination and determination of standards which lies at the very core of the UGC Act.

44. In this context, it shall be apt to quote para 12 of the judgment, which reads thus:

> *"12. It is clear that Section 26 enables the Commission to make regulations only if they are consistent with the UGC Act. This necessarily means that such regulations must conform to Section 20 of the Act and under Section 20 of the Act the Central Government is given the power to give directions on questions of policy relating to national purposes which shall guide the Commission in the discharge of its functions under the Act. It is clear, therefore, that both the directions of 12th November, 2008 and 30th March, 2010 are directions made pertaining to questions of policy relating to national purposes inasmuch as, being based on the Mungekar Committee Report, the Central Government felt that a common uniform nationwide test should be a minimum eligibility condition for recruitment for the appointment of Lecturer/Assistant Professors in Universities/Colleges/Institutions. This is for the obvious reason that M. Phil. Degrees or Ph.D. degrees are granted by different Universities/Institutions having differing standards of excellence. It is quite possible to conceive of M.Phil/ Ph.D. degrees being granted by several Universities which did not have stringent standards of excellence. Considering as a matter of policy that the appointment of Lecturers/ Assistant Professors in all institutions governed by the UGC Act (which are institutions all over the country), the need was felt to have in addition a national entrance test as a minimum eligibility condition being an additional qualification which has become necessary in view of wide disparities in the granting of M. Phil./ Ph.D. degrees by various Universities/ Institutions. The object sought to be achieved by these directions is clear: that all Lecturers in Universities/Colleges/Institutions governed by the UGC Act should have a certain minimum standard of excellence before they are appointed as such. These directions are not only made in exercise of powers under Section 20 of the Act but are made to provide for coordination and determination of standards which lies at the very core of the UGC Act. It is clear, therefore, that any regulation made under Section 26 must conform to directions issued by the Central Government under Section 20 of the Act."*

45. The other argument raised before the Hon'ble Supreme Court by the appellants therein was that since the previous approval of the Central Government was not necessary for regulations which define the qualifications required of persons to be appointed to the teaching staff of a University, the Government has no role to play in such matters and cannot dictate to the Commission.

46. This contention was repelled by the Hon'ble Supreme Court on the ground that such argument ignores the opening lines of Section 26(1) which states that the Commission can only make regulations consistent with the Act, which brings in the Central Government's power under Section 20 of the Act, a power that is independent of sub-section (2) of Section 26. A regulation may not require the previous approval of the Central

Government and may yet have to be in conformity with a direction issued under Section 20 of the Act.

47. Now once the Hon'ble Supreme Court has upheld the validity of the directions issued by the government on 12.11.2008 and 30.3.2010 respectively, then the necessary consequence is that the requirement of having passed NET/SLET/SET is mandatory and cannot be relaxed even in the cases of the candidates possessing the degree of M.Phil or Ph.D while considering the cases for appointment to the teaching post of Assistant Professor.

48. Learned counsel for the petitioner(s) at this stage would vehemently argue that the regulations framed by the UGC cannot be given retrospective effect so as to prejudicially affect the interest of any person to whom such regulation may be applicable. Similar contention was raised, in P.Suseela's case (supra) but the same was repelled by the Hon'ble Supreme Court in the following manner:

> *"14.The other interesting argument made is that such regulations should not be given retrospective effect so as to prejudicially affect the interests of any person to whom such regulation may be applicable. In order to appreciate this contention, it is necessary to distinguish between an existing right and a vested right. This distinction was made with great felicity in Trimbak Damodhar Rajpurkar v. Assaram Hiraman Patil, 1962 Suppl. 1 SCR 700. In that case a question arose as to whether an amendment made to Section 5 of the Bombay Tenancy and Agricultural Lands Amendment Act could be said to be retrospective because its operation took within its sweep existing rights. A bench of five Hon'ble Judges of this Court held that Section 5 had no retrospective operation.*
>
> *15.This Court held: (Trimbak case, AIR pp.1760-61, paras 8-10 SCR pp.707-09).*
>
> > "8.Besides, it is necessary to bear in mind that the right of the appellant to eject the respondents would arise only on the termination of the tenancy, and in the present case it would have been available to him on March 31, 1953 if the statutory provision had not in the meanwhile extended the life of the tenancy. It is true that the appellant gave notice to the respondents on March 11, 1952 as he was then no doubt entitled to do; but his right as a landlord to obtain possession did not accrue merely on the giving of the notice, it accrued in his favour on the date when the lease expired. It is only after the period specified in the notice is over and the tenancy has in fact expired that the landlord gets a right to eject the tenant and obtain possession of the land. Considered from this point of view, before the right accrued to the appellant to eject the respondents amending Act 33 of 1952 stepped in and deprived him of that right by requiring him to comply with the statutory requirement as to a valid notice which has to be given for ejecting tenants.
> >
> > 9.In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are

included. As observed by Buckley, L.J. in West v. Gwynne [(1911) 2 Ch 1 at pp 11, 12] retrospective operation is one matter and interference with existing rights is another.

> "....If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."

These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. It was held that the provisions of the said section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5(1) of the amending Act with which we are concerned appears to us to be substantially similar.

> *10.A similar question had been raised for the decision of this Court in Jivabhai Purshottam v. Chhagan Karson [Civil Appeal No 153 of 1958 decided on 27-3-1961] in regard to the retrospective operation of Section 34(2)(a) of the said amending Act 33 of 1952 and this Court has approved of the decision of the Full Bench of the Bombay High Court on that point in Durlabbha Fakirbhai v. Jhaverbhai Bhikabhai [(1956) 58 BLR 85] . It was held in Durlabbhai case [(1956) 58 BLR 85] that the relevant provision of the amending Act would apply to all proceedings where the period of notice had expired after the amending Act had come into force and that the effect of the amending Act was no more than this that it imposed a new and additional limitation on the right of the landlord to obtain possession from his tenant. It was observed in that judgment that (Jivabhai Purshottam case[10], AIR p.1493, para-4)*

> > *'4....A notice under Section 34(1) is merely a declaration to the tenant of the intention of the landlord to terminate the tenancy; but it is always open to the landlord not to carry out his intention. Therefore, for*

> *the application of the restriction under sub-section 2(a) on the right of the landlord to terminate the tenancy, the crucial date is not the date of notice but the date on which the right to terminate matures; that is the date on which the tenancy stands terminated".*

49. Learned counsel for the petitioner(s) would then argue that on account of the judgments rendered by this Court from time to time, they had a vested right of being appointed to the post in question.

50. Even this contention of the petitioner cannot be accepted for the reason that it is not in dispute that the advertisement No.3/2011 has not been taken to its logical end by making appointment and till and so long the appointments are actually not made, the petitioner(s) cannot claim any vested right of appointment, at the highest, petitioner(s) could only contend that they have a right to be considered for the post in question. This right is always subject to minimum eligibility conditions and till such time as the petitioner(s) are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition is laid down, it does not mean that any vested right of the petitioner(s) is affected. This is precisely what was even held in P.Suseela's case (supra) when similar contentions were raised before the Hon'ble Supreme Court:-

> *"16. Similar is the case on facts here. A vested right would arise only if any of the appellants before us had actually been appointed to the post of Lecturer/Assistant Professors. Till that date, there is no vested right in any of the appellants. At the highest, the appellants could only contend that they have a right to be considered for the post of Lecturer/Assistant Professor. This right is always subject to minimum eligibility conditions, and till such time as the appellants are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition in the form of a NET test is laid down, it does not mean that any vested right of the appellants is affected, nor does it mean that the regulation laying down such minimum eligibility condition would be retrospective in operation. Such condition would only be prospective as it would apply only at the stage of appointment. It is clear, therefore, that the contentions of the private appellants before us must fail."*

51. The learned counsel would then argue that in terms of the directions passed by this Court in CWP No. 6479 of 2011 they have a preferential right of being considered for appointment. We have gone through the directions and find that this court has no where directed the respondents while making appointments, to ignore the qualifications of the recommendees, rather a specific direction was passed that while considering the recommendations, the Executive Council will have to examine as to whether the recommendees are fulfilling the requirements specified in the advertisement bearing No.3 of 2011 as would be clear from the following observations:

> *"the Executive Council, while considering the recommendations, will have to examine as to whether the recommendees are fulfilling the requirements specified in the advertisement bearing No.3/11 and as per other mandatory requirements of rules governing the selection process and take final decision on that basis."*

52. Learned counsel for the petitioners would then desperately argue that the issue raised in the instant case is squarely covered by the judgment rendered by the

Division Bench of the Allahabad High Court in Dr. Ramesh Kumar Yadav's case (supra) wherein it was held that a candidate could be held to be eligible for consideration for appointment as lecturer in University provided he satisfy any six test out of eleven laid down by the UGC and the Union of India, i.e. Ministry of Human Resource Development had no power whatsoever to override the decision taken by the UGC.

53. This submission deserves outright rejection for the simple reason that the judgment in Ramesh Kumar Yadav's case upon which much reliance is being placed by the petitioners, has been specifically over ruled by the Hon'ble Supreme Court in P.Suseela's case in the following manner:

> "22. The Allahabad High Court in its judgment dated 6th April, 2012 Ramesh Kumar Yadav V. University of Allahabad, 2012,SCC Online All paras 105-106 has held as follows:
>
> *"105. CONCLUSIONS:*
>
> *1. The Central Government, in exercise of its powers under Section 20 (1) of UGC Act, 1956, does not possess powers and authority to set aside or annul the recommendations of the University Grants Commission, and the regulations made by it under Section 26 (1) (e) of the Act defining the qualification, that should ordinarily be required to be possessed by any person to be appointed to the teaching posts of the University, for which under Section 26 (2) of the UGC Act, 1956, the previous approval of the Central Government is not required.*
>
> *2. The exemptions given by UGC to those, who were awarded Ph.D degrees prior to 31.12.2009 before the enforcement of the Regulations of 2009, is not a question of policy relating to national purpose on which the Central Government could have issued directions under Section 20 (1) of the UGC Act, 1956.*
>
> *3. The UGC is an expert body constituted with specialists in laying down standards and for promotion and coordination of University education. The recommendations made by it in the matters of qualifications and the limited exemptions of such qualifications for appointment for teachers in Universities taken after constituting expert Committees and considering their recommendations is not subject to supervision and control by the Central Government. The Central Government in the matters of laying down minimum qualifications for appointment of teachers in the University, does not possess any supervisory powers, to annul the resolutions of UGC.*
>
> *4. The Ph.D holders, who were awarded Ph.D degrees prior to 31.12.2009, cannot be said to have legitimate expectation maturing into any right to be considered for appointment on teaching posts in the University, without obtaining the NET/SLET/SET qualifications, unless the UGC has provided for any exemptions.*
>
> *5. The resolution on agenda item no. 6.04 and 6.05 in the 468th meeting of the UGC held on 23.2.2010, and the resolution of UGC in its 471st meeting on agenda item no. 2.08 dated 12.8.2010 recommending the 3rd Amendments to the Regulations of 2009 to be prospective in nature, is binding on the Universities including the University of Allahabad.*

> *6. The petitioners were awarded Ph.D degrees in the year 2009 and in the year 2003 respectively prior to enforcement of the 3rd Amendment in the regulations, which came into force on 31.12.2009, and thus they are eligible, even if they are not NET/SLET/SET qualified, if they have been awarded Ph.D degree with any six conditions out of 11 recommended by the UGC prior to 31.12.2009.*
>
> *The writ petition is allowed. The petitioners are held eligible for consideration for appointment as Lecturer for guest faculty in the Department of Sanskrit of the University, provided they satisfy any of the six tests out of eleven, laid down by the UGC, and which are made essential for award of Ph.D degree under the 3rd Amendment of the Regulations of 2009. It will be open to the University to consider from the material produced by the petitioners, that they satisfy six out of eleven tests recommended by the University Grants Commission for award of their Ph.D."*
>
> 22. We have already pointed out how the directions of the Central Government under Section 20 of the UGC Act pertain to questions of policy relating to national purpose. We have also pointed out that the regulation making power is subservient to directions issued under Section 20 of the Act. The fact that the UGC is an expert body does not take the matter any further. The UGC Act contemplates that such expert body will have to act in accordance with directions issued by the Central Government.
>
> 23. The Allahabad High Court adverted to an expert committee under the Chairmanship of Professor S.P. Thyagarajan which laid down that if six out of eleven criteria laid down by the Committee was satisfied when such University granted a Ph.D. degree, then such Ph.D. degree should be sufficient to qualify such person for appointment as Lecturer/Assistant Professor without the further qualification of having to pass the NET test. The UGC itself does not appear to have given effect to this recommendation of the Thyagarajan Committee. However, the High Court thought it fit to give effect to this Committee's recommendation in the final directions issued by it. When the UGC itself has not accepted the recommendations of the said Committee, we do not understand how the High Court sought to give effect to such recommendations. We, therefore, set aside the Allahabad High Court judgment dated 6th April, 2012 in its entirety."

54. Now what emerges from the above said analysis and discussion is that the petitioners admittedly have not qualified NET/SLET/SET, which terms of P.Suseela's case is an essential qualification for being appointed as Assistant Professor. These writ petitions at their instance are, therefore, not maintainable and are accordingly dismissed, leaving the parties to bear the costs.

CWP No. 7366 of 2013

55. This writ petition has been preferred for quashing of the selections made by the respondent University to the post of Assistant Professor, Fine Arts (Painting) on the ground that there were certain irregularities in the selection process.

56. That respondent University has filed its reply, wherein it has been stated that the present petition is covered by the decision of this Court rendered in CWP No. 2429 of 2013, titled Desh Raj Thakur Vs. H.P. University.

57. As per petitioner own showing he has not qualified NET/SLET/SET examination and, therefore, being ineligible like the petitioners in the aforesaid cases, he too cannot maintain this petition.

58. Moreover, the petitioner has also not chosen to appear in the interview though to justify the same, he has levelled allegation that he was dissuaded by the other candidates and even members of the ruling party exerted pressure upon him not to appear, but these allegations are totally unsubstantiated.

59. That apart, the record reveals that interviews for the post were held on 26.8.2012, but the instant petition came to be filed after more than one year on 30.8.2013. If at all the petitioner was genuinely aggrieved because of the alleged irregularities in the selection, then what prevented him to approach the Court immediately, is not forthcoming. The allegations are nothing but an afterthought.

60. Accordingly there is no merit in this petition and the same is dismissed, leaving the parties to bear the costs.

COPCs No. 4266 & 4267 of 2013.

61. Petitioners in these petitions have prayed for initiation of proceedings against the respondents under the Contempt of Courts Act on the ground that they have deliberately and willfully violated the judgment passed by this Court on 25.9.2013 in a batch of writ petitions, the lead whereof was CWP No.2429 of 2013.

62. We have considered this submission and are of the considered view that in light of the judgment rendered by the Hon'ble Supreme Court in P.Suseela's case (supra), which in turn has been followed by us while deciding CWP No. 9048 of 2013 along with CWPs No. 9051, 9055, 7031, and 7366 of 2013 (supra), the respondent University will now be required to first decide the eligibility of each of the candidates strictly in accordance with what has been laid down by the Hon'ble Supreme Court in P.Suseela's case and thereafter alone can it proceed to make appointments.

63. This in fact is what has otherwise been directed even by this Court while adjudicating CWP No. 6479 of 2011 titled Surender Sharma & ors Vs. H.P. University, where it was held:

> "the Executive Council, while considering the recommendations, will have to examine as to whether the recommendees are fulfilling the requirements specified in the advertisement bearing No.3/11 and as per other mandatory requirements of rules governing the selection process and take final decision on that basis."

64. That being the position, no ground for initiating proceedings under the Contempt of Courts Act at this stage is made out and accordingly, both these contempt petitions are dismissed.

****

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

Himachal Pradesh State Electronics Development Corporation Ltd. ...Appellant.

Versus

Vijay Sikka ..Respondent.

LPA No.99 of 2010.
Decided on: October 06, 2015.

Constitution of India, 1950- Article 226- Petitioner was working as a Technician and was Non Matriculate- he sought pay parity with the Technicians who were matriculates- respondent contended that there were two different categories of technicians, one of matriculates and the other one of non matriculates- writ petition was allowed by a Single Judge- held, that pay parity can be claimed when the functions, responsibilities and the duties are similar- hence, order passed by the Single Judge set aside. (Para-3 to 8)

Case referred:
The Principal Secretary (Personnel) & another vs. Pratap Thakur, I L R 2014 (V) HP 313

For the Appellant: Mr.Praneet Gupta, Advocate.
For the Respondent: Mr.Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This Letters Patent Appeal is directed against the judgment, dated 6th April, 2010, passed by a learned Single Judge of this Court, in CWP(T) No.4638 of 2008, titled Vijay Sikka vs. H.P. State Electronics Development Corporation, whereby the writ petition filed by the petitioner (respondent herein) was allowed and the appellant (writ respondent) was directed to grant pay scale of Rs.1500-2640/-, alongwith arrears with interest at the rate of 6% per annum, applying the doctrine of "equal pay for equal work", (for short the impugned judgment),.

2. We have heard the learned counsel for the parties and perused the writ record. The impugned judgment, on the face of it, is bereft of any reason and illegal for the following reasons.

3. The writ petitioner was working as Technician in T.V. Factory, Chambaghat in the pay scale of Rs.750-1350/- and was Non Matriculate. The petitioner sought pay parity with the Technicians who were Matriculate. The writ respondent (appellant herein) has filed the reply and pleaded therein that there were two different categories of Technicians – one category was of Matriculates and the another was of Non Matriculates. The learned Single Judge, without dilating on the issues whether the Technicians belonging to these two categories perform same duties, whether both the categories serve as feeder cadre for promotion to the higher cadre etc., has granted the relief while keeping in view the judgment, dated 26th May, 2009, passed by this Court in CWP(T) No.4562 of 2008, titled Rattan Chand vs. H.P. State Electronics Development Corporation Ltd.

4. The learned Single Judge has not discussed the fact that there was no production in the T.V. Factory since the year 1990 and on account of the closure of the said Factory, its employees, who were senior to the writ petitioner, including Senior Assistants, were absorbed as Clerks or in lower scales in other Departments and were given lower salary, for which reason also, the writ petitioner cannot be granted higher pay scale, which would amount to injustice.

5. It also appears that the learned Single Judge has not taken note of the judgment of the Division Bench of this Court in **CWP No. 873 of 1993,** titled as **Roshan Lal versus Hon'ble High Court of Himachal Pradesh and another,** decided on 27th October, 1994, wherein tests have been laid down how equal pay for equal work can be granted and what are the factors which have to be kept in mind while granting such a relief. Thus, the impugned judgment is not in tune with the judgment of the Division Bench of this Court in Roshan Lal's case (supra) and only on this count, the same merits to be set aside.

6. Following the decision of the Division Bench of this Court in Roshan Lal's case, supra, this Court in **LPA No.11 of 2012, titled as The Principal Secretary (Personnel) & another vs. Pratap Thakur, decided on 22nd September, 2014,** has held in paragraphs No.10 to 18, as under:

> *"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 versus 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."*
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> *12. The Apex Court in another case titled as **State of Madhya Pradesh and others versus 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 versus 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 versus 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. versus 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 versus 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 versus 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 versus 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.""

7. A similar question was also considered by this Court in case titled as **Himachal Pradesh State Electricity Board versus 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.""

8. Applying the tests supra, the impugned judgment is bad in law. Accordingly, is same is set aside and the appeal is allowed. Consequently, the writ petition is dismissed.

9. Pending CMPs, if any, also stand disposed of accordingly.

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

Kawaljeet Singh Duggal .....Petitioner.

Versus

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

CWP No.3003 of 2015
Decided on: 06.10.2015.

Constitution of India, 1950- Article 226- Petitioner sought directions to the respondents to enter his name in the column of ownership in respect of land detailed in the petition- Reply also filed by the respondents- writ petition disposed off with the directions to respondent No. 2 to examine the case of the petitioner in light of the averments contained in the writ petition, along with annexure appended thereto, read with the Rules occupying the field, within six weeks. (Para 3)

For the Petitioner: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.

For the respondents: M/s Romesh Verma & Anup Rattan, Addl.A.Gs. and Mr.J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Petitioner has sought writ of mandamus commanding the respondents to enter his name in the column of ownership in respect of land comprised in Khasra No.591(old), new Khasra Nos.172 to 184 and 188, measuring 2117.37 square meters,

situated in Up Muhal Krishna Nagar Bazar, Ward Bara Shimla, Shimla (Rural), on the grounds taken in the memo of writ petition.

2. Respondents No.1 and 2 have filed the reply, which was adopted by respondent No.3. Rejoinder has also been filed by the petitioner.

3. In the facts of the case, we deem it proper to dispose of the writ petition by directing respondent No.2 to examine the case of the petitioner in light of the averments contained in the writ petition, alongwith anneuxres appended thereto, read with the Rules occupying the field, within six weeks from today. Ordered accordingly.

4. Needless to say that in case the order goes against the petitioner, he is at liberty to challenge the same.

5. Pending CMPs, if any, also stand disposed of. Copy dasti.

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

Lalit Kumar .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.2177 of 2014
Reserved on : 03.09.2015
Pronounced on: 06.10.2015.

Constitution of India, 1950- Article 226- Father of the petitioner died in service in the year 1994 when the petitioner was minor - the mother of the petitioner desired that her son be considered for compassionate employment on his attaining the age of maturity- the respondent also issued a letter to the mother of the petitioner to this effect-after qualifying his 10+2 the petitioner applied for being appointed on compassionate ground- the respondents verified the background of the petitioner and on finding that the family was still living in destitution and needed employment assistance, recommended the case-the case was rejected by the respondents in the year 2013 on the ground of delay-held that, the aim of providing employment assistance on compassionate ground was to help the family which has come to a naught after death of the breadwinner-once the family of the petitioner was found to be living in destitution and in need of employment, the case could not be rejected on the ground of delay when delay is not attributable to the petitioner-the petitioner has acted promptly on the assurance given by the respondents- writ petition allowed with the directions to the respondents to consider petitioner's case afresh and pass orders within three months. (Para 3 to 9)

For the Petitioner: Mr.G.R. Palsara, Advocate.

For the respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

The writ petition was de-linked from the group of cases, the lead case of which was CWP No.9094 of 2013, and was taken up separately.

2. By the medium of instant writ petition, the petitioner has sought writ of certiorari for quashing the order, dated 1st October, 2013, Annexure P-13, made by the respondents rejecting the claim of the petitioner for appointment on compassionate ground, and has also sought writ of mandamus commanding the respondents to consider the case of the petitioner for appointment against the post of Constable on compassionate ground.

3. Precisely, the case of the petitioner is that father of the petitioner, who was serving as Constable in the Central Industrial Security Force, died on 22nd September, 1994, while in service. It is pleaded that as the petitioner was minor at the relevant point of time, respondent No.3 issued a letter, dated 13th December, 1994, (Annexure P-2), to the effect that the petitioner would be considered for appointment on compassionate ground on his attaining the age of 18 years, if the mother of the petitioner desired so. The mother of the petitioner responded to the said letter of respondent No.3, vide letter Annexure P-3, whereby she expressed her willingness and requested the authorities to provide employment to her son on his attaining the age of majority.

4. The petitioner did his Matriculation in the year 2006 and also qualified 10+2 in the year 2009, as is evident from Annexures P-6 and P-7. The petitioner on attaining the age of majority applied to the respondents for being appointed on compassionate ground, alongwith all requisite documents, as is evident from Anenxures P-4 and P-5. It was further pleaded that certain objections were raised by the respondents from time to time, as would be evident from Annexure P-12. Ultimately, the case of the petitioner was rejected on the ground of delay, vide order dated 1st October, 2013.

5. Respondents have filed the reply, wherein they have admitted the issuance of letter, dated 13th December, 1994, Annexure P-2, whereby it was intimated to the mother of the petitioner that the case of the petitioner for compassionate appointment would be considered on his attaining the age of majority. It has been admitted that the petitioner, on attaining the age of majority, vide application dated 27th September, 2009, applied for compassionate appointment. The respondents, vide Annexures R-1 and R-2, asked the petitioner to remove the objections, which were ultimately removed by the petitioner on 3rd January, 2013. Thereafter, the case of the petitioner was sent to the CISF Headquarters, New Delhi, vide letter dated 12th February, 2013, who, in turn, taken up the matter with the Ministry of Home Affairs, Government of India, New Dehil. However, the Ministry of Home Affiars did not accord permission since the case of the petitioner was delayed by 15 years.

6. The aim and object of providing employment assistance on compassionate ground to the family of a deceased-employee is to provide immediate assistance in order to help the family which comes to a naught after the death of its breadwinner. We are also aware that such help must reach to the family as early as possible or within the period as specified in the Rules/Policy framed in this regard by the Central Government as also the State Governments.

7. Coming to the facts of the instant case, It is the admitted case of the respondents that the petitioner was minor at the time of death of the employee and the respondents informed the petitioner, vide letter dated 13th December, 1994, Anneuxre P-2, to apply for appointment on compassionate ground on his attaining the age of majority. The petitioner, on attaining the age of majority, applied for being appointed on compassionate ground. It is further admitted case of the respondents that after receiving such application, they deputed an officer to verify the family background as also the assets/liabilities of the petitioner, who, in turn, recommended the case of the petitioner for compassionate employment, meaning thereby that the family of the petitioner was still living in destitution and needed employment assistance. Thereafter, from 27th September, 2009 till the rejection

letter was issued on 1st October, 2013, for about four years, the matter of the petitioner remained pending with the respondents, may be, because of some objections here and there. Thus, it does not lie in the mouth of the respondents to reject the case of the petitioner on the ground of delay, when no delay is attributable to the petitioner. On the contrary, the petitioner, on the assurance given by the respondents, acted promptly on his attaining the age of majority.

8. The respondents themselves deputed an officer to verify the background of the family, who, on seeing the plight of the family, recommended the case of the petitioner for appointment on compassionate ground.

9. Having said so, the writ petition is allowed, the impugned letter is quashed and the respondents are directed to examine the case of the petitioner and pass orders afresh within a period of three months from today.

10. The writ petition is disposed of, so also the pending applications, if any.

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

Monal Potteries & Ceramics (Pvt.) Ltd. .....Petitioner.

Versus

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

CWP No.2391 of 2015
Decided on: 06.10.2015.

Constitution of India, 1950- Article 226- Petitioner sought directions against the respondents to grant permanent registration to its Unit and not to pass any penal orders against it- Reply also filed- Respondents directed to examine the representation of the petitioner, dated 22nd March, 2012, and to pass appropriate orders--the petitioner also given liberty to file fresh representation before the respondents encapsulating all the grounds taken in the writ petition- time bound directions issued to the respondents. (Para-2)

For the Petitioner: Mr.Y.P. Sood, Advocate.

For the respondents: M/s Romesh Verma & Anup Rattan, Addl. A. Gs. and Mr. J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Petitioner-Company has sought writ of mandamus commanding the respondents to grant permanent registration to its Unit and not to pass any penal orders against it. Respondents have filed the reply.

2. It is a moot question whether the writ petition is maintainable. However, we leave this question open and dispose of the writ petition with a direction to the respondents/competent Authority to examine the representation of the petitioner, dated 22nd March, 2012, (Annexure P-12), and pass appropriate orders within a period of three weeks

from today. Instead, the petitioner is also at liberty to file fresh representation before the respondents encapsulating all the grounds taken in the writ petition within a period of one week from today and the respondents/competent Authority is directed to examine the said representation within two weeks from the receipt thereof.

3. Pending CMPs, if any, also stand disposed of.

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

Satish Kumar Singh .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.405 of 2014.

Judgment reserved on: 22.09.2015.

Date of decision: October 06, 2015.

Constitution of India, 1950- Article 226- Petitioner filed a public interest litigation- respondent contended that petition has been filed to espouse private interest – held, that it is duty of the Court hearing public interest litigation to be satisfied about the bona fides of the petitioner and that he is espousing the cause of the public through such litigation - any abuse of public interest litigation has to be viewed very seriously- petition was dismissed by respondent No. 9 after conducting the inquiry which shows that petitioner is filing petition with malafide objectives and for vindication of his personal grievances- the process of the Court cannot be abused for oblique considerations- petition dismissed.

(Para-5 to 10 and 16 to 18)

Constitution of India, 1950- Article 226- Petitioner filed a writ petition which was opposed on the ground that a writ petition seeking similar relief was filed before Calcutta High Court by the wife of the petitioner which was dismissed- petitioner contended that the findings recorded in the petition filed by his wife are not binding upon him and that issues raised in the writ petition were not properly appreciated by Calcutta High Court - wife of the petitioner had sought same relief which has been sought by the petitioner - Calcutta High Court had discussed all the issues raised by wife of the petitioner and had ordered the dismissal of the petition on merits- no appeal was preferred against the judgment of Calcutta High Court- if the questions were not properly addressed by the Calcutta High Court, the remedy was to file an appeal before the Supreme Court and not another writ petition- petition dismissed with the costs of Rs.1 lac. (Para-11 to 14 and 21)

Cases referred:

Devender Chauhan Jaita vs State of Himachal Pradesh and others, ILR 2014 (VI) HP 755

Vijay Kumar Gupta versus State of Himachal Pradesh and others, ILR 2015 (I) HP 351 (D.B.)

Anurag Sharma and another versus State of Himachal Pradesh and others, I L R 2015 (IV) HP 351 (D.B.)

State of Uttaranchal versus Balwant Singh Chaufal and others (2010) 3 SCC 402

Central Electricity Supply Utility of Odisha vs Dhobei Sahoo and others (2014) 1 SCC 161

For the Petitioner : Petitioner in person.

For the Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Desh Raj Thakur, Advocate, for respondents No.1 to 4.

Respondent No.5 ex parte.

Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General, for respondents No.6 and 7.
Mr.Sandeep Sharma, Senior Advocate with Mr.Parshant Sharma, Advocate, for respondents No.8,9 and 14.
Mr.Dilip Sharma, Senior Advocate with Ms.Nishi Goel, Advocate, for respondents No.10 and 11.
Ms.Meera Devi, Advocate, for respondent No.12.
Mr.Pawan K.Sharma, Advocate, for respondent No.13.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner who is a permanent resident of West Bengal has filed this petition purportedly in public interest whereby the following substantive reliefs have been claimed:-

"a) That impugned orders dated 18.01.2013, Annexure: P-13 and orders dated 27.11.2013, Annexure: P-33, may very kindly be quashed and set aside, being contrary to all norms of justice with directions to the respondents not to give effect to the same, if given, the same again be brought under the direct control of CTSA, as earlier was being run;

b) That transfer of moveable/immovable properties in the State of Himachal Pradesh from CTSA to CTA being contrary to section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, is otherwise not sustainable in the eyes of law and liable to be quashed and set aside, for which humble petitioner respectfully prays for;

c) That directions may be given to the foreigners added as respondents in the writ petition not to run a parallel Government in the Union Territory of India. In the alternative, directions may be given to the Government of India not to allow the foreigners to run parallel Government in the Union Territory of India from Dharamshala, District Kangra, H.P;

d) That directions may be given to respondent No.1 to get the matter inquired into with respect illegal issuance of order/letter dated 18.01.2013, which is totally contrary to all norms of justice and the very Constitution of India, with directions to place on record of this case the report of said inquiry, as is got conducted;

e) That there being conversion of religion of minor kids, as is clear from perusal of Annexure: P-34, is hit by the provisions of the Himachal Pradesh Freedom of Religion Act, 2006. Said respondents are liable to be punished suitably in accordance with law as per provisions of the Act. Categorical directions are liable to be issued to the respondents to desist from doing so in future, for which humble petitioner respectfully prays for;

f) That transfer, vide letter dated 27.11.2013, is only a transfer of first phase and transfer of properties of remaining schools is in offing in second phase. Respondents may very kindly be restrained from doing so permanently, in the interest of law and justice."

2. Respondents No.8, 9 and 14 have raised preliminary objection regarding the very maintainability of the petition on the ground that petition seeking similar reliefs was infact filed before the Calcutta High Court by Smt. Kajal Ghosh (Singh), who is none other

than the wife of the present petitioner, which was dismissed on merits and the instant petition, therefore, is not maintainable.

3. In such circumstances, we have to first decide the question of maintainability and only if we hold this petition to be maintainable, then alone we will go into the merits of the case.

We have heard the petitioner and the learned counsel for the respondents and have gone through the records of the case.

4. The petitioner has vehemently argued that the decision rendered by the Calcutta High Court has no bearing to the facts of this case for the simple reason that the petition before that Court had not been filed by him but by his wife and further that the issues raised therein had not been appreciated by the Calcutta High Court in their right perspective and, therefore, all the issues are thus open to judicial scrutiny before this Court.

5. The petitioner claims to have filed this petition as *Pro Bono Publico*, whereas, the respondents have challenged the locus-standi by contending that the petition has not been filed in public interest, but has been filed to espouse private interest.

6. It is settled law that before entertaining public interest litigation, the Courts have to be satisfied about bonafide of the petitioner and it is the cause of the public which he seeks to espouse through such litigation. This Court is repeatedly coming across litigations under the brand name of public interest litigation, whereas, the same is used for suspicious products of mischief. This Bench has repeatedly warned against such mis-adventure. Reference in this regard can conveniently be made to CWP No.7249 of 2010 titled as Devender Chauhan Jaita versus State of Himachal Pradesh and others, decided on 03.12.2014, being lead case, CWP No.9480 of 2014 titled as Vijay Kumar Gupta versus State of Himachal Pradesh and others, decided on 09.01.2015, CWP No.2775 of 2015 titled as Anurag Sharma and another versus State of Himachal Pradesh and others, decided on 07.07.2015. It may be pertinent to observe here that the decision in CWP No.9480 of 2014 was assailed before the Hon'ble Supreme Court by way of SLP(C) No.8459 of 2015 and the same was dismissed *in limine* on 23.03.2015.

7. Even the Hon'ble Supreme Court has viewed the abuse of public interest litigation very seriously and in this regard reference can conveniently be made to the judgment of the Hon'ble Supreme Court in ***State of Uttaranchal*** versus ***Balwant Singh Chaufal and others (2010) 3 SCC 402***, where after noticing the instances of misuse of public interest litigation, the necessity to check such abuse was emphasized. It was held:-

> "143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non- monetary directions by the courts.
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> 144. In BALCO Employees' Union v. Union of India & Others AIR 2002 SC 350, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of

public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide." Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.

145. In S. P. Gupta v. Union of India 1981 Supp SCC 87 this Court has found that this liberal standard makes it critical to limit standing to individuals "acting bona fide. To avoid entertaining frivolous and vexatious petitions under the guise of PIL, the Court has excluded two groups of persons from obtaining standing in PIL petitions. First, the Supreme Court has rejected awarding standing to "meddlesome interlopers". Second, the Court has denied standing to interveners bringing public interest litigation for personal gain.

146. In Chhetriya Pardushan Mukti Sangharsh Samiti v. Starte of U.P. (1990) 4 SCC 449 the Court withheld standing from the applicant on grounds that the applicant brought the suit motivated by enmity between the parties.

147. Thus, the Supreme Court has attempted to create a body of jurisprudence that accords broad enough standing to admit genuine PIL petitions, but nonetheless limits standing to thwart frivolous and vexations petitions. The Supreme Court broadly tried to curtail the frivolous public interest litigation petitions by two methods-one monetary and second, non-monetary.

148. The first category of cases is that where the court on filing frivolous public interest litigation petitions, dismissed the petitions with exemplary costs. In Neetu v. State of Pubjab & Others AIR 2007 SC 758, the Court concluded that it is necessary to impose exemplary costs to ensure that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

149. In S.P. Anand v. H.D. Deve Gowda AIR 1997 SC 272, the Court warned that (SCC p. 745, para 18) it is of utmost importance that those who invoke the jurisdiction of this Court “seeking a waiver of the locus standi rule must exercise restraint in moving the Court by not plunging in areas wherein they are not well-versed”.

150. In Sanjeev Bhatnagar v. Union of India AIR 2005 SC 2841, this Court went a step further by imposing a monetary penalty against an Advocate for filing a frivolous and vexatious PIL petition. The Court found that the petition was devoid of public interest, and instead labelled it as "publicity interest litigation." Thus, the Court dismissed the petition with costs of Rs.10,000/-.

151. Similarly, in Dattaraj Nathuji Thaware v. State of Maharashtra & Others (2005) 1 SCC 590, the Supreme Court affirmed the High Court's monetary penalty against a member of the Bar for filing a frivolous and vexatious PIL petition. This Court found that the petition was nothing but a camouflage to foster personal dispute. Observing that no one should be permitted to bring disgrace to the noble profession, the Court concluded that the imposition of the penalty of Rs. 25,000 by the High Court was appropriate. Evidently, the Supreme Court has set clear precedent validating

the imposition of monetary penalties against frivolous and vexatious PIL petitions, especially when filed by advocates.

152. This Court, in the second category of cases, even passed harsher orders. In Charan Lal Sahu v. Zail Singh AIR 1984 SC 309, the Supreme Court observed that, "we would have been justified in passing a heavy order of costs against the two petitioners" for filing a "light-hearted and indifferent" PIL petition. However, to prevent "nipping in the bud a well-founded claim on a future occasion," the Court opted against imposing monetary costs on the petitioners." In this case, this Court concluded that the petition was careless, meaningless, clumsy and against public interest. Therefore, the Court ordered the Registry to initiate prosecution proceedings against the petitioner under the Contempt of Courts Act. Additionally, the court forbade the Registry from entertaining any future PIL petitions filed by the petitioner, who was an advocate in that case.

153. In J. Jayalalitha v. Government of T.N. (1999) 1 SCC 53, this court laid down that public interest litigation can be filed by any person challenging the misuse or improper use of any public property including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest.

154. This court has been quite conscious that the forum of this court should not be abused by any one for personal gain or for any oblique motive. In BALCO (supra), this court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the court must take care that the forum be not abused by any person for personal gain.

155. In Dattaraj Nathuji Thaware v. State of Maharashtra (2005) 1 SCC 590 this court expressed its anguish on misuse of the forum of the court under the garb of public interest litigation and observed (SCC p.595, para 12) that the

> "public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.... The court must not allow its process to be abused for oblique considerations. ...."

156. In Thaware's case (supra), the Court encouraged the imposition of a non-monetary penalty against a PIL petition filed by a member of the bar. The Court directed the Bar Councils and Bar Associations to ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of Public Interest Litigation. This direction impels the Bar Councils and Bar Associations to disbar members found guilty of filing frivolous and vexatious PIL petitions.

157. In Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra (2007) 14 SCC 281, this Court observed as under: (SCC pp. 287d-288a, para 10)

> "10.'....12. It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, the time which otherwise could have been spent for disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending

our long arm of sympathy to the poor, the ignorant, the oppressed and the needy, whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters -government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system'."

158. The Court cautioned by observing that: (Holicow case (2007) 14 SCC 281 pp.288-89, para 10)

"10. '.....13. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. ...

* * *

15. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon

> the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico though they have no interest of the public or even of their own to protect."

8. In ***Central Electricity Supply Utility of Odisha*** versus ***Dhobei Sahoo and others (2014) 1 SCC 161***, the Hon'ble Supreme Court felt the need to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It was observed as under:-

> "24. Ordinarily, after so stating we would have proceeded to scan the anatomy of the Act, the Rules, the concept of the Scheme under the Act and other facets but we have thought it imperative to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It is an ingenious and adroit innovation of the judge-made law within the constitutional parameters and serves as a weapon for certain purposes. It is regarded as a weapon to mitigate grievances of the poor and the marginalized sections of the society and to check the abuse of power at the hands of the Executive and further to see that the necessitous law and order situation, which is the duty of the State, is properly sustained, the people in impecuniosity do not die of hunger, national economy is not jeopardized; rule of law is not imperiled; human rights are not endangered, and probity, transparency and integrity in the governance remain in a constant state of stability. The use of the said weapon has to be done with care, caution and circumspection. We have a reason to say so, as in the case at hand there has been a fallacious perception not only as regards the merits of the case but also there is an erroneous approach in issuance of direction pertaining to recovery of the sum from the holder of the post. We shall dwell upon the same at a later stage.
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> 25. As advised at present, we may refer to certain authorities in the field in this regard. In Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 Bhagwati, J., (as his Lordship then was) had observed thus: (SCC p.183, para 9)
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> > "9....When the Court entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programme, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realization of the constitutional objectives."
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> 26. In Dr. D.C. Wadhwa and others v. State of Bihar (1987) 1 SCC 378 the Constitution Bench, while entertaining a petition under Article 32 of the Constitution on behalf of the petitioner therein, observed that it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. It has also been stated therein that the rule of law constitutes the core of our Constitution and it is the essence

of rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitation and if any practice is adopted by the executive which is in flagrant violation of the constitutional limitations, a member of the public would have sufficient interest to challenge such practice and it would be the constitutional duty of the Court to entertain the writ petition.

27. In Neetu v. State of Punjab (2007) 10 SCC 614 the Court has opined that it is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigation. Commenting on entertaining public interest litigations without being careful of the parameters by the High Courts the learned Judges observed as follows: (SCC p. 617, para 5)

> "5. '16....Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives. High Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. (Ashok Kumar Pandey v. State of West Bengal (2004) 3 SCC 349, SCC p.358, para 16)"

Thereafter, giving a note on caution, the Court stated: -

> "6. '12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens." (B.Singh versus Union of India (2004) 3 SCC 363, SCC p.372, para 12)"

28. In State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402 this Court adverted to the growth of public interest litigations in this country, and the view expressed in various PILs and the criticism advanced and eventually conceptualized the development which is extracted below: (SCC p. 427, para 43)

> "43.....We deem it appropriate to broadly divide the public interest litigation in three phases:
>
> • Phase I. – It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.
>
> • Phase II. – It deals with the cases relating to protection, preservation or ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.
>
> • Phase III. – It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."

29. In Bholanath Mukherjee v. Ramakrishna Mission Vivekananda Centenary College (2011) 5 SCC 464 it has been laid down that public interest litigation would not be maintainable in service law cases.

30. In Duryodhan Sahu v. Jitendra Kumar Mishra (1998) 7 SCC 273 a three-Judge, Bench posed a question whether the administrative tribunals constituted under the Administrative Tribunals Act, 1985 can entertain a public interest litigation. A post of lecturer was created in a Government Medical College recognized by the Medical Council of India and the State Government requested the Public Service Commission to recommend a suitable candidate from the reserved list. At that stage, a third party described himself as the Secretary of a particular Surakhya Committee, filed an original application for quashing the Government order creating the post of the teacher. A grievance was also put forth that the post was not advertised. The tribunal restrained the appointment of the beneficiary, the appellant before this Court. The learned Judges opined that the administrative tribunal constituted under the said Act cannot entertain a public interest litigation at the instance of a total stranger. While so stating the three-Judge Bench opined that as the prayer was for quashment of the creation of post itself and preventing the authorities and for preventing the Government from appointing any candidate as Lecturer, the prayer would not come in the sphere of quo warranto.

31. Thus, from the aforesaid authorities it is quite vivid that the public interest litigation was initially evolved as a tool to take care of the fundamental rights under Article 21 of the Constitution of the marginalized sections of the society who because of their poverty and illiteracy could not approach the court. In quintessence it was initially evolved to benefit the have-nots and the handicapped for protection of their basic human rights and to see that the authorities carry out their constitutional obligations towards the marginalized sections of people who cannot stand up on their own and come to court to put forth their grievances. Thereafter, there has been various phases as has been stated in Balwant Singh Chaufal (supra). It is also perceptible that court has taken note of the fact how the public interest litigations have been misutilized to vindicate vested interests for the propagated public interest. In fact, as has been seen, even the people who are in service for their seniority and promotion have preferred public interest litigations. It has also come to the notice of this Court that some persons, who describe themselves as pro bono publico, have approached the court challenging grant of promotion, fixation of seniority, etc. in respect of third parties."

9. The issue regarding public interest has elaborately been dealt with by this Bench in ***CWP No.9480 of 2014, titled Vijay Kumar Gupta versus State of Himachal Pradesh and others***, decided on 09.01.2015 and after taking into consideration the entire law on the subject, it was concluded as follows:-

"29. From the aforesaid exposition of law, it can safely be concluded that the Court would allow litigation in public interest only if it is found:-

(i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;

(ii) That the action complained of is palpably illegal or malafide and affects the group of persons who are not in a position to protect their own interest or on account of poverty, incapacity or ignorance;

(iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;

(iv) That such person or group of persons is not a busy body or a meddlesome inter-loper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;

(v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;

(vi) That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man in the institution of the judicial and the democratic set up of the country;

(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;

(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;

(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;

(x) That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons of groups with mala fide objective or either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest."

10. In the above background, this Court is required to first satisfy itself regarding the credentials of the petitioner, the prima-facie correctness of the information given by him because after all the attractive brand name of public interest litigation cannot be used for suspicious products of mischief. It has to be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta or private motive. The process of the Court cannot be abused for oblique considerations by masked phantoms who monitor at times from behind. The common rule of locus-standi in such cases is relaxed so as to enable the Court to look into the grievances complained of on behalf of the poor, deprive, deprivation, illiterate and the disabled and who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. But, then while protecting the rights of the people from being violated in any manner, utmost care has to be taken that the Court does not transgress its jurisdiction nor does it entertain petitions which are motivated. After all, public interest litigation is not a pill or panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged. Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind

the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering justice to the citizens. Courts must do justice by promotion of good faith and prevent law from crafty invasions. It is for this reason that the Court must maintain social balance by interfering for the sake of justice and refuse to entertain where it is against the social justice and public good.

11. Adverting to the facts, it would be seen that prior to the filing of the instant petition, the wife of the petitioner had already approached the learned Calcutta High Court by filing a writ petition styled as a public interest litigation wherein she had sought the following reliefs:-

> "(a) A writ of or in the nature of Mandamus commanding the respondents to show cause as to why the impugned order of transfer of movable and immovable property of Central Tibetan Schools Administration (CTSA), Government of India to Department of Education, Central Tibetan Administration, Dharamsala, Himachal Pradesh vide No. F.No.22-12/2012-CTSA(P/E) dated 27th November, 2013 should not be quashed and/ or set aside;
>
> (b) A writ of or in the nature of Mandamus commanding the respondents No.1 to 7 to implement the rules applicable for the foreigners who are not entitled to acquire or transfer of immovable property in India in terms of the Foreign Exchange Management (Acquisition And Transfer of Immovable Property In India) Regulations, 2000, Notification No.FEMA 21/2000-RB dated 3rd May 2000 without the prior permission of the Reserve Bank of India, other than lease not exceeding five years;
>
> (c) A writ of or in the nature of Prohibition restraining the respondents from transferring the immovable properties attached to the schools under the Central Tibetan School Administration, Ministry of Human Resource Development, Government of India to the Central Tibetan Administration which is a foreign institution and also not to allow the respondent No.10 to run parallel government within the territory of India;
>
> (d) A writ of or in the nature of Certiorari directing the respondents to certify and transmit all relevant records of this case to this Hon'ble Court so that conscionable justice may be administered;
>
> (e) Rule NISI in terms of prayers (a) to (d) above;
>
> (f) An interim order of stay of operation of the impugned order vide No.F.No.22-12/2012-CTSA (P/E) dated 27th November, 2013 issued by the Director, Central Tibetan Schools Administration, Ministry of Human Resource Development, Government of India and also not to transfer any other properties of Central Tibetan School Administration to the Central Tibetan Administration till disposal of this instant writ application."

12. It is evident from the aforesaid that the reliefs sought in the instant petition are virtually the same as had been claimed before the learned Calcutta High Court. It would also be seen that except for inter-play of words here and there, the reliefs claimed in both the petitions are virtually the same.

13. In case, we now advert to and peruse the judgment rendered by the learned Division Bench of the Calcutta High Court, it is abundantly clear that all the issues raised in that petition have been discussed on merits and it is only thereafter that the petition was ordered to be dismissed.

14. It is also not in dispute that the order passed by the Calcutta High Court has attained finality, but as noticed above, for some strange reasons, the petitioner would still like to canvass that the issues raised therein had not been properly appreciated by that Court and were, therefore, still open for judicial scrutiny by this Court.

15. The petitioner has appeared in person and, therefore, some leverage and leniency has to be shown to him for his lack of knowledge of law, but, then he cannot be permitted to raise arguments which are legally not tenable and against judicial propriety. Admittedly, the petition before the Calcutta High Court was filed by none other, but the wife of the petitioner. Even if it is assumed that the same was in public interest, even then nothing prevented the petitioner from assailing the said order in case he was really aggrieved and felt that the same was to his prejudice. But then, under no circumstances, can the petitioner be permitted to assail the order passed by the learned Division Bench of the Calcutta High Court before this Court. Not only the Courts but even the litigants are bound by propriety, procedure and judicial discipline and, therefore, no one can be permitted to breach the same.

16. As we have already noticed, the petitioner is a permanent resident of West Bengal. Therefore, what is the special interest he has in this State and, particularly, with the Central Tibetan School Administration and Central Tibetan Administration? The answer to this is not difficult to find. The record reveals that the petitioner is a disgruntled dismissed employee of respondent No.9 and the Central Tibetan School Administration where he worked from 01.08.1994 to 08.01.2004 as a Post Graduate Teacher (Geography). The petitioner on his appointment was initially posted at Central School for Tibetans ('CST'), Shimla, where he worked with effect from 01.08.1994 to 08.05.1998. However, there were several complaints made against him by the Principal due to which he was transferred to CST, Herbertpur, District Dehradun, Uttarakhand. Even after joining CST, Herbertpur, on 16.05.1998, the petitioner is alleged to have indulged in various anti school/organization activities resulting in initiation of disciplinary proceedings against him. The petitioner was served with a charge-sheet dated 11.07.2000 and after regular inquiry, the Disciplinary Authority imposed penalty of dismissal from service upon him vide order dated 09.01.2004.

17. All the aforesaid facts have not at all been controverted by the petitioner and, therefore, clearly establishes beyond any reasonable doubt that the process of public interest litigation has been misused by the petitioner and the instant petition has been filed only with malafide objectives and for vindication of his personal grievances on considerations that are extraneous to public interest.

18. Moreover, the petitioner has not approached this Court with clean hands, clean heart and clean objectives. The material on record goes to show that the petition though styled as public interest litigation is nothing but a camouflage to foster personal disputes. There is no real and genuine public interest involved in the litigation. Rather, as observed earlier, the petitioner has filed this petition only to settle his personal cause and satisfy his personal grudge and, therefore, the petition deserves to be thrown out on this ground alone.

19. From the aforesaid discussion, it is amply proved that the present petition is not bonafide, but is vexatious and, therefore, not maintainable. The petitioner has infact criminally wasted the valuable time of this Court which could have been better utilized for imparting justice to those, who are waiting in the queue.

20. At this stage, we may once again revert back to the judgment of the Hon'ble Supreme Court in ***Balwant Singh Chaufal's case*** (supra) wherein the Hon'ble Supreme

Court observed that the malice of frivolous and vexatious petitions did not originate in India and the jurisprudence developed by the Indian Judiciary regarding the imposition of exemplary costs upon frivolous and vexatious PIL petitions was consistent with jurisprudence developed in other countries. It noticed that US Federal Courts and Canadian Courts have also imposed monetary penalties upon public interest claims regarded as frivolous. It was observed:-

> "159..... In Everywoman's Health Centre Society v. Bridges (1990) 54 BCLR (2d) 273 (CA), the British Columbia Court of Appeal granted special costs against the Appellants for bringing a meritless appeal.
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> 160. The U.S. Federal Courts too have imposed monetary penalties against plaintiffs for bringing frivolous public interest claims. Rule 11 of the Federal Rules of Civil Procedure (FRCP) permits Courts to apply an "appropriate sanction" on any party for filing frivolous claims. Federal Courts have relied on this rule to impose monetary penalties upon frivolous public interest claims.
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> 161. For example, in Harris v. Marsh 679 F.Supp. 1204, the District Court for the Eastern District of North Carolina imposed a monetary sanction upon two civil rights plaintiffs for bringing a frivolous, vexatious, and meritless employment discrimination claim. The Court explained that "the increasingly crowded dockets of the federal courts cannot accept or tolerate the heavy burden posed by factually baseless and claims that drain judicial resources." As a deterrent against such wasteful claims, the Court levied a cost of $83,913.62 upon two individual civil rights plaintiffs and their legal counsel for abusing the judicial process.
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> 162. Case law in Canadian Courts and U.S. Federal Courts exhibits that the imposition of monetary penalties upon frivolous public interest claims is not unique to Indian jurisprudence.
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> 163. Additionally, U.S. Federal Courts have imposed non- monetary penalties upon Attorneys for bringing frivolous claims. Federal rules and case law leave the door open for such non-monetary penalties to be applied equally in private claims and public interest claims. Rule 11 of the FRCP additionally permits Courts to apply an "appropriate sanction" on Attorneys for filing frivolous claims on behalf of their clients. U.S. Federal Courts have imposed non-monetary sanctions upon Attorneys for bringing frivolous claims under Rule 11.
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> 164. In Frye v. Pena 199 F.3d 1332 (Table), 1999 WL 974170, for example, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order to disbar an Attorney for having
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> > "brought and pressed frivolous claims, made personal attacks on various government officials in bad faith and for the purpose of harassment, and demonstrated a lack of candor to, and contempt for, the court."
>
> This judicial stance endorses the ethical obligation embodied in Rule 3.1 of the Model Rules of Professional Conduct ("MRPC"):
>
> > "3.1. a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."

Together, the FRCP, U.S. federal case law, and the MRPC endorse the imposition of non-monetary penalties upon attorneys for bringing frivolous private claims or public interest claims.

165. In Bar Council of Maharashtra v. M.V.Dabholkar (1975) 2 SCC 702 this court was apprehensive that by widening the legal standing there may be flood of litigation but loosening the definition is also essential in the larger public interest. To arrest the mischief is the obligation and tribute to the judicial system.

166. In S.P. Gupta v. Union of India 1981 Supp SCC 87 the court cautioned that important jurisdiction of public interest litigation may be confined to legal wrongs and legal injuries for a group of people or class of persons. It should not be used for individual wrongs because individuals can always seek redress from legal aid organizations. This is a matter of prudence and not as a rule of law.

167. In Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P. (1990) 4 SCC 449 this court again emphasized that Article 32 is a great and salutary safeguard for preservation of fundamental rights of the citizens. The superior courts have to ensure that this weapon under Article 32 should not be misused or abused by any individual or organization.

168. In Janata Dal v. H.S. Chowdhary & Others (1992) 4 SCC 305, the court rightly cautioned that expanded role of courts in modern "social" state demand for greater judicial responsibility. The PIL has given new hope of justice-starved millions of people of this country. The court must encourage genuine PIL and discard PIL filed with oblique motives.

169. In Guruvayoor Devaswom Managing Committee & Another v. C.K. Rajan (2003) 7 SCC 546, it was reiterated that the court must ensure that its process is not abused and in order to prevent abuse of the process, the court would be justified in insisting on furnishing of security before granting injunction in appropriate cases. The courts may impose heavy costs to ensure that judicial process is not misused.

170. In Dattaraj Nathuji Thaware v. State of Maharashtra (2005) 1 SCC 590 this court again cautioned and observed that the court must look into the petition carefully and ensure that there is genuine public interest involved in the case before invoking its jurisdiction. The court should be careful that its jurisdiction is not abused by a person or a body of persons to further his or their personal causes or to satisfy his or their personal grudge or grudges. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

171. In Neetu v. State of Punjab (2007) 10 SCC 614 this court observed that under the guise of redressing a public grievance the public interest litigation should not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature.

172. In Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra (2007) 14 SCC 281 this court observed that the judges who exercise the jurisdiction should be extremely careful to see that behind the beautiful veil of PIL, an ugly private malice, vested interest and/or publicity- seeking is not lurking. The court should ensure that there is no abuse of the process of the court."

21. Since the petitioner has abused the process of this Court to satisfy his personal grudge thereby polluting the stream of justice, he has made himself liable for imposition of heavy costs. Accordingly, this petition is dismissed with costs of Rs.1,00,000/- to be paid by the petitioner to the H.P. State Legal Services Authority. Pending, application(s), if any, also stand disposed of. The Registry is directed to send a copy of this judgment to the petitioner and the Member Secretary, H.P. State Legal Services Authority.

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

Shashi Mahajan and another. ...Appellants.

Versus

Vinay Kumar and others. ...Respondents.

RSA No. 544 of 2003
Reserved on: 1.10.2015
Decided on: 6.10.2015

Code of Civil Procedure, 1908- Section 11- Issue regarding the structure was decided in a previous suit- regular second appeal was also dismissed- held, that once the issue has been decided, previous finding could not have been brushed aside and the relief of mesne profit could not have been granted. (Para-11)

Code of Civil Procedure, 1908- Section 100- High Court is not bound to confine itself to the question of law initially framed by it but can hear the appeal on a question of law subsequently framed by it. (Para-12 and 13)

Cases referred:

Santosh Hazari vs. Purushottam Tiwari (deceased) by Lrs. (2001) 3 SCC 179

Om Prakash vs. Manoharlal, AIR 2002 Rajasthan 386

For the Appellants :Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

For the Respondents :Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 4.9.2003 rendered by the Additional District Judge, Kangra at Dharamshala in Civil Appeal No. 68-D/99.

2. "Key facts" necessary for the adjudication of this appeal are that predecessor-in-interest of plaintiffs Sh. Niku Ram Mahajan has filed a suit for partition as well as mesne profit. According to the averments made in the plaint, his father Dev Raj owned 48 shares in the suit property. He died in the year 1959. Besides the plaintiff, he had two sons, namely, defendant No.2 Prem Chand and Nanak Chand. The latter died and was succeeded by his widow Sumati Devi defendant No.1 and Kamlesh Kumari defendant No.7

and son Vinay Kumar defendant No. 8, as per the cause title of the original suit. The remaining defendant Nos. 3 to 5 were legal heirs of late Shri Faquir Chand. The plaintiff claimed himself and defendant No. 1 and 2 to be the members of a joint Hindu family. The suit property according to the plaintiff was jointly owned and possessed by the parties. Defendant No. 7 Kamlesh Kumari mortgaged the house with the State o H.P. without the approval and consent of the plaintiff. She secured a loan of Rs. 50,000/-. He apprehended that she would sell the house. The case of the plaintiff was that defendant No. 1 rented out certain portion of the suit property and has been receiving rent since 1954. She was repeatedly asked to go for partition by metes and bounds. However, this issue was evaded. Notices were issued in the month of March, 1991 for partition.

3. Suit was contested by defendant Nos. 1, 7 and 8 on the ground that they did not constitute a Hindu joint family with the plaintiff and defendant No. 2. The structures standing in the suit land was their exclusive property alongwith defendant No. 6. They have been living separately even when their predecessor-in-interest Nanak Chand brother of plaintiff and even defendant No. 2 was alive. No part of the suit property was possessed by the plaintiff. He was entitled to 1/6th share in the suit property but not in the structure standing on the suit land. There was an old structure on the suit land. It was damaged in the earthquake of 1978. She raised loan of Rs.50,000/- for the reconstruction of the old structure. A house was constructed in the year 1980-81 and shop was constructed in the year 1982. Another shop was built by her in the year 1986-87. The matter qua rent has already been adjudicated upon by the Court in Civil Suit No. 60/1989.

4. The replication was filed by the plaintiff. He contended that defendants have failed to substantiate the claim in Civil Suit No. 381/1986, wherein they were defendant Nos. 6 to 9. The structures in question were part of the subject matter of the partition. Senior Sub Judge framed the issues on 14.9.1994. Suit was partly decreed. A preliminary decree for possession of the plaintiffs 1/6th share in the suit land as per the correct khatauni No. 837 by partition by metes and bounds was granted. They were not held entitled to any share in the structures standing on the suit land. The possession of their 1/6th share was ordered to be delivered out of the unconstructed portion of the suit land. Suit regarding the remaining relief was dismissed. Plaintiff preferred an appeal before the Additional District Judge-II. Kangra at Dharamshala. He dismissed the same on 4.9.2003. Hence, the present regular second appeal. It was admitted on 8.8.2012 on the following substantial questions of law:

(1) Whether both the Courts below have wrogly dismissed the suit of the plaintiffs/appellants pertaining to the claim of mesne profits by erroneously holding the judgment and decree Ex.D-1 operating as resjudicata, by misreading the same and without appreciating that matters substantially in issue in both the suits were not the same?

(2) When the revenue entries having presumption of truth supported the claim of the plaintiff of jointness of the suit property, have not both the courts acted beyond their jurisdiction not to raise the presumption of jointness qua the structures also, when the parties admitted the existence of the old houses etc. of their predecessor on such land, especially when no pleadings of ouster or adverse claim were made by the defendant?

5. Though the appeal was admitted on the substantial questions of law framed on 8.8.2012, but during the course of hearing, it transpired that additional substantial question of law was also required to be framed to the following effect:

> **"Whether both the courts below have acted in illegal, erroneous and perverse manner in not holding the claim of the defendants being exclusive owners qua the structures barred by the principles of res judicata in view of the judgment and decree Ex.P-1, which was rendered much after the structures were claimed to have been raised wherein the plaintiffs were held to be co-owners of the suit property?"**

Respondents were also put to notice and were heard on this substantial question of law also at length.

6. Mr. Bhupender Gupta, learned Senior Advocate on the basis of substantial questions of law framed has vehemently argued that the judgment and decree Ext. D-1 has not been properly construed by the Courts below. In addition to the substantial questions of law framed, Mr. Bhupender Gupta has also argued that the Courts below have not taken into consideration Ext. P-1 judgment rendered in Civil Suit No. 381/1986, decided on 5.10.1988.

7. Mr. G.D. Verma, learned Senior counsel has supported the judgments and decrees passed by both the Courts below and has vehemently argued that the substantial question of law which has not been formulated at the time of admission of the present appeal cannot be taken into consideration.

8. I have heard learned counsel for both the parties and have gone through the records carefully.

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

10. Sumati Devi has appeared as DW-1. She has deposed that Nanak Chand was her husband. Dev Raj had two houses at Dharamshala. Defendant No. 2 Prem Chand and plaintiff Niku Ram went away with their families and did not return to Dharamshala. The houses were damaged in the earthquake in 1978 and half portion of one of them was reconstructed by her daughter Kamlesh Kumari after securing a loan from the government. The remaining half portion of the house was reconstructed in the year 1980-81. Two shops were also constructed in the year 1982 and another shop was constructed in the year 1986-87. The plaintiff instituted a suit against them for share in the rent of shops. This plea was dismissed. The trial Court held that the structures standing on the suit land only belongs to defendant Nos. 1, 7 and 8. Plaintiffs were not held entitled to these structures. Learned trial Court has brushed aside the documents i.e. Ex.PW-2/A to Ex.PW-2/F. Issue No.9 was decided in favour of the defendant and accordingly issue Nos. 1 and 2 were also decided partly in favour of the plaintiff and partly in favour of defendant Nos. 1, 7 and 8. Plaintiffs were not held entitled to any share in the structures. Issue Nos. 3 and 6 were decided against the plaintiffs on the basis of Ex.D-1 judgment dated 24.3.1994. The courts below have not taken into consideration the judgment between the same parties qua the structures rendered by the Sub Judge III Class in Civil Suit No. 381/1986 dated 5.10.1988. Plaintiff N.R. Mahajan had filed a suit for declaration that mortgage deed dated 5.11.1980 executed by Smt. Kamlesh in favour of Governor of Himachal Pradesh for a sum of Rs.50,000/- was a sham document. Smt. Kamlesh is now defendant No. 7 in Civil Suit

No.128/91. Issues were framed by the Sub Judge III Class on 5.8.1987. Relevant issue, inter alia, reads as under:

> Whether the plaintiff is a co-sharer of the property mortgaged by defendant No.6? OPP

Suit for declaration was decreed in favour of the plaintiff and against the defendants and mortgage dated 5.11.1980 registered on 10.11.1980 executed by Kamlesh Kumari in favour of Governor of Himachal Pradesh was declared to be sham document. Learned Sub Judge has returned a finding that plaintiff was definitely a co-sharer of the property mortgaged by defendant No.6 and the mortgage could not be effected without the consent of the plaintiff.

11. It is specifically averred in the grounds of appeal before the first appellate court that issue pertaining to structures has been conclusively decided in favour of the plaintiff in Civil Suit No. 381/66 decided on 5.10.1988. Thereafter, the Regular Second Appeal was also dismissed. Thus, judgment dated 5.10.1988 has attained finality. The issue whether the property was joint or not once has been decided and upheld by this Court was not required to be re-adjudicated upon by the trial court. The judgment rendered in Civil Suit No. 381/1986 could not be brushed aside. It is declared that plaintiffs are also owners to the extent of 1/6th share in the suit land as well as in the structures. The plaintiffs cannot be granted any relief of mesne profit.

12. Their Lordships of the Hon'ble Supreme Court in ***Santosh Hazari*** vs. ***Purushottam Tiwari (deceased) by Lrs***. (2001) 3 SCC 179 have held that the High Court is not bound to confine itself to dealing only with the question initially framed by it and the High Court may hear the appeal on any other such question so long as it is satisfied that the case involves the question and records its reasons for such satisfaction. Their Lordships have held as under:

> **[10] At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal by only on 'substantial question of law involved in the case'. An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied : (i) the High Court feels satisfied that the case involves such question and (ii) the High Court records reasons for its such satisfaction.**

13. Learned Single Judge of Rajasthan High Court in ***Om Prakash*** vs**.** ***Manoharlal***, AIR 2002 Rajasthan 386 has held that even at the time of hearing, another substantial question of law comes into picture, the Court can frame it, but for that there are some limitations. The first limitation is that the question to be framed must be as substantial question of law. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposed to decide even if such substantial question of law was not earlier formulated by it. Substantial question of law is sine qua non for the exercise of the jurisdiction under the amended provisions. Learned Single Judge has held as under:

> **[35] Thus, from the above ruling, if at the time of hearing, another substantial question of law comes into picture, the Court can frame it, but for that there are some limitations which are mentioned just below.**
>
> **[36] The first limitation is that the question to be framed must be a substantial question of law. The proviso presupposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. Thus, the existence of a "substantial question of law" is sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 of the Code of Civil Procedure.**
>
> **[37] The second limitation is that such a substantial question of law can be formulated at the initial stage and in some exceptional cases, at a later point of time and in the present case, in my considered opinion, even at the time of argument stage, such substantial question of law can be formulated provided the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet out the point.**

14. The substantial questions of law are answered accordingly.

15. In view of the analysis and discussion made hereinabove, the appeal is allowed. Preliminary decree for possession of the plaintiffs' 1/6 share in the suit land as per correct Khatauni number which is 837 as well as in the structures by partition by metes and bonds is granted in their favour. The judgments and decrees passed by the courts below are modified to this extent. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Surinder Kumar .....Petitioner.

Versus

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

CWP No.9094 of 2013 with connected matters.
Reserved on: 3rd September, 2015.
Pronounced on: October 6 , 2015.

Constitution of India, 1950- Article 226- Clause 5(c) of the Policy provides that when one or more persons of the family of the deceased were already in government job or employment of Autonomous bodies Boards/Corporations of the State or Central Government, employment assistance, under any circumstances, would not be provided to the second or third member of the family- however, in case widow makes a representation that her employed sons/daughters were not supporting her, her request could be considered- held that in a case where a widow is not possessing the minimum qualification or due to any other reasons, she does not intend to seek employment and makes a representation carving out sufficient reason, the Authority may consider such cases sympathetically.

(Para-99 to 102)

Constitution of India, 1950- Article 226 - Clause-7 of the policy for appointment on compassionate ground provides the power to relax the educational qualification and the age limit - therefore, the compassionate appointment cannot be refused to class-IV posts on the basis of age/education disqualification. (Para-91 to 98)

Constitution of India, 1950- Article 226- Policy on compassionate appointment provides that if the dependent of the employee is minor on the date of the death, the offer of the appointment would be kept open till the eldest son/un-married daughter attains the age of 21 years- thus, cause of action will arise on the day when the claim is presented by filing an application for appointment on compassionate grounds- the date of the death of the employee is not to be taken into consideration while seeing the applicability of the policy- similarly, the date on which application comes for consideration before the Competent Authority is also of no importance as the applicants cannot be made to suffer for the inaction on the part of the Authorities. (Para-56 to 64)

Constitution of India, 1950- Article 226- State Government framed a policy for providing employment assistance on compassionate grounds for the sons, daughters and near relations of those government employees who had died in harness - policy provided that compassionate appointment should be given only in a case, where the family of the deceased is left in indigent circumstances- policy was amended from time to time- Government Department had issued a letter that maximum income limit for a family of four persons was Rs. 1.50 lacs, by taking into account the amount received by the family towards family pension and other terminal benefits- clause 10(c) of the Policy provides that while making appointment on compassionate grounds the Competent Authority has to keep in mind the benefits received by the family on account of ex-gratia grant, family pension and death gratuity- no income ceiling was provided- held, that the purpose of appointment on compassionate grounds is to provide immediate assistance to the destitute family- family pension and other retiral benefits cannot be equated with the employment assistance- grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground – instructions issued by the Department cannot amount to amendment of the policy- hence, the denial of the employment assistance to the dependents of the deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law.

(Para-46 to 55)

Constitution of India, 1950- Article 226- The dependent of the employee who died in harness cannot make a claim for appointment after considerably long period- the employment on compassionate ground is not a vested right which can be exercised at any time- Clause-8 of the policy provides the time limit of three years for making the application and in case of minor, the date of attaining the age of 21 years by the eldest son/un-married daughter- held that clause is reasonable. (Para-81 to 90)

Constitution of India, 1950- Article 226- The dependents of a deceased employee cannot claim the appointment on compassionate ground as a matter of right- their claim can be considered only in accordance with the policy framed by the Government- the discretion has

been conferred upon the authority to offer the appointment and to see whether a person is to be appointed against a Class-IV or Class-III post or on daily wage basis –when a person had accepted the offer of appointment and had joined without any demur; he is precluded from claiming that he should have been appointed on higher post or should have been given appointment on regular basis- therefore, offer of appointment on contract basis is legal.

(Para-65 to 80)

Cases referred:

Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (2000) 6 Supreme Court Cases 493

National Institute of Technology & Ors. vs. Niraj Kumar Singh, 2007 AIR SCW 1169

Union of India & Anr. vs. B. Kishore, 2011 AIR SCW 2293

Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289

A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,

Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212

State Bank of India and others vs. Jaspal Kaur, 2007 AIR SCW 1044

Maharani Devi & Anr. vs. Union of India & Ors., 2009 AIR SCW 5775

Bhawani Prasad Sonkar vs. Union of India & Ors., 2011 AIR SCW 2039,

MGB Gramin Bank vs. Chakrawarti Singh, 2013 AIR SCW 4801

I.G. (Karmik) & Ors. vs. Prahlad Mani Tripathi, 2007 AIR SCW 3305,

State Bank of India & Anr. vs. Somvir Singh, 2007 AIR SCW 1571

Umesh Kumar Nagpal vs. State of Haryana and others, (1994) 4 Supreme Court Cases 138

Union of India and others vs. K.P. Tiwari, (2003) 9 Supreme Court Cases 129,

Steel Authority of India vs. Madhusudan Das & Ors., 2009 AIR SCW 390

Director General of Posts and others vs. K. Chandrashekar Rao, (2013) 3 Supreme Court Cases 310

Local Administration Department & Anr. vs. M. Selvanayagam @ Kumaravelu, 2011 AIR SCW 2198

State of Gujarat & Ors. vs. Arvindkumar T. Tiwari and Anr., 2012 AIR SCW 5131

State of Gujarat and another vs. Chitraben, 2015 AIR SCW 4305,

Presence for the parties:

Mr.Bimal Gupta, Ashwani Pathak, Mr.Sanjeev Bhushan, Ms.Jyotsna Rewal Dua, Ms.Ranjana Parmar, Mr.Satyen Vaidya, Senior Advocates, with Mr.Satish Sharma, Ms.Komal Chaudhary, Ms.Abhilasha Kaundal, Ms.Sahalini Thakur, Advocates, M/s Dushyant Dadwal, G.R. Palsara, Trilok Jamwal, Archna Dutt, M.L. Sharma, M.C. Verma, Neel Kamal Sood, Naresh Verma, Lalit K. Sharma, Nitin Thakur, Jeevesh Sharma, P.P. Chauhan, Surender Sharma, Rahul Mahajan, B.N. Bhardwaj, Digvijay Singh, Rakesh Kumar Dogra, V.B. Verma, Jivender Katoch, Anu Azta, Parmod Negi, Arvind Sharma, Y.S. Thakur, Avneesh Bhardwaj, Salochana Kaundal, Jagdish Thakur, Vijay Bhatia, Sanjay Jaswal, Vikas Rajput, Lokender Pal Thakur, V.S. Rathore, Ranjan Sharma, Ashok Thakur, Naresh Kaul, Adarsh Kumar Vashisht, Raj Pal Thakur, Ramesh Sharma, R.L. Chaudhary, Sandeep Kumar Chauhan, Arush Matlotia, V.D. Khidta, Varun Chandel, Vikrant Chandel, Naveen Kumar Bhardwaj, Shyam Singh, Daleep Singh Kaith, Sharmila Patial, Tarun Kumar Sharma, Javed Khan, S.C. Sharma, Devinder Chauhan Jaita, Sandeep Kumar Pandey, B.B. Vaid, Balwant Singh Thakur, B.N. Sharma, Anjali Soni Verma, Ashwani Gupta, L.N. Sharma, Gaurav Sharma, Diwan Singh Negi, Rajinder Singh Thakur, P.D. Nanda, Rupesh Sharma, Dalip Kumar Sharma,

Surender Saklani, Raman Jamalta, Bhuvnesh Sharma, Ashok Kumar Tyagi, Pawan Gautam, Shashi Kiran and Kamlesh Shandil, Advocates, for the respective parties.

Mr. Shrawan Dogra, Advocate General with Mr. V.S. Chauhan and Mr. Romesh Verma, Additional Advocate Generals, for the State.

Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate, for the Union of India.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Batch of Letters Patent Appeals and Writ Petitions emanates from a policy, dated 18th January, 1990, framed by the State Government, for providing employment assistance on compassionate grounds to the dependant of a government servant, who dies in harness, leaving behind his family in immediate need of assistance, (hereinafter referred to as the Policy). Thus, all the appeals and the writ petitions were clubbed together and are being disposed of by this common judgment.

2. Before we deal with the Policy and the applicability thereof viz. a viz. to the facts of the each case, we deem it proper to find the origin and rationale behind granting compassionate appointment.

3. It is well settled principle of service jurisprudence that every appointment against a public post must be made strictly in consonance with the mandatory provisions of Articles 14 and 16 of the Constitution of India and as per the Rules occupying the field. Any selection/appointment made de hors the Rules, is illegal. However, an exception has been carved out for providing employment on compassionate ground. The aim and object of granting appointment on compassionate ground is to provide help to the family/dependants of an employee, who dies in harness, in tiding over the crisis which they suddenly met on the death of the bread-earner of the family. The other object of promulgating such a scheme is to save the dependants of the deceased-employee from social evils and to come to their rescue in the hour of need, particularly, to those families who, on the death of their breadwinner, fall on the earth and lose everything.

4. The Central Government and the State Governments, have made Rules/Regulations/Policies/ Schemes for making appointment on compassionate ground. The Corporations and the Semi Government Departments, including Banks etc., have either adopted those Schemes or have framed their own Schemes.

5. The State of Himachal Pradesh, being a model employer, is no exception and has framed a Policy for providing employment assistance on compassionate ground for the sons/daughters/near relations of those government employees, who died in harness and left their families in immediate need of assistance, which was notified on 18th January, 1990. It may be placed on record that the said Policy was amended by the respondents-State from time to time.

6. Before the said Policy is scrutinized and examined meticulously, we deem it proper to refer to the decisions of the Apex Court in regard to the aim and object of providing employment assistance on compassionate grounds.

7. The Apex Court in **Balbir Kaur and another vs. Steel Authority of India Ltd. and others,** reported in **(2000) 6 Supreme Court Cases 493,** has discussed the aim

and object of granting employment on compassionate ground, while referring to the law expounded on the subject till the year 2000. In the said decision, the Apex Court observed that the socialistic pattern of society, as envisaged in the Constitution, has to be attributed its full meaning and the law courts cannot gaze as a mute spectator where relief is denied to the family, who is suffering due to the death of bread-earner. It is apt to reproduce paragraphs 8 and 9 of the said decision, hereunder:

> *"8 The employer being Steel Authority of India, admittedly an authority within the meaning of Article 12 has thus an obligation to act in terms of the avowed objective of social and economic justice as enshrined in the Constitution but has the authority in the facts of the matters under consideration acted like a model and an ideal employer - It is in this factual backdrop, the issue needs an answer as to whether we have been able to obtain the benefit of constitutional philosophy of social and economic justice or not. Have the lofty ideals which the founding fathers placed before us any effect in our daily life - the answer cannot however but be in the negative - what happens to the constitutional philosophy as is available in the Constitution itself, which we ourselves have so fondly conferred on to ourselves. The socialistic pattern of society as envisaged in the Constitution has to be attributed its full meaning. A person dies while taking the wife to a hospital and the cry of the lady for bare subsistence would go unheeded on certain technicality. The bread earner is no longer available and prayer for compassionate appointment would be denied, as "it is likely to open a Pandora's Box" - This is the resultant effect of our entry into the new millennium. Can the law courts be a mute spectator in the matter of denial of such a relief to the horrendous sufferings of an employee's family by reason of the death of the bread-earner. It is in this context this Court's observations in Dharwad Distt. PWD Literate Daily Wage Employees Assn. v. State of Karnataka (1990) 2 SCC 396 : (AIR 1990 SC 883 : 1990 Lab IC 625) seem to be rather apposite. This Court upon consideration of Randhir Singh v. Union of India (Daily Rated Casual Labour Employed under P and T Dept. through Bhartiya Dak Tar Mazdoor Manch v. Union of India) (1988) 1 SCC 122 : (AIR 1987 SC 2342 : 1988 Lab IC 37) as also Surinder Singh v. Engineer-in-chief (1986) 1 SCC 639 : (AIR 1986 SC 584 : 1986 Lab IC 551) and D. S. Nakara v. Union of India (1983) 1 SCC 305 : (AIR 1983 SC 130 : 1983 Lab IC 1) observed in paragraphs 14 and 15 as below :*
>
> > *"14. We would like to point out that the philosophy of this Court as evolved in the cases we have referred to above is not that of the court but is ingrained in the Constitution as one of the basic aspects and if there was any doubt on this there is no room for that after the Preamble has been amended and the Forty-second Amendment has declared the Republic to be a socialistic one. The judgments, therefore, do nothing more than highlight one aspect of the constitutional philosophy and make an attempt to give the philosophy a reality of flesh and blood.*
> >
> > *15. Jawaharlal Nehru, the first Prime Minister of this Republic while dreaming of elevating the lot of the common man of this country once stated :*
> >
> > > *"Our final aim can only be a classless society with equal economic justice and opportunity to all, a society organized on a planned basis for the raising of mankind to higher material and cultural levels. Everything that comes in the way will have to be removed gently, if possible; forcibly if necessary, and there seems to be little doubt that coercion will often be necessary."*
> >
> > *These were his prophetic words about three decades back. More than a quarter of century has run out since he left us but there has yet been no*

percolation in adequate dose of the benefits the constitutional philosophy stands for to the lower strata of society. Tolstoy wrote :

> *"The abolition of slavery has gone on for a long time. Rome abolished slavery. America abolished it and we did but only the words were abolished, not the thing."*

Perhaps what Tolstoy wrote about abolition of slavery in a large sense applies to what we have done to the constitutional ethos. It has still remained on paper and is contained in the book. The benefits have not yet reached the common man. What Swami Vivekananda wrote in a different context may perhaps help a quicker implementation of the goal to bring about the overdue changes for transforming India in a positive way and in fulfilling the dreams of the Constitution fathers. These were the words of the Swami :

> *'It is imperative that all this various yogas should be carried out in practice. Mere theories about them will not do any good. First we have to hear about them; then we have to think about them. We have to reason the thoughts out, impress them on our minds and meditate on them; realise them, until at last they become our whole life. No longer will religion remain a bundle of ideas or theories or an intellectual assent; it will enter into our very self. By means of an intellectual assent, we may today subscribe to many foolish things, and change our minds altogether tomorrow. But true religion never changes. Religion is realisation; not talk, nor doctrine, nor theories, however beautiful they may be. It is being and becoming, not hearing or acknowledging. It is the whole soul's becoming changed into what it believes. That is religion.'"*

9. As a matter of fact the constitutional philosophy should be allowed to become a part of every man's life in this country and then only the Constitution can reach everyone and the ideals of the Constitution framers would be achieved since the people would be nearer the goal set by the Constitution - an ideal situation but a far cry presently."

8. The Apex Court in case titled as **National Institute of Technology & Ors. vs. Niraj Kumar Singh,** reported in **2007 AIR SCW 1169,** while dilating upon the aim and object of granting appointment on compassionate ground, has held that no appointment can be made on compassionate ground in the absence of Scheme and the Scheme must be corresponding to the scheme of equality, as enshrined in the Constitution. It was further held that all appointments against public posts must be made while keeping in view the mandate of Articles 14 and 16 of the Constitution of India. It is apt to reproduce paragraphs 14 to 16 of the said decision hereunder:

"14. Appointment on compassionate ground would be illegal in absence of any scheme providing therefor. Such scheme must be commensurate with the constitutional scheme of equality.

15. This Court in Punjab Water Supply & Sewerage Board v. Ranjodh Singh & Ors. 2006 (13) Scale 426, has observed:

> *"The statutory bodies are bound to apply the rules of recruitment laid down under statutory rules. They being 'States' within the meaning of Article 12 of the Constitution Of India, 1950 are bound to implement the constitutional scheme of equality. Neither the statutory bodies can refuse to fulfil such constitutional duty, nor the State can issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Articles 14 and 16 of the Constitution Of India, 1950"*

16. All public appointments must be in consonance with Article 16 of the Constitution Of India, 1950. Exceptions carved out therefore are the cases where appointments are to be given to the widow or the dependent children of the employee who died in harness. Such an exception is carved out with a view to see that the family of the deceased employee who has died in harness does not become a destitute. No appointment, therefore, on compassionate ground can be granted to a person other than those for whose benefit the exception has been carved out. Other family members of the deceased employee would not derive any benefit thereunder."

9. The Apex Court in another decision in **Union of India & Anr. vs. B. Kishore, 2011 AIR SCW 2293,** while dealing with the case of appointment on compassionate ground, has observed that the aim and object of providing compassionate appointment to the dependants of a deceased-employee is to provide immediate succour to the family, who, on the sudden death of the employee, may find itself in a state of destitution and if that object is taken out of the scheme, in that case, it would turn out to be a reservation in favour of the dependants of an employee who died in harness, which would not be in consonance with the mandate of Articles 14 and 16 of the Constitution of India. It is apt to reproduce paragraphs 5 and 6 of the said decision hereunder:

"5. On going through the judgment passed by the High Court, it is evident that it is based on a complete misconception about the scheme of compassionate appointments. Contrary to the High Court's observation, indigence of the dependents of the deceased employee is the first pre-condition to bring the case under the scheme of "compassionate appointment". The very purpose and object of the scheme is to provide immediate succour to the family of an employee that, on his death, may suddenly find itself in a state of destitution. If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be a reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution.

6. In State Bank of India v. Raj Kumar, 2010 11 SCC 661, elucidating the nature of the scheme of compassionate appointments this Court observed:

"It is now well settled that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant."

10. After going through the pronouncements of the Apex Court, one comes to inescapable conclusion as to what is the purpose behind making appointment on compassionate ground and what factors are to be kept in mind by the concerned Authorities while making such appointments, of course, in consonance with the Scheme/Policy/Rules/ Regulations occupying the field.

11. The genesis of the controversy, in hand, is the Policy, dated 18th January, 1990, framed by the Government of Himachal Pradesh for making appointments on compassionate ground, which is reproduced hereinbelow:

> ***"Subject;- Appointment of sons/daughters/near relations of a government servant who died in harness, leaving his family in immediate need of assistance.***
>
> *The undersigned is directed to say that the question of revising the policy for providing employment assistance to dependents of Govt. servants, who died while in Govt. service, leaving their families in indigent circumstances was under consideration of the Govt. for some time past. After thorough consideration and in supersession of all previous orders in this respect, it has now been decided to adopt the following new policy for grant of employment on compassionate grounds to the dependents of deceased Govt. servants in future:-*
>
> ***1) Policy**:-The employment on compassionate grounds to the dependents of Govt. servants who die while in service is not to be provided as a matter of right. It should be given only in deserving cases where the family of deceased Govt. servant is left in indigent circumstances requiring immediate means of subsistence. The concerned Administrative Departments would satisfy themselves about the indigent circumstances of the family before appointment on compassionate grounds is made.*
>
> ***2) To whom the policy is applicable**:- The employment assistance on compassionate grounds will be allowed in order of priority only to widow or a son or an unmarried daughter (in case of unmarried Govt. servant to father, mother brighter and unmarried sister) of:-*
>
> *(a) a Govt. servant who dies while in service (including by suicide) leaving his family in immediate need of assistance.*
>
> *(b) a Daily wage employee who dies while in service after having rendered at least 5 years service with not less than 240 days on daily wage basis in a year(to be computed as an average of the number of days served in the preceding years) leaving his family in immediate need of assistance. In such cases compassionate employment would be on daily wages only,*
>
> *(c) a Govt. servant who has been missing for more than two years and the family needs the immediate assistance.*
>
> *(d) a Govt. servant (Class-III and IV only) who retires on medical grounds under rule 38 of the C.C.S. (Pension) Rules, 1972.*
>
> *Provided the employee so retiring has not crossed the age of 53 years and 55 years in case of Class-III and IV respectively.*
>
> *(e) a Govt. servant who dies during the period of extension in service but not re-employment, leaving his family in immediate need of assistance.*
>
> ***3) Authority competent to make appointment on Compassionate Grounds**.*
>
> *(a) The compassionate appointment is to be provided basically in the department to which the deceased Govt. servant belonged, subject to fulfillment of minimum educational and technical qualifications prescribed for the post. In exceptional cases*

where the post does not at all exist in the Deptt. concerned, the said Department may recommend appointment in another department.

(b) Head of the Department to which the late employee belonged shall be competent to make compassionate appointment subject to fulfillment of all essential conditions and his satisfaction as to the indigent circumstances of the family of the deceased/retired Govt. servant.

***4) Post to which such appointment can be made**:- The appointment on compassionate grounds can be made only to the lowest rung of class-IV and Class-III posts carrying the pay scale of Rs.300-430 (now revised to Rs.750-1350) and 400-600 or 400-660 (now revised to Rs.950-1800 respectively). Class-III jobs would include all equivalent jobs including technical posts and teachers (class-III) in the scale of Rs.950-1800 only.*

5. Eligibility:-

(a) appointment on compassionate grounds can be made only against direct recruitment quota posts and candidate should possess the minimum educational and technical qualifications prescribed for the post as prescribed in recruitment Rules.

(b) if any training requirement is a pre-requisite for the post the incumbent seeking compassionate appointment against the post should possess such training and also possess physical standard wherever required for particular posts. Selection of incumbents on such compassionate basis for training is not permissible.

(c) In all cases where one or more members of the family are already in Government service or in employment of Autonomous bodies/Boards/ Corporations etc., of the State/Central Government, employment assistance should not under any circumstances be provided to the second or third member of the family. In cases however, where the widow of the deceased Government servant represents or claims that her employed sons/daughters are not supporting her, the request of employment assistance should be considered only in respect of the widow. Even for allowing compassionate appointment to the widow in such cases the opinion of the Department of Personnel and Finance Department should specifically be sought and the matter finally decided by the Council of Ministers.

(d) In the case of deceased Government servant who had taken loans/advances from the Government, the employment assistance to his widow or son of unmarried daughter will be provided only after obtaining an undertaking from him/her on non-judicial paper of the value of Rs.3/- to refund the entire amount of loan together with interest which the deceased Government servant had taken in the prescribed application form.

***6) whether advance increment(s) can be given**:- No advance increment will be given to the dependents of the deceased Government servants on their compassionate appointment under any circumstances.*

***7) Extent of relaxation and power to make relaxation**:- While providing employment on compassionate grounds the following relaxation can be made by the Administrative Department_*

(a) Recruitment procedure, i.e. without the agency of Public service Commission or Employment Exchange.

(b) If there is ban on filling up the posts, the ban shall be deemed to have been relaxed for the purpose of making compassionate appointments.

(c) The educational qualification for class-IV posts will be relaxable in genuine cases with the prior approval of the Cabinet. However, in case of a widow of Govt. servant to the appointed as Class-IV employee, the educational qualification can be relaxed by the concerned Administrative Department.

(d) Age relaxation shall not be given by any authority. Genuine cases will be placed before the Cabinet for allowing age relaxation by the Deptt. concerned.

***8) Belated requests for compassionate appointments**: Requests for grant of employment assistance should be received in the Deptt. concerned **within three years** of the death of the Government servant. In case where none of the sons/daughters of the deceased Government servant attain majority (age of 18 years) at the time of the death of the Government servant, **the time limit for receipt of request for employment assistance in department concerned will be attained of age of 21 years by the eldest son/un-married daughter**. No relaxation will be allowed in entertaining requests beyond the above age except in the case of sons/un-married daughter/widow of deceased Govt. servants belonging to the difficult areas as laid down in the Transfer Policy.*

***9) Widow appointed on compassionate grounds getting remarried**:-A widow appointed on compassionate grounds will be allowed to continue in service even after re-marriage.*

10) Selective approach:-

(a) Except as provided in para 7(c) above, the appointments on compassionate grounds should be made in such a way that persons appointed to the posts do have the essential educational and technical qualifications and experience requirements maintenance of efficiency of administration.

(b) It is not essential that a son or a daughter or a widow of a deceased Class-IV employee should be considered for employment against Class-IV post only but can be appointed against the lowest rung of Class-III post as indicated in para 4 above for which he is educationally qualified, proved a vacancy in Class-III is available.

(c) The provision of employment assistance was introduced in 1958 and since then a number of welfare measures have been introduced by the Govt. which made significant difference in the financial position of the families of the Govt. servants dying in harness. The benefit received by the family on account of these measures may be kept in view while considering cases of employment assistance on compassionate grounds. Such measures, in brief, which are at present available to the families of the deceased employees are as under:-

(i) Ad-hoc ex-gratia grant @ 10 times the emoluments which the Government servant was receiving before death, subject to a minimum of Rs.10,000/- and maximum of Rs.30,000/-.

(ii) Grant of improved family pension.

(iii) Grant of death Gratuity as under:-

Length of service	***Rate of gratuity***
a) Less than one year	*2 times of emoluments.*

b) One year or more but less than 5 years	*6 times of emoluments.*
c) 5 years or more but less than 20 years	*12 times of emoluments*
d) 20 years or more	*Half of emoluments for every completed six monthly period of qualifying service subject to a maximum of 33 times emoluments provided that the amount of Death Gratuity shall in no case, exceed one lakh rupees.*

(iv) Employees Group Insurance Scheme:- Financial assistance to the family of the deceased Government servant as under:-

(i)	*Class-IV employees-*	*Rs.10,000/-*
(ii)	*Class-III employees-*	*Rs.20,000/-*
(iii)	*Class-II employees-*	*Rs.40,000/-*
(iv)	*Class-I employees-*	*Rs.80,000/-*

(v) In addition nearly 2/3rd of the amount contributed by the Government servant to the fund is also payable alongwith the above amounts.

(vi) Encashment of the leave at the credit of the deceased Govt. servant subject to the maximum of 240 days.

(vii) Entitlement of additional amount equal to the average balance in the GPF of the deceased Govt. servant during the three years immediately preceding the death of the subscriber subject to certain condition under the Deposit Linked Insurance Scheme.

***11) Request for change in posts**:- When a person has accepted a compassionate appointment to a particular post the set circumstances which led to his/her initial appointment should be deemed to have ceased to exist and thereafter the **person who has accepted compassionate appointment in a particular post should strive in his carrier like his colleagues for future advancement. The request for change in posts should not be allowed**. However, the incumbents would be allowed to apply for jobs under Govt./Corporation/Govt. of India, if they have better prospects there like other Govt. servants.*

***12) General**:- The proforma as in Annexure (Part I and II) may be used by the candidate and the Department respectively for processing the cases of compassionate appointments."* Emphasis applied.

12. Clause-1 of the said Policy provides that compassionate appointment should be given only in deserving cases where the family of the deceased-employee is left in indigent circumstances. Clause-2 of the Policy lays down the scope of the Policy and provides that – i) employment assistance would be provided to the dependants in those cases where a government servant dies in harness, ii) where a daily wage employee who dies while in service after having rendered at least 5 years service with not less than 240 days on daily wage basis in a year, iii) where an employee is missing for more than two years, and iv) where an employee (class-III and class-IV only), who retires on medical grounds under Rule 38 of the CCS (Pension) Rules, 1972, provided that such an employee has not crossed the age of 53 years and 55 years in the case of Class-III and Class-IV, respectively. Clause-3 of the Policy provides as to who would be the competent Authority to make appointment on compassionate ground.

13. Clause-4 of the Policy provides that compassionate appointment would be made only to the lowest rung of Class-IV and Class-III posts. It was also provided under this Clause that Class-III jobs would include all equivalent jobs including technical posts and teachers (Class-III). Clause-5 of the Policy deals with the eligibility.

14. Clause-7 deals with the power of relaxation and provides that relaxation can be granted in regard to recruitment procedure, in case there is ban on filling up the posts the ban shall be deemed to have been relaxed, relaxation in educational qualification would be provided only in respect of Class-IV posts and, that too, in genuine cases, with the prior approval of the Cabinet. However, in the cases of widows who are seeking appointment against Class-IV post, relaxation in educational qualification can be granted by the concerned Administrative Department. In respect of relaxation in age, such cases are required to be placed before the Cabinet.

15. Clause-8 of the Policy postulates that requests for grant of employment assistance must be received in the Department concerned within three years of the death of the Government servant. However, in case, at the time of death of the government servant, the sons/daughters of such an employee have not attained the age of majority, the time limit for receiving the request for employment assistance has been prescribed as attainment of 21 years by the eldest son/un-married daughter.

16. Clause 10 of the Policy postulates that the benefits received by the family of the deceased-employee on account of family pension, death gratuity and ex-gratia grant have to be kept in mind while considering the cases under the Policy. Clause 11 states that once a person accepts compassionate appointment to a particular post, he/she cannot seek change of post and such requests would not be allowed.

17. The Policy, for the first time, was amended vide Office Memorandum, dated 26th February, 1990, which provided that incumbents, who were offered appointment on compassionate grounds, either on the death of their parents/brothers/sisters or on the retirement of their parents on medical grounds, as the case may be, would be entitled to senior scale on qualifying the type test. It is apt to reproduce the relevant portion of the Office Memorandum, dated 26th February, 1990, as under:

> *".....it has been decided by the Government that the incumbents appointed as clerks on compassionate grounds either due to death of their parents/brothers/sisters etc. in service or due to retirement of their parents on medical grounds will not be allowed the senior scale till they qualify the type test. The decision may be brought to the notice of all concerned."*

18. Thereafter, an amendment was brought into the Policy vide Office Memorandum, dated 28th June, 1991, whereby it was provided that where the employee who sought retirement on medical grounds, at the age of 53 years in the case of a Class-III employee and 55 years in the case of a Class-IV employee, the case of wife or husband, as the case may be, would be considered, at the first instance, for grant of compassionate appointment.

19. On 3rd October, 1992, again the said Policy was amended, whereby it was provided that the incumbents, who were appointed on compassionate grounds, were to qualify the tying test within one year of their appointment and the incumbents not qualifying the typing test within one year, would not be entitled for annual increment and the annual increment would be granted in such cases from the date the incumbents qualify the typing test.

20. On 1st June, 1992, the Policy was again amended only in regard to compassionate appointment on medical grounds, which is not necessary for present discussion.

21. Thereafter, on 18th May, 1995, Clause 2(b) of the said Policy was amended, whereby it was provided that the employment assistance on compassionate ground would be provided to the dependant of a deceased daily waged worker on daily wage basis only, irrespective of the fact whether the deceased daily waged worker had put in five years service with 240 days, on daily wage basis, in a calendar year or not. It is apt to reproduce relevant portion of the said Office Memorandum, dated 18th May, 1995, hereunder:

> *……. It has now been decided by the Government that the employment assistance to the dependent of a deceased daily waged worker shall be provided irrespective of the fact whether the deceased daily waged worker had put in 5 years service with 240 days on daily wages basis in a year.*
>
> *Accordingly, para 2(b) of this Department O.M. of even number dated 18.1.1990 may be deemed to have been amended as under:-*
>
> *"2(b). A daily waged employee who dies while in service leaving his family in immediate need of assistance may be given compassionate employment on daily wages only."*

22. Vide Office Memorandum, dated 12th December, 1997, another amendment was carried out and clause-5(c) of the policy was amended to the following effect:

> *"……. After due consideration of the matter it has now been decided by the Government that the employment assistance to the dependent of the deceased Government servant shall also be provided irrespective of the fact whether one or more members of the deceased family is/are in Defence Services.*
>
> *Accordingly para 5(c) of this Department office Memorandum of even number dated 18.1.1990 may deem to have been amended to the above extent."*

23. Thereafter, the Policy was again amended vide Office Memorandum, dated 8th May, 2001, to the following effect:

> *"….. After careful consideration it has been decided that a person appointed on compassionate grounds should give an undertaking in writing that he/she will maintain properly the other family members who were dependent on the deceased Government servant and in case it is proved subsequently (at any time) that the family members are being neglected or are not being looked after properly by him/her, his/her services may be terminated forthwith. It should be incorporated as one of the additional conditions in the offer of appointment applicable only in the case of compassionate appointee.*
>
> *Further, it has been decided that such compassionate appointments can be terminated on the grounds stated in the offer of appointment after providing an opportunity to the person appointed on compassionate grounds by way of issuing a show cause notice asking him/her to explain why his/her services should not be terminated for non-compliance of the condition(s) in the offer of appointment and it will not be necessary to follow the procedure prescribed in the Disciplinary Rules/Temporary Service Rules for this purpose.*
>
> *In order to check its misuse, it has also been decided that his power of termination of services for non-compliance of the condition(s) in the offer of compassionate appointment should vests only with the concerned Administrative*

Secretary of the Department not only in respect of persons working in the department but also in respect of Attached/subordinate Offices under that Department."

24. The Policy was also amended on 20th May, 2000 to the following effect:

"…. That as per provision of para-3 of the instructions ibid, the Head of Deptt. are competent to make appointment on compassionate grounds where the person seeking employment fulfils the criteria of educational as well as age and also his case covers under the instructions issued by the Govt. on the above subject. However, where relaxation on accounts of age/education qualification is necessitated, keeping in view the genuineness of the cases, such cases should be sent to the Admn. Deptt. alongwith specific recommendations and record of the case. As such, it is requested that in future such cases be decided finally at your level (except where relaxation on account of age/education qualification is needed) so that un-necessary delay to finalize these cases could be avoided."

25. Again, pursuant to the Office Memorandum dated 25th May, 2001, the Policy was amended and it was provided that all cases pertaining to compassionate appointment be sent by the concerned Heads of Department to the Finance Department of the Government for examination.

26. Vide Office Memorandum dated 21st June, 2002, once more, the Policy was amended and it was provided that the Administrative Departments would be the competent Authority to take a decision on the requests for compassionate appointments, subject to fulfillment of essential conditions, including satisfaction in regard to indigent circumstances of the family of the deceased/retired employee. The relevant portion of the said Office Memorandum is reproduced below:

"….it has been decided by the Government that henceforth the Administrative Departments shall be the competent authority to take a decision on the requests for compassionate appointments subject to fulfillment of all essential conditions of the policy and their satisfaction as to the indigent circumstances of the family of the deceased/retired Government servant."

27. On 24th August, 2002 and 2nd September, 2002, clarifications in regard to 'indigent circumstances' were issued defining the word "indigent", as referred to in the Policy. Relevant portion of the letter dated 24th August, 2002 is reproduced below:

"……in this connection, references have been received from certain departments enquiring as to what constitutes "Indigent circumstances" and also requesting that some uniform guidelines on the subject may be issued.

The matter has been considered carefully and it is noticed that specific guidelines with respect to what would amount to "indigent circumstances" will not be possible or practicable "indigent circumstances" of a family are to be seen with specific reference to the assets i.e. immoveable and moveable property left behind by the deceased income from various sources i.e. assets, house(s), pension, savings resulting to income employment status and number of employees within the extended family etc. as also liabilities i.e. number of dependents specially unmarried daughters aged parents etc. left behind by the deceased, some consideration towards the particular standard of life that the family of the deceased might be used to during the life time of the government employee etc. These are vital parameters that have to be kept in mind before any decision is arrived at regarding admissibility of employment to the ward/dependent of the deceased employee. As the above would show the question of "indigent circumstances", therefore has to be decided in each individual case after obtaining detailed information about all the relevant aspects mentioned, so that

employment on compassionate grounds is not given as matter of routine. While every effort should be made to provide suitable employment in all deserving cases. It should always be kept in mind that employment on compassionate ground can not be claimed as a matter of right. Also the competent authority should take full precautions to exclude the element of "pick and choose" while considering such cases."

It may be placed on record that it appears that these clarificatory letters, dated 24th August 2002 and 2nd September, 2002, were issued without amending the Policy and without any approval from the competent Authority.

28 Vide Office Memorandum, dated 23rd November, 2004, yet again the Policy was amended and it was provided that the Administrative Departments would send the requests for compassionate appointments to the Finance Department of the Government, who, in turn, would submit the same to the Hon'ble Chief Minister through Chief Secretary. It is apt to reproduce the relevant portion of the said Office Memorandum, hereunder:

"..... After due consideration it has now been decided by the Government that henceforth all the Administrative Departments will send case-files in this regard to the Finance department which will submit the same to the Hon'ble Chief Minister through Chief Secretary for approval."

29. Again, amendment in the said Policy was made on 16th August, 2005, whereby Clause 2(b) of the said Policy was amended and it was laid down that in case a work charge Beldar, working on daily wage basis with 7 years continuous service, dies in harness, one of his dependants be appointed on compassionate ground, on daily wage basis and the Deputy Commissioners, Superintending Engineers of Public Works Department, Irrigation & Public Health Department, HPSEB, Conservators of Forest, Chief Medical Officers, Deputy Director of Horticulture/Agriculture Department and other equivalent Regional/District Level Officers, as the case may be, would be competent to make such an appointment.

".....With a view to further liberalize the policy, it has been decided by the Government that if a Work Charged Beldar on daily wages with 7 years continuous service dies in harness one of his dependents be appointed on daily wages. In such cases appointments will be done by Deputy Commissioner, Superintending Engineers of Public Works Department, Irrigation & Public Health Department, H.P.S.E.B., Conservators of Forest, Chief Medical Officers, Deputy Director of Horticulture/Agriculture Department and other equivalent Regional/District Level Officers as the case may be.

Accordingly, para 2(b) of this Department O.M. of even number dated 18.01.1990 may be deemed to have been amended as under:-

"2(b)(i) A daily waged employee who dies while in service leaving his family in immediate need of assistance may be given compassionate employment on daily wages only."

2b(ii) A work Charge/Beldar on daily wages with 7 years continuous service who dies in harness, one dependent may be appointed on daily wages. Appointment will be done by Deputy Commissioner, Superintending Engineers of Public Works Department, Irrigation & Public Health Department, H.P.S.E.B., Conservators of Forest, Chief Medical Officers, Deputy Director of Horticulture/Agriculture Department and other equivalent Regional/District Level Officers as the case may be.""

30. The policy was amended vide Office Memorandum, dated 4th April, 2008, and it was provided that only indigent circumstances of the family were required to be looked into and no indigent certificate of any kind was required. It is apt to reproduce the relevant portion of the said Office Memorandum hereunder:

> *".....It has been brought to the notice of the Government that some departments are not implementing these provisions and therefore, the Government has decided to reiterate the following points:*
>
> *1. That employment should be given on merit i.e. after examining the indigent status of the family properly.*
>
> *2. The applications received for such employment may have some deficiencies/objections. All such deficiencies/ objections should be raised only once and the practice of returning the applications several times is not correct. This causes unnecessary harassment to the families and therefore it should be avoided; and*
>
> *3. No indigent certificate of any kind is required as per instructions. Only indigent circumstances of the family are required to be looked into. This purpose can be achieved by examining the income of the family. There is no such certificate prescribed by the Government nor should indigent certificate be demanded from the affected families."*

31. Subsequently, Office Memorandum was issued on 10th November, 2008, whereby 5% vacancies, falling under the direct recruitment quota in Class-III and Class-IV posts, were reserved for appointments to be made on compassionate grounds. It is apt to reproduce the relevant portion of the said amendment hereunder:

> ".....The matter for providing employment on compassionate grounds expeditiously in deserving cases was under consideration of the Government for some time past. After due consideration it has been deiced by the ?Government that in order to provide compassionate employment to the deserving and eligible persons 5% of vacancies falling under direct recruitment quota in Class-III & IV post should be reserved for this category. The Appointing Authority may therefore, hold up to 5% of vacancies in the aforesaid categories to be filled by direct recruitment, so as to fill such vacancies by appointment on compassionate grounds."

32. Vide Office Memorandum, dated 21st January, 2009, issued by the Secretary (Personnel) to the Government Himachal Pradesh, it was provided that the cases for appointment on compassionate ground on daily wage basis be also sent to the Finance Department for obtaining approval. It is apt to reproduce relevant portion of the said Office Memorandum hereunder:

> *".....After due consideration and in continuation of the above said Office Memoranda, it has now been decided by the Government that henceforth the compassionate cases of employment of daily-wagers shall also be sent by the Departments to the Administrative Departments who will send the same to the Finance Department for obtaining the approval of the competent authority so as to expedite the matter and maintain uniformity in approach."*

33. A letter, dated 15th July, 2010, was issued by the Principal Secretary (Finance) to the Government of Himachal Pradesh, to all the Administrative Secretaries whereby it was conveyed that for the present, only those cases be sent to the Finance Department for appointment on compassionate ground in which the applicant is a widow or where both parents of the applicant are not alive. The relevant extract of the said letter is reproduced hereunder:

"....as per present policy of the Government this Department is considering those cases where the applicant is a widow or cases of those applications whose both parents are not alive."

34. In the sequel, vide letter dated 25th September, 2010, again an amendment was brought into the said Policy wherein it was provided that apart from widows, the cases of the applicants whose parents were not alive, would be considered on priority basis for appointment on compassionate grounds. The relevant portion of the said letter is extracted hereinbelow:

"....Now, it has been decided by the Government that apart from the widow applicants the cases of applicants whose both parents are not alive shall be given priority for considering the matter of providing employment on compassionate grounds subject to fulfillment of other relevant criteria prescribed by the Govt. from time to time. You are requested to please bring these instructions to the notice of all concerned for strict adherence."

35. Thereupon, Clause 2(f) was added in the Policy vide Office Memorandum, dated 4th September, 2012, whereby it was provided that the dependant of a contractual employee, who died in harness, would be entitled for appointment on compassionate ground on daily wage basis. It is apt to reproduce relevant portion of the said notification hereunder:

".....It has further been decided by the State Govt. that the employment on compassionate grounds shall also be extended to the dependents of Contract employees who die while in service. Accordingly, the following sub clause (f) below para 2 is inserted in the above mentioned policy dated 18.01.1990:-

(f) A contractual employee who dies while in service leaving his family in immediate need of assistance may be given compassionate employment on daily waged basis."

36. Letter dated 21st December, 2012, issued by the Finance Department of the Government to the Administrative Secretaries, mandates that all cases wherein appointment on compassionate ground has been sought, be examined in light of the benefits received by the family of the deceased-employee on account of family pension, ex-gratia grant, death gratuity, employees group insurance scheme, leave encashment, deposit link insurance and the amount under the contributory pension scheme.

37. Thereafter, in terms of the Office Memorandum, dated 10th September, 2013, following amendment was effected in Clause 2(d) and Clause 10 (b), which are reproduced below:

".....After careful consideration, the Para(s): 2(d) & 10(b) of the Department of Personnel's Office Memorandum No.Per.(AP-II)-F-(4)-4/89 dated 18.01.1990 are substituted as under:

"2(d): A Government servant (Class-III and Class-IV) who retires on medical grounds under Rule-38 of the C.C.S. (Pension) Rules, 1972

Provided that the employee so retiring has not crossed the age of 45 years in case of Class-III and IV respectively."

"10(b): The dependents of deceased Class-IV employees would be given compassionate employment against Class-IV posts only."

38. However, vide office Memorandum, dated 17th December, 2013, the amendment effected in Clause 10(b), vide office Memorandum dated 10th September, 2013,

supra, was withdrawn with effect from the date of its commencement i.e. 10th September, 2013. It is apt to reproduce the relevant extract of the said office memorandum hereunder:

> *"....Para-10(b) of the Department of Personnel's Office Memorandum No.Per.(AP-II)-F-(4)-4/89 dated 18.01.1990 was amended vide this Department's Office Memorandum of even number dated 10.09.2013 by substituting the same with the following provision:-*
>
> > *"10(b): The dependents of deceased Class-IV employees would be given compassionate employment against Class-IV posts only."*
> >
> > *After careful consideration, it has now decided to withdraw the said amendment from the date of its commencement i.e. w.e.f. 10.09.2013."*

39. Other amendments were also brought into the said policy, however, those amendments have no bearing on the cases in hand and therefore, are not being referred to, for the sake of brevity.

40. As far as fixing of income slab is concerned, no material has been placed on record to suggest that the income slab was prescribed by amending the Policy and the decision to that effect was taken by the appropriate Authority. A specific query was put to the learned Advocate General to show from the records whether the decision for fixing the maximum income ceiling, by taking into account the income received from family pension and other terminal benefits, was taken by amending the Policy and whether such amendment has been approved by the Cabinet.

41. To this, the learned Advocate General submitted that Clause 10(c) of the Policy itself provides that amounts received by the family of the deceased employee on account of ex-gratia, improved family pension and death gratuity, are to be taken into consideration, while granting appointment on compassionate ground. In order to show that the decision for fixing the maximum income ceiling was taken by amending the policy, he has placed reliance upon a letter dated 1st November, 2008, which was written by the Secretary (PW) to the Engineer-in-Chief, HP PWD, in which it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. It is apt to reproduce the said letter hereunder:

> *"From*
>
> *The Secretary(PW) to the*
> *Govt. of Himachal Pradesh*
>
> *To*
>
> *The Engineer-in-Chief,*
> *HP PWD, Nirman Bhawan,*
> *Shimla-2.*
>
> *Dated Shimla-2, the 1.11.2008*
>
> *Subject: Regarding Employment assistance on compassionate grounds.*
> *Sir,*
>
> *On the above cited subject, I am directed to say that Finance Deptt. has issued some instructions/conditions regarding compassionate employment which already stands conveyed to your office vide this deptt letter No.PBW-A-B(2)-34/2006 dated 29th September 2008. One of the conditions is that before offer of appointment,*

department is to ensure that Income based indigency criteria is met with. However, the Income based criteria fixed by the Finance Department is reproduced as under:-

"The Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family for 4 members as Rs.1.00 lac and for smaller families, the internal criteria is Rs.25,000/- per person, per annum. Thus, if there is only one dependent, the overall income limit to be considered is Rs.25,000/- per annum. In case, there are two dependents of the deceased, the income of the applicant should not exceed Rs.50,000/- per annum. In case of three dependents, the overall income should not exceed Rs.75,000/- per annum. The overall income limit is Rs.1.00 lac per annum, even if family size is more than four. Gratuity, leave encashment, commutation amount are excluded for purpose of calculating family income but monthly pension/family pension, Dearness Relief, Interim Relief is included for calculation of yearly family income."

You are therefore, requested that while sending the cases of employment assistance on compassionate grounds to this department, these may be examined on the basis of above criteria fixed by the Finance Department and such cases which do not fulfill the above criteria, need not be sent to the Govt. and be decided at your own level.

Yours Faithfully
Sd/-
Under Secretary (PW) to the
Govt. of Himachal Pradesh"

It is mentioned in the said letter that the maximum family income ceiling fixed by the finance Deptt. for a family of 4 members was Rs.1.00 lac. Thereafter, as has come on the record, the maximum income ceiling was increased to Rs.1.50 lacs.

42. However, it is not clear from a perusal of the above letter - whether the maximum income ceiling, by taking into account the amount received by the family towards family pension and other terminal benefits, was fixed on the basis of the amendment effected by the competent Authority i.e. the State Cabinet. If the answer to this question is in the affirmative, then it is again a mystery that why the follow-up orders were not issued by the concerned Department of the Government bringing the said amendment into broad day light. The learned Advocate General was also not in a position to place on record any material which would be suggestive of the fact that the said ceiling was fixed by amending the Policy.

43. It is also pertinent to note that the Finance Department of the Government of Himachal Pradesh issued a letter, dated 18th July, 2014, to all the Administrative Secretaries that an appeal be filed in cases where the Courts have passed direction for giving compassionate appointment to a claimant without counting family pension as income.

44. Thus, from the above discussion of the Policy, as amended from time to time, and from the facts of the cases, which would be enumerated subsequently, the following questions emerge for determination, in order to narrow down and settle the controversy:

(i) Whether the amount of family pension and other retiral benefits, received by the family of the deceased-employee, can be included in the family income for denying the compassionate appointment?

(ii) Which date would be relevant viz. a viz. applicability of the Policy - whether the date of death of the employee or the date when the application was presented, for

the first time, for seeking employment on compassionate ground or the date on which the application came up for consideration before the Authorities, and whether a claim for compassionate appointment can be decided on the basis of subsequent amendment, when the application was presented prior to such amendment?

(iii) If an applicant was in lis and his case was directed to be reconsidered, whether the claim of such applicant is to be determined as per the policy which was existing at the time of passing the order or as per the policy which was in place at the time of staking claim for the first time or as per the policy existing at the time of consideration?

(iv) Whether the applicant can claim appointment on compassionate ground against a higher cadre, once he had been appointed in the lower cadre?

(v) In case a person is appointed on contract basis, whether he is within his rights to seek appointment on regular basis?

(vi) In a given set of cases, in one case the appointment on compassionate ground has been offered against a Class-III post and in other case, the appointment has been offered to a Class-IV post, whether it amounts to discrimination?

(vii) Whether a person can claim compassionate appointment after a considerable delay?

(viii) Whether requisite qualification or age can be relaxed?

(ix) In case one or more dependants of a deceased-employee is/are in service, though living separately, whether that can be made a ground to deny compassionate appointment to the other dependant of the deceased-employee?

45. After going through the Policy, dated 18th January, 1990, as amended from time to time, and the facts, as are emerging, our point-wise findings, on the above points, are as under.

Point No.(i) : **Whether the amount of family pension and other retiral benefits, received by the family of the deceased-employee, can be included in the family income for denying the compassionate appointment?**

46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.

47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.

48. While reaching at this conclusion, we are supported by the decision of the Apex Court in **Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,** wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:

> *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……."*

49. The Apex Court in **A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,** while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
>
> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.*
>
> *Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."*
>
> *4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."*

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in **Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,** while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:

> *"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.*
>
> *16. In **Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493**, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-*
>
> > *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."*
>
> *Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."*
>
> *Emphasis applied.*

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in **Canara Bank's case (supra).** Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one

Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that *"the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac."* It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law. Point No.(i) is answered accordingly.

Point No.(ii) - Which date would be relevant viz. a viz. applicability of the Policy - whether the date of death of the employee or the date when the application was presented, for the first time, for seeking employment on compassionate ground or the date on which the application came up for consideration before the Authorities, and whether a claim for compassionate appointment can be decided on the basis of subsequent amendment, when the application was presented prior to such amendment?

Point No.(iii) - If an applicant was in lis and his case was directed to be reconsidered, whether the claim of such applicant is to be determined as per the policy which was existing at the time of passing the order or as per the policy which was in place at the time of staking claim for the first time or as per the policy existing at the time of consideration?

56. These points, being overlapping, are taken up together and are being determined as follows.

57. To answer these points, we may refer to Clause-8 of the Policy, which provides that at the time of death of the employee, in case, the dependant of the employee is minor, the writ respondents would keep the offer of appointment under eclipse i.e. open till the eldest son/un-married daughter attains the age of 21 years. Thus, from a perusal of the above Clause and the Policy in its entirety, we are of the considered view that in order to achieve the avowed purpose of the Policy, the cause of action can be said to have arisen on the date when the claim is presented by the applicant by filing the application claiming appointment on compassionate ground, and that, the claim for appointment on compassionate ground, presented under a particular scheme, cannot be considered under a scheme which was amended after the date of making the claim.

58. While reaching at the above conclusion, we are supported by the decision of the Apex Court in **State Bank of India and others vs. Jaspal Kaur, 2007 AIR SCW 1044,** wherein the Apex Court has held that appointment on compassionate ground has to be

made strictly in accordance with the Policy/Scheme which was applicable at the time of making the application. It is apt to reproduce paragraph 30 of the said decision hereunder:

> *30. Finally, in the fact situation of this case, Sri. Sukhbir Inder Singh (late), Record Assistant (Cash & Accounts) on 01.08.1999, in the Dhab Wasti Ram, Amritsar branch, passed away. The respondent, widow of Sri Sukhbir Inder Singh applied for compassionate appointment in the appellant Bank on 05.02.2000 under the scheme which was formulated in 2005. The High Court also erred in deciding the matter in favour of the respondent applying the scheme formulated on 04.08.2005, when her application was made in 2000. A dispute arising in 2000 cannot be decided on the basis of a scheme that came into place much after the dispute arose, in the present matter in 2005. Therefore, the claim of the respondent that the income of the family of deceased is Rs.5855/- only, which is less than 40% of the salary last drawn by Late Shri. Sukhbir Inder Singh, in contradiction to the 2005 scheme does not hold water."*

59. The Apex Court in **Maharani Devi & Anr. vs. Union of India & Ors., 2009 AIR SCW 5775,** while considering the question as to what would be the relevant date – whether date of death of the employee or the date when the application was presented or the date of consideration, remanded the matter to the High Court to decide the said issue. It is apt to reproduce paragraphs 12, 13, 14 and 15 of the said decision hereunder:

> *"12. The learned Counsel for the appellants relied on the judgment of this Court reported in Chairman Railway Board and Ors. v. C.R. Rangadhamaiah and Ors. which is a Constitution Bench decision. This was a case wherein the validity of the same Notification issued by the Railways under Article 309 amending Rule 2544 of Indian Railway Establishment Board with retrospective effect was under consideration. By that amendment the pension conditions of the employees who had already retired on the date of Notification was adversely affected. The Court held that in the circumstances, the rules could not have been amended retrospectively affecting the rights of the employees. The Court, however, held that on the date when the said retrospective amendments were introduced, Article 19(1)(f) and Article 31(1) were available in the Constitution of India. The Court held that, therefore, the right of property of the petitioner was breached by the impugned retrospective circulars. Further in cutting down the pension by bringing in the amendments to the provisions retrospectively would be invalid, breaching Articles 14 and 16. Relying heavily on this judgment the learned Counsel suggests that at least in the aforementioned case, the amendments were retrospective while in the present case they were not retrospective and, therefore, the amended Circular dated 13.12.1995 would not be applicable. The further argument is that under any circumstance the right for being considered for compassionate appointment had accrued on the date of death of the employee that being the only relevant date. According to the learned Counsel the date on which the representation was made was irrelevant.*
>
> *13. As against this the learned senior counsel Shri Harish Chandra urged that the most relevant date would only be when the representation was made because the Railway Board had to consider as to whether the appellants were indigent on the date when the application was made.*
>
> *14. On this crucial question, however, the High Court has not expressed any opinion. It has merely approved of the judgment of the Tribunal. Learned senior counsel in support of his argument relied on the judgment in State Bank of India and Ors. v. Jaspal Kaur, reported in 2007 (9) SCC 571. However, we do not find any similarity in the situation appearing in this case and the one decided by this Court. The reported decision only considered the question as to which scheme pertaining to compassionate*

appointment should be preferred - whether it should be the scheme prevailing at the time when the application for compassionate appointment was filed or the one which was available on the date of decision of the Court.

15. Such question is not for our consideration in the present matter. That decision is, therefore, of no use for learned Counsel for the respondents. However, in our view the question posed by us as to what would be the relevant date for consideration, whether it would be the date of death of employee or whether it would be the date of making the representation? That has not been considered by the High Court. We, therefore, remand this matter to the High Court with a request to the High Court to decide the same. We request the High Court to dispose of the matter within six months of the writ reaching the High Court as the matter pertains to the rights of a poor widow. The appeal is allowed in the terms stated by us with no orders as to the costs."

60. The Apex Court in **Bhawani Prasad Sonkar vs. Union of India & Ors., 2011 AIR SCW 2039,** while dealing with the case of compassionate appointment, has held that a scheme or policy promulgated by the employer is binding on the employer and the employee. It is apt to reproduce paragraph 15 of the said decision hereunder:

"15. Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve. We do not propose to burden this judgment with reference to a long line of decisions of this Court on the point. However, in order to recapitulate the factors to be taken into consideration while examining the claim for appointment on compassionate ground, we may refer to a few decisions."

61. The Apex Court in **MGB Gramin Bank vs. Chakrawarti Singh, 2013 AIR SCW 4801,** held that in case a scheme does not create any legal right, a candidate cannot claim that his case be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. It is apt to reproduce paragraphs 12 and 13 of the said decision hereunder:

"12. A scheme containing an in pari materia clause, as is involved in this case was considered by this Court in State Bank of India & Anr. vs. Raj Kumar, (2010) 11 SCC 661. Clause 14 of the said Scheme is verbatim to clause 14 of the scheme involved herein, which reads as under:

> *"14. Date of effect of the scheme and disposal of pending applications: The Scheme will come into force with effect from the date it is approved by the Board of Directors. Applications pending under the Compassionate Appointment Scheme as on the date on which this new Scheme is approved by the Board will be dealt with in accordance with Scheme for payment of ex-gratia lump sum amount provided they fulfill all the terms and conditions of this scheme."*

13. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. , this Court held that in such a situation, the case under the new Scheme has to be considered."

62. The Apex Court in its latest decision in **Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212, (supra),** held that when the dependant of the deceased-employee applied in time, under a particular Scheme, his case cannot be considered under the Scheme, which was introduced subsequently. It was also held that the subsequently introduced Scheme, being administrative or executive order, cannot have a retrospective effect. It is apt to reproduce paragraphs 9, 11, 13, 14 and 17 of the said decision hereunder:

"9. Before adverting to the arguments of the learned counsel for the parties, it is necessary to examine the scope of the Scheme dated 8.05.1993 vide Circular No.154/1993 for "compassionate appointment". The object of the Scheme is to help dependants of employees of Canara Bank who die or become totally and permanently disabled while in harness and to overcome the immediate financial difficulties on account of sudden stoppage of the main source of income. The employment under the scheme will be considered only if there are indigent circumstances necessitating employment to one of the dependants and the deceased employee's service record is unblemished. Mere eligibility will not vest a right for claiming employment. As per para 3.1, application for employment should be sought within 21/2 years from the date of death of the employees. In para 3.2, it is stated that in case of the dependant of the deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority provided a request is made to the bank by the family of the deceased employee and the same may be considered subject to rules prevailing at the time of consideration.

....

11. The main question falling for consideration is whether the Scheme passed in 2005 providing for ex-gratia payment or the Scheme then in vogue in 1993 providing for compassionate appointment is applicable to the respondent. Appellant-bank has placed reliance upon the judgment of this Court in Jaspal Kaur's case to contend that the respondent's case cannot be considered on the basis of 'Dying in Harness Scheme 1993' when the new Scheme of 2005 providing for ex-gratia payment had been put in place. In Jaspal Kaur's case , Sukhbir Inder Singh employee of State Bank of India, Record Assistant (Cash & Accounts) passed away on 1.08.1999. Widow of the employee applied for compassionate appointment in State Bank of India on 5.02.2000. On 7.01.2002, the competent authority of the bank rejected the application of Jaspal Kaur in view of the Scheme vis- a-vis the financial position of the family. Against that decision of the competent authority, the respondent filed writ petition before the Punjab and Haryana High Court which has directed to consider the case of Jaspal Kaur by applying the Scheme formulated on 4.08.2005 when her application was made in the year 2000. In that factual matrix, this Court has directed that dispute arising in the year 2000 cannot be decided on the basis of a Scheme that was put in place much after the dispute. By perusal of the judgment in Jaspal Kaur's case, it is apparent that the judgment specifically states that claim of compassionate appointment under a

scheme of a particular year cannot be decided in the light of the subsequent scheme that came into force much after the claim.

....

13. Applying these principles to the case in hand, as discussed earlier, respondent's father died on 10.10.1998 while he was serving as a clerk in the appellant-bank and the respondent applied timely for compassionate appointment as per the scheme 'Dying in Harness Scheme' dated 8.05.1993 which was in force at that time. The appellant-bank rejected the respondent's claim on 30.06.1999 recording that there are no indigent circumstances for providing employment to the respondent. Again on 7.11.2001, the appellant-bank sought for particulars in connection with the issue of respondent's employment. In the light of the principles laid down in the above decisions, the cause of action to be considered for compassionate appointment arose when the Circular No.154/1993 dated 8.05.1993 was in force. Thus, as per the judgment referred in Jaspal Kaur's case, the claim cannot be decided as per 2005 Scheme providing for ex-gratia payment. The Circular dated 14.2.2005 being an administrative or executive order cannot have retrospective effect so as to take away the right accrued to the respondent as per circular of 1993.

14. It is also pertinent to note that 2005 Scheme providing only for ex-gratia payment in lieu of compassionate appointment stands superseded by the Scheme of 2014 which has revived the scheme providing for compassionate appointment. As on date, now the scheme in force is to provide compassionate appointment. Under these circumstances, the appellant- bank is not justified in contending that the application for compassionate appointment of the respondent cannot be considered in view of passage of time.

....

17. Considering the scope of the Scheme 'Dying in Harness Scheme 1993' then in force and the facts and circumstances of the case, the High Court rightly directed the appellant-bank to reconsider the claim of the respondent for compassionate appointment in accordance with law and as per the Scheme (1993) then in existence. We do not find any reason warranting interference."

63. Applying the ratio to the cases in hand and keeping in view the provisions of the Policy in question, we hold that the date of death of the employee is not to be taken into consideration while seeing the applicability of the Policy. Similarly, the date on which the application comes up for consideration before the competent Authority is also of no importance, since, because of the lackadaisical approach of the Departments, such cases may have been kept pending for a pretty long time and during that period, the policy may have been amended. Thus, the applicants, in such circumstances, cannot be made to suffer for the inaction on the part of the Authorities.

64. Accordingly, we hold that the case of the applicant would be governed by the provisions of the Policy which was in place at the time when the application, for the first time, was made by the applicant to the Department, and in the case of a minor, the right to apply would commence from the date he/she attained majority, as given in the Scheme and his/her application would be considered as per the Policy/Scheme which was in vogue at the time of presenting the application. In the matters where the Court or the Tribunal has directed the Authorities to consider the case of the applicant afresh, the claim of the applicant has to be determined as per the policy applicable at the time of presenting the application for the first time before the Department concerned. Points No.(ii) and (iii) are answered accordingly.

<u>Points No.(iv)</u>: Whether the applicant can claim appointment on compassionate ground against a higher cadre, once he had been appointed in the lower cadre?

<u>Point No.(v)</u>: In case a person is appointed on contract basis, whether he is within his rights to seek appointment on regular basis?

<u>Point No.(vi)</u>: In a given set of cases, in one case the appointment on compassionate ground has been offered against a Class-III post and in other case, the appointment has been offered to a Class-IV post, whether it amounts to discrimination?

65. These points are interconnected and, therefore, the same are being settled together.

66. As has been discussed above, the idea behind providing employment assistance on compassionate ground is to tide over the immediate hardship which is faced by a family on account of the death of the bread earner. However, endless compassion cannot be shown to such a family. We may also place on record that right to claim appointment on compassionate ground cannot be used as a method to seek employment. It is just an exception and discretion of the competent Authority. The applicant cannot claim that he is entitled to appointment on compassionate ground as a matter of right.

67. The Apex Court in **I.G. (Karmik) & Ors. vs. Prahlad Mani Tripathi, 2007 AIR SCW 3305,** has laid down the same principles. It is apt to reproduce paragraph 13 of the said decision hereunder:

> *"13. Furthermore, Appellant accepted the said post without any demur whatsoever. He, therefore, upon obtaining appointment in a lower post could not have been permitted to turn round and contend that he was entitled for a higher post although not eligible therefor. A person cannot be appointed unless he fulfils the eligibility criteria. Physical fitness being an essential eligibility criteria, the Superintendent of Police could not have made any recommendation in violation of the rules. Nothing has been shown before us that even the petitioner came within the purview of any provisions containing grant of relaxation of such qualification. Whenever, a person invokes such a provision, it would be for him to show that the authority is vested with such a power."*

68. The Apex Court in **State Bank of India & Anr. vs. Somvir Singh, 2007 AIR SCW 1571,** has held that dependants of employees who died in harness do not have any special or additional claim to public services other than one conferred, if any, by the employer. It was also held that the claim for compassionate appointment has to be considered only in accordance with the scheme framed by the employer in this regard. It is apt to reproduce paragraphs 7 and 10 of the said decision hereunder:

> *"7. Article 16(1) of the Constitution of India, 1950 guarantees to all its citizens equality of opportunity in matters relating to employment or appointment to any office under the State. Article 16(2) protects citizens against discrimination in respect of any employment or office under the State on grounds only of religion, race, caste, sex, descent. It is so well settled and needs no restatement at our ends that appointment on compassionate grounds is an exception carved out to the general rule that recruitment to public services is to be made in a transparent and accountable manner providing opportunity to all eligible persons to compete and participate in the selection process. Such appointments are required to be made on the basis of open invitation of applications and merit. Dependants of employees died in harness do not have any special or additional claim to public services other than the one conferred, if any, by the employer.*

…….. …….. ……..

10. There is no dispute whatsoever that the appellant-Bank is required to consider the request for compassionate appointment only in accordance with the scheme framed by it and no discretion as such left with any of the authorities to make compassionate appointment de hors the scheme. In our considered opinion the claim for compassionate appointment and the right, if any, is traceable only to the scheme, executive instructions, rules etc. framed by the employer in the matter of providing employment on compassionate grounds. There is no right of whatsoever nature to claim compassionate appointment on any ground other than the one, if any, conferred by the employer by way of scheme or instructions as the case may be."

69. The Apex Court in **Umesh Kumar Nagpal vs. State of Haryana and others, (1994) 4 Supreme Court Cases 138,** has held that if the dependant of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so. It is further held that the post offered is not to cater to the status of such dependant, but to enable the family to tide over the financial calamity being faced by the family on the death of bread earner. It was also held that compassionate appointment, in posts above Class-III and Class-IV, is legally impermissible. It is apt to reproduce paragraphs 3 and 5 of the said decision hereunder:

"3. Unmindful of this legal position, some governments and public authorities have been offering compassionate employment sometimes as a matter of course irrespective of the financial condition of the family of the deceased and sometimes even in posts above Classes III and IV. That is legally impermissible.

…….. …….. …….. ……..

5. It is obvious from the above observations that the High court endorses the policy of the State government to make compassionate appointment in posts equivalent to the posts held by the deceased employees and above Classes III and IV. It is unnecessary to reiterate that these observations are contrary to law. If the dependant of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so. The post is not offered to cater to his status but to see the family through the economic calamity."

70. The Apex Court in a case of compassionate appointment in **Union of India and others vs. K.P. Tiwari, (2003) 9 Supreme Court Cases 129,** has held in paragraph 4 as under:

"4. It is unnecessary in this case to examine either question of law or fact arising in the matter. Suffice to say that the respondent has been appointed now and has been in service for more than five years. We do not think, it would be appropriate to disturb that state of affairs by making any other order resulting in uprooting the respondent from his livelihood. "

71. The Apex Court in **Steel Authority of India vs. Madhusudan Das & Ors., 2009 AIR SCW 390,** has held that provision for compassionate appointment has been carved out to provide minimum relief to the grief stricken family and that such appointment cannot be claimed as a matter of right. It is apt to reproduce paragraph 14 of the said decision hereunder:

"14. Appellant being a State within the meaning of Article 12 of the Constitution of India, while making recruitments, it is bound to follow the rules framed by it. Appointment of a dependant of a deceased employee on compassionate ground is a matter involving policy decision. It may be a part of the service rules. In this case it would be a part of the settlement having the force of law. A Memorandum of

Settlement entered into by and between the Management and the employees having regard to the provisions contained in Section 12(3) of the Industrial Disputes Act is binding both on the employer and the employee. In the event, any party thereto commits a breach of any of the provisions thereof, ordinarily, an industrial dispute is to be raised. We would, however, assume that a writ petition therefor was maintainable. It is in that sense of the term, the learned Single Judge opined that the question as to whether there has been a breach of the Memorandum of Settlement on the part of the employer or not involves a disputed question of fact. The Division Bench of the High Court, however, proceeded on the premise that the employer was bound to provide appointment on compassionate appointment in all cases involving death of an employee. The Division Bench, in our opinion, was not correct in its view. This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor, viz., that the death of the sole bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right. (See General Manager, State Bank of India & Ors. vs. Anju Jain, 2008 8 SCC 475)"

72. The Apex Court in **Director General of Posts and others vs. K. Chandrashekar Rao, (2013) 3 Supreme Court Cases 310,** has laid down the same principle. It is apt to reproduce paragraphs 22 and 26 of the said decision hereunder:

"22. From the above Scheme and Office Memorandum, it is clear that where on the one hand, the State had formulated a welfare scheme for compassionate appointments, there on the other, because of limitations of its financial resources it decided to take economic measures by reducing the extent of appointment by direct recruitment from the financial year 2001-2002. Both these matters falling in the domain of the Government and being matters of policy, the Court is hardly called upon to comment upon either of them. These are the acts which fall in the domain of the State and do not call for any judicial interference. All that we propose to hold is that State has to abide by the Scheme it has floated for compassionate appointment. 23. The 1998 Scheme floated by the Government should receive a liberal construction and application as it is stated to be a social welfare scheme and largely tilted in favour of the members of the family of the deceased employee. The purpose appears to be to provide them with recruitment on a regular basis rather than circumvent the same by adopting any other measure. That is the reason why the Government specifically states in its Scheme that efforts should be made to appoint the members of a distressed family to the post provided he/she satisfies the other parameters stated in the Scheme.

…… …… …… ……..

26. Despite the fact that the judgment of the Central Administrative Tribunal (for short "the Tribunal") has been upheld by the High Court, we are unable to contribute and sustain the view taken by the Tribunal that the Memorandum dated 16th May, 2001 frustrated the very object of the Scheme for Compassionate Appointment and on that ground alone, it was liable to be declared invalid. As already noticed, both the matters are policy matters of the State and for valid and proper reasons, without infringing the spirit of Article 14 and 16 of the Constitution. The State can frame its policy, where it is for economic reasons, least such decision would be open to judicial review to that

extent. In the present case, there is some ambiguity created by issuance of office memorandums dated 16th May, 2001 and 14th June, 2006 and the enforcement of the former vide office memorandum dated 4th July, 2002 in relation to the implementation of Compassionate Appointment Scheme of 1998. Thus, it is not only desirable but necessary that the competent authority should issue comprehensive guidelines squarely covering the issue, but they cannot tamper with the existing rights of the appointees."

73. Clause-11 of the Policy, reproduced supra, mandates that when a person has accepted the offer of appointment on compassionate ground to a particular post, the request for change in post shall not be allowed. Similarly, Clause 2(b) also provides that if a daily wage employee or a work charge Beldar, on daily wages with 7 years continuous service, dies while in service, one of the dependants of such employee will be "appointed on daily wages only". Further Clause 2(f) was added later on vide Office Memorandum dated 4th September, 2012 (reproduced above), which entitled the dependant of a contractual employee dying in harness to claim compassionate employment on "daily waged basis".

74. The policy also postulates in Clause-4 that appointment on compassionate ground would only be made to "the lowest rung of Class-IV and Class-III posts". It was also provided that Class-III jobs would include all equivalent jobs including technical posts and teachers (class-III).

75. In view of the decisions referred to above, what flows is that the compassionate employment cannot be claimed as a matter of right, rather this provision has been carved out, against the general rule of equality, in order to ameliorate the hardship of a family. Moreover, the Policy itself explicitly provides that once a person accepted appointment on a particular post, he would not be allowed to seek change in post.

76. The discretion to offer appointment on compassionate ground is vested with the respondents/Authorities and it is for the said Authorities to see whether a person is to be appointed against a Class-IV or Class-III post or on daily wage basis and that discretion cannot be questioned on the ground of discrimination, and that too, when a person has accepted the offer of appointment and joined without any demur and enjoyed the benefits. However, there is also no quarrel about the proposition that the Authority, who is vested with the discretion of making appointment on compassionate ground, is expected to exercise the discretion vested in it judiciously and without being influenced, strictly in accordance with the provisions envisaged in the Policy, so that the avowed object sought to be achieved by the State, by framing such a policy, is achieved.

77. The sum and substance of the above discussion is that the incumbents, who have been appointed on a particular post and have joined to the said post without expressing any reluctance or protest, such incumbents are precluded from claiming that they should either be appointed to a higher post or should have been given appointment on regular basis, instead of employment on contract basis, or have been discriminated viz. a viz. similarly paced persons.

78. It was also brought to our notice that the Government of Himachal Pradesh had taken a decision in the year 2003 making provision for appointment on contract basis. This fact has been sought to be substantiated by a copy of letter, dated 12th December, 2003, issued by the Chief Secretary, to the Government of Himachal Pradesh, to all the Secretaries, the Heads of Department, all the Divisional Commissioners and all the Deputy Commissioners, which is reproduced below:

" No. PER(AP)C-B(19)2 98-Part-II

Government of Himachal Pradesh
Department of Personnel (AP-III)
Dated Shimla-171002 the 12th December, 2003

From

The Chief Secretary to the
Government of Himachal Pradesh

1. All the Secretaries to the
Govt. of Himachal Pradesh.

2. All Heads of Department in
Himachal Pradesh
3. All Divisional Commissioners in
Himachal Pradesh.
4. All Deputy Commissioners in
Himachal Pradesh.

Subject:- Prescribing of Provision for appointment on contract basis.

Sir,

I am directed to say that it has been decided by the Government that the mode of recruitment by way of "contract recruitment" may also be prescribed in addition to other mode of recruitment in all the Recruitment and Promotion Rules.

It is, therefore, requested that all existing Recruitment & Promotion Rules where the mode of direct recruitment of the post has been prescribed the same may be amended. As such provision of Col.No.10 of the Recruitment and Promotion Rules be prescribed in the following manner:-

"Col.No.10: By direct recruitment or on Contract basis."

Since the matter has already been approved by the Council of Ministers it is therefore, requested to amend the Recruitment & Promotion Rules accordingly without referring the matter to the Cabinet.

Yours faithfully

Sd/-
Under Secretary (Pers.) to the
Govt. of Himachal Pradesh."

79. Thus, it is clear from the perusal of the above letter that the Government has taken a policy decision to make appointments on contract basis to different cadres, including Class-III and Class-IV cadres against which the compassionate employment is provided. As discussed hereinabove, the compassionate employment is an exception and the person is given appointment without undergoing any selection process. The persons, who are directly appointed have to undergo the selection process as prescribed in the Recruitment Rules and only thereafter, are appointed, and that too, on contract basis. Thus, it would be inappropriate to entitle a person for appointment on regular basis who is given employment out of compassion and without undergoing the rigors of the selection process, and the another person, who has put himself to the test and got selected, is offered appointment on contract basis. If that is permitted, then the persons appointed on compassionate ground would steal a march over and above the persons who are appointed

through a selection process, which would be against the concept of service jurisprudence and also not in consonance with the mandate of Articles 14 and 16 of the Constitution of India.

80. Thus also, the appointments on compassionate ground made on contract basis are legally correct and need no interference.

81. Points No.(iv), (v) and (vi) are answered accordingly.

Point No.(vii): Whether a person can claim compassionate appointment after a considerable delay?

82. To answer the above point, we may first refer to the decisions of the Apex Court on the issue. The Apex Court, in case titled as **Local Administration Department & Anr. vs. M. Selvanayagam @ Kumaravelu, 2011 AIR SCW 2198,** in which case, the wife of the deceased-employee had not made application immediately after the death of the employee and the son of the employee had applied after 7-1/2 years of the death of his father for appointment on compassionate ground, in such circumstances, held that once the family had been able to tide over the blow of the death of the bread winner for such a considerable long period, therefore, granting of belated appointment cannot be said to subserve the basic object and purpose of the scheme. The Apex Court has also observed that, no doubt, it is not possible to lay down a rigid time limit within which appointment on compassionate ground must be made, but emphasis must be that such an appointment must have some bearing on the object of the scheme. It is apt to reproduce paragraphs 7 to 9 of the said decision hereunder:

> *"7. We think that the explanation given for the wife of the deceased not asking for employment is an after-thought and completely unacceptable. A person suffering from anemia and low blood pressure will always greatly prefer the security and certainty of a regular job in the municipality which would be far more lucrative and far less taxing than doing menial work from house to house in an unorganized way. But, apart from this, there is a far more basic flaw in the view taken by the Division Bench in that it is completely divorced from the object and purpose of the scheme of compassionate appointments. It has been said a number of times earlier but it needs to be recalled here that under the scheme of compassionate appointment, in case of an employee dying in harness one of his eligible dependents is given a job with the sole objective to provide immediate succour to the family which may suddenly find itself in dire straits as a result of the death of the bread winner. An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee would be directly in conflict with Articles 14 & 16 of the Constitution and hence, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind.*
>
> *8. Ideally, the appointment on compassionate basis should be made without any loss of time but having regard to the delays in the administrative process and several other relevant factors such as the number of already pending claims under the scheme and availability of vacancies etc. normally the appointment may come after several months or even after two to three years. It is not our intent, nor it is possible to lay down a rigid time limit within which appointment on compassionate grounds must be made but what needs to be emphasised is that such an appointment must have some bearing on the object of the scheme.*

> 9. *In this case the respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made on July 2, 1993, even while he was a minor. Another application was made on his behalf on attaining majority after 7 years and 6 months of his father's death. In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme. It would rather appear that on attaining majority he staked his claim on the basis that his father was an employee of the Municipality and he had died while in service. In the facts of the case, the municipal authorities were clearly right in holding that with whatever difficulty, the family of Meenakshisundaram had been able to tide over the first impact of his death. That being the position, the case of the respondent did not come under the scheme of compassionate appointments.*

83. The Apex Court in **Umesh Kumar Nagpal's case (supra)** has held that keeping in view the aim and object of compassionate employment, the same cannot be granted after a lapse of a reasonable period, which must be specified in the rules. It was also held that employment on compassionate ground is not a vested right which can be exercised at any time. It is apt to reproduce paragraph 6 of the said decision as under:

> *"6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."*

84. Now, let us have a glace of the relevant provision of the Policy pertaining to the period within which application has to be made by the dependant after the death of an employee. Clause-8 of the Policy prescribes that application for grant of employment on compassionate ground be made to the Department concerned within three years of the death of the government servant. Clause-8 of the Policy further postulates that in case the dependant of an employee is minor at the time of death of the employee, then, in that eventuality, the time limit for receiving application in the department concerned would be the attaining of age of 21 years by the eldest son/un-married daughter.

85. While reading Clause 8 of the Policy, two factors arise – a) where the employment on compassionate ground has been sought by the widow or the son/un-married daughter, who were major, at the time of death of the employee-concerned; and b) where the dependants were minor and widow of the deceased employee was not inclined to take employment on compassionate ground.

86. In the first factor, the policy itself is amply clear that the claim for employment assistance must be made within three years of the death of the government employee. In the given circumstances, the appointment is to be sought within three years of the death of the government-employee and not thereafter.

87. As far as the other factor is concerned, the above judgments are distinguishable since as per the mandate of the Policy, if a dependant is minor at the time of the death of the employee, he can apply for compassionate appointment till the attainment of 21 years by the eldest son/unmarried daughter. Thus, the case of such applicant cannot be dismissed on the ground that the dependant has applied after a considerable lapse of time. However, it is mandatory for the Authorities to consider such cases as per the provisions of the Scheme/Policy occupying the field at the relevant point of time when the application was made for claiming such employment.

88. We can also not be oblivious to yet another situation where the claim for compassionate employment has been preferred within the time stipulated in the Policy, but the matter remained pending with the respondent-Authorities for a considerable long period, in such a situation, we are clear in our mind that once the delay is not attributable to the claimant, his application cannot be rejected on the ground of delay.

89. Then, another question would arise as to which Policy would govern the appointment of such an applicant – whether the policy which was in place at the time of the death of the employee or the policy when such an applicant preferred his claim.

90. In that case, we have already held above that the Policy which was prevailing and was in force at the time when the application was presented by the applicant after attaining the age of majority would be relevant and applicable to such an applicant and the policy which was governing the field at the time of the death of the employee would be of no consequence. To dilate further, the said applicants would become eligible, as per the Policy and the Rules occupying the field, at the time of attaining the age of majority. Clause-8 of the Policy, in hand, provides mechanism, which is *pari materia* to Clause 3.2 of the Scheme discussed by the Apex Court in the case of **Canara Bank v. M. Mahesh Kumar (supra)** and the discussion made by the Apex Court in paragraph 15 of the said decision, reproduced above, is the complete answer to the question in hand.

91. The point stands answered accordingly.

Point No.(viii): Whether requisite qualification or age can be relaxed?

92. For making appointment against public posts, possessing minimum educational qualification is one of the essential conditions and that condition cannot be relaxed. However, Clause 7 of the Policy, dated 18th January, 1990, deals with the "Extent of relaxation and power to make relaxation". Sub Clause (c) of Clause 7 deals with granting relaxation in educational qualification to those aspirants who are seeking appointment against a Class-IV post. It is provided in the said Sub Clause that in genuine cases, the condition of possessing minimum educational qualification can be relaxed with the prior approval of the Cabinet. A distinction has also been carved out in the cases where the widows of the deceased employee are seeking appointment against Class-IV posts and in those cases, the relaxation in educational qualification can be provided by the concerned Administrative Department.

93. Similarly, Sub Clause (d) of Clause 7 provides that age relaxation would not be allowed. However, the genuine cases would be placed before the Cabinet for allowing age relaxation.

94. Thus, it is amply clear from the reading of Clause 7(c) and (d) of the Policy that relaxation in educational qualification or age can be granted, subject to approval by the Authority, as prescribed therein, only when the appointment is to be made against Class-IV post.

95. The said Clause 7 of the Policy was amended vide office order, dated 25th April, 1991, and it was provided that in those cases where appointment on compassionate ground was claimed against a Class-IV post, by seeking relaxation in respect of educational qualification or age, the concerned Administrative Department would have the power to grant such relaxation. In the matters, other than those, the power of relaxation was vested with the Chief Minister.

96. Fixing the eligibility criteria for a particular post falls under the domain of the legislature/executive and power to relax the same also lies with the said Authority. Our

this view is fortified by the decision of the Apex Court in **State of Gujarat & Ors. vs. Arvindkumar T. Tiwari and Anr., 2012 AIR SCW 5131.** It is apt to reproduce paragraphs 8 and 9 of the said decision hereunder:

> *"8. 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."*
>
> *9. 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., 1999 AIR(SC) 2012 and Praveen Singh v. State of Punjab & Ors.,2000 8 SCC 436)"*

97. A reference may also be made to the latest decision of the Apex Court in **State of Gujarat and another vs. Chitraben, 2015 AIR SCW 4305,** wherein also the applicant was seeking appointment on compassionate grounds but was not fulfilling the minimum educational qualification, as prescribed under the Rules governing the field. It was held by the Apex Court that the case of the applicant was rightly rejected for compassionate appointment since the applicant was not fulfilling the minimum requisite educational qualification as stipulated in the Rules governing the field. It is apt to reproduce paragraphs 8 and 9 of the said decision hereunder:

> *"8. It is not a matter of dispute, that the Government of Gujarat, in its General Administration Department, issued a notification dated 16-3-2005 laying down eligibility conditions for appointment in different Class-IV posts. Insofar as the eligibility for direct recruitment is concerned, the same is stipulated in Rule 3 of the afore-stated rules, which is being extracted hereunder:*
>
> "3. To be eligible for appointment by direct selection to the post mentioned in Rule 2, a candidate shall:-
>
> (i) not be less than 18 years and not more than 25 years of age;
>
> (ii) have passed Secondary School Certificate Examination.
>
> (iii) Possesses skills relevant to the job as may be prescribed by Government from time to time." (Emphasis is ours)

A perusal of Rule 3(ii) indicates, that to be eligible for appointment by direct recruitment against a Class-IV posts, the concerned candidate should possess the "secondary school certificate". It is therefore apparent, that eligibility for appointment on compassionate grounds, under resolution dated 10-3-2000, after 16-3-2005 (when the aforesaid notification in respect of recruitment to class IV posts was issued), requires to possess the qualification stipulated therein, i.e., "secondary school certificate" qualification.

9. It is not a matter of dispute, that the respondent has possessed only the qualification of IV standard, and does not possess the qualification of "secondary school certificate" examination, as has been postulated in Rule 3(ii) of the notification dated 16-3-2005. It is therefore imperative for us to conclude, that the respondent was not qualified for appointment against a class-IV posts, when her husband died in harness on 13-6-2006. When the respondent applied for appointment on compassionate grounds on 17-7-2006, it was necessary for her, to fulfil the qualification stipulated in the notification dated 16-3-2005. Since, admittedly the respondent did not fulfil the aforesaid qualification, she was not eligible to claim appointment on compassionate grounds, under the resolution dated 10-3-2000."

98. Thus, it is clear from the perusal of the above decision that no relaxation can be granted in educational qualification. However, the said decision is distinguishable since the legislature, while making the Policy in hand, in its wisdom, has provided that relaxation in educational qualification and age can be granted in respect of cases where appointment is sought against a Class-IV post, as has been discussed supra. Thus, it cannot be a ground to refuse compassionate appointment against a Class-IV post and the point stands answered accordingly.

Point No.(ix): In case one or more dependants of a deceased-employee is/are in service, though living separately, whether that can be made a ground to deny compassionate appointment to the other dependant of the deceased-employee?

99. In order to answer this point, we may have a glance of the Policy, Clause 5(c) whereof provides that in all cases where one or more members of the family of the deceased-employee were already in Government service or employment of Autonomous bodies/Boards/Corporations etc., of the State/Central Government, employment assistance would not "under any circumstances" be provided to the second or third member of the family. However, in case where the widow of the deceased Government servant made a representation that her employed sons/daughters were not supporting her, in that case request of the widow could be considered and the final decision was to be taken by the Council of Ministers.

101. Viewed thus, it is manifestly clear that in case any member of the deceased-employee is in gainful employment i.e. either in the government service or serving in autonomous bodies/Boards/ Corporations etc., of the State/Central Government, no employment assistance on compassionate ground, under any circumstance, shall be provided to second or third member of that family. However, only the claim for such employment assistance can be considered qua the widow of the deceased-employee, as discussed hereinabove.

101. In regard to gainful employment, we may refer to the decision of the Apex Court in **Govind Prakash Verma's case (supra),** wherein, the elder brother of the applicant was engaged in agricultural work and was also doing the work of a casual painter. The Apex Court held that in such circumstances, the elder brother of the applicant cannot

be said to be in gainful employment. It is apt to reproduce the relevant portion of paragraph 6, of the said decision hereunder:

> *".....So far as the question of gainful employment of the elder brother is concerned, we find that it had been given out that he has been engaged in cultivation. We hardly find that it could be considered as gainful employment if the family owns a piece of land and one of the members of the family cultivates the field. This statement is said to have been contradicted when it is said that the elder brother had stated that he works as a painter. This would not necessarily be a contradiction much less leading to the inference drawn that he was gainfully employed somewhere as a painter. He might be working in his field and might casually be getting work as painter also. Nothing has been indicated in the enquiry report as to where he was employed as a regular painter. The other aspects, on which the officer was required to make enquiries, have been conveniently omitted and not a whisper is found in the report submitted by the officer. In the above circumstances, in our view, the orders passed by the High Court are not sustainable. The respondents have wrongly refused compassionate appointment to the appellant. The inference of gainful employment of the elder brother could not be acted upon. The terminal benefits received by the widow and the family pension could not be taken into account."*

102. Adverting to the Policy in hand, there is no provision in the policy according to which any other dependant, except widow, can make a claim for compassionate appointment, in case one of the dependants of the deceased-employee is in Government or Semi Government service, as discussed above. However, there may be probability that at the time of death of the employee concerned, the widow may have crossed the maximum age limit fixed by the Government for seeking employment or the widow is not possessing the minimum qualification or for any other reason, the widow is not intending to seek employment and makes a representation, carving out sufficient reasons, for grant of employment to the other member of the family, the Authority concerned, in order to achieve the mandate of the Policy being a social legislation, may consider such cases sympathetically, after proper inquiry, and, of course, after adverting to the provisions as contained in the Policy and also keeping in view the dictum of the Apex Court, supra.

103. Having said so, the point is answered accordingly.

104. We also deem it proper to place on record here that the Central Government as well as the State Governments have made their Rules/Regulations/Schemes for providing employment assistance on compassionate ground and even the Semi Government Departments/Boards/Corporations etc. have also adopted those Schemes or have made their own Schemes. Each case has to be considered as per the Policy of an Organization, applicable at the relevant point of time.

105. Cases in hand are to be dealt with as per the Scheme which is holding the field as on today and any judgment, which is outcome of a Policy not *pari materia* with the above Policy of the State, cannot be made a ground for granting or declining the relief. Thus, the judgments based on the Schemes, which are not applicable to the State, are distinguishable.

106. It is apt to record herein that the Apex Court in **Canara Bank vs. M. Mahesh Kumar (supra)** has discussed all the judgments, read with the Policy/Scheme governing the field, while arriving at the conclusions. In the instant case, the Policy contains Clauses stipulating the terms and conditions for making appointment on compassionate ground. Therefore, the cases, in hand, are to be tested as per the mandate of the judgment in

Canara Bank vs. M. Mahesh Kumar (supra), read with the Policy/Scheme, referred to above.

107. Now, let us examine the instant cases on the basis of the principles, as discussed hereinabove.

CWPs No.1638 of 2011, 4475 of 2011, 8325, 9300, 10111 of 2012, 695, 5550, 7010, 7109, 8674, 10011 of 2013, 453, 1204, 1787, 1788, 2202, 2619, 8059, 8214, 8216, 8308, 8309, 8362, 8503, 9010, 9132, 9371, 9516 of 2014, 77, 99, 372, 373, 533, 1351, 1676, 1846, 2169, 2323, 2684, 3394, 3395, 3400, 3401, 3556, 3561, 3583, 3667, 3670, 3762, 3763, 3774 and 3822 of 2015.

108. In all these writ petitions, the petitioners have laid a challenge to the action of the respondents, whereby the claims of the writ petitioners for appointment on compassionate ground has been rejected on the ground that the family(ies) of the deceased-employee(s) do not fall within the indegency criteria laid down by the Finance Department of the Government and that the income of the family exceeds more than the limit prescribed in the Policy.

109. Facts of CWP No.1638 of 2011 are being enumerated taking the same as lead case in this group. Father of the petitioner, who was working as Chief Pharmacist with the respondent-Department, died on 9.5.2008, while in service. The petitioner being 10+2 and having one year computer diploma applied for the post of Clerk, and the respondents duly recommended his case. However, vide letter dated 21.7.2010 (Annexure P-2), the petitioner was informed that his case was considered and rejected as the income of the family of the petitioner exceeds more than Rs.1,00,000. Thus, the writ petition for quashing Annexure P-2. The respondents filed the reply to the writ petition stating therein that the respondents have rightly rejected the claim of the petitioner, as the income of the family of petitioner, as per the certificate issued in this regard, was more than the cap fixed by the Government. Therefore, it was pleaded that the case of the petitioner did not fall within the scope of the policy.

110. During the course of hearing, the learned counsel for the petitioners argued that the respondents have wrongly taken into account the amount of family pension and other retiral benefits received by the family of the deceased-employee or the employee who sought retirement on medical grounds**.** The said action of the respondents is against the law laid down by the Apex Court on the issue and therefore, prayed that the impugned orders, whereby the applications of the petitioners have been rejected, be quashed.

111. On the other hand, the learned Advocate General submitted that the appointment on compassionate ground cannot be claimed as a matter of right and the Policy empowers the respondents to examine the indigent circumstances of the family of the deceased-employee, by taking into account the amount received as family pension and other retiral benefits, as prescribed in the Policy. It was further submitted that the respondents have amended the Policy, dated 18th January, 1990, and have laid down a definite criteria, including maximum income ceiling, for assessing the eligibility of a family for providing employment assistance on compassionate ground. Thus, it was submitted that the respondents were well within their right to reject the claims projected by the petitioners on the ground that the family of the deceased-employee exceeded the limit prescribed in the Policy.

112. In view of our findings on point No.(i) recorded hereinabove, the arguments advanced by the learned Advocate General are devoid of any force and the same are repelled accordingly. The impugned orders, in these cases, are quashed and the respondents are

directed to do the needful and pass appropriate orders afresh expeditiously, while keeping in view the findings made hereinabove.

CWP No.9172 of 2012

113. The father of the petitioner, who was working as Class-IV employee, was suffering from mental ailment, respondent department got him examined from medical board which opined that he was suffering from schizophrenia. The medical board issued certificate Annexure P-6 and opined that the father of the petitioner was not fit for present job. Thereafter vide Annexure P-7, office order dated 13.12.2004, the father of the petitioner allowed premature retirement w.e.f. 3.12.2004, the day when the medical board had issued the certificate. Along with the writ petition, the petitioner has annexed Annexure P-8, whereby it has been sought to be demonstrated that the father of the petitioner was granted pension w.e.f. 26.5.2004, before crossing the age of 55 years.

114. The petitioner applied for the post of Clerk or Physical Education Teacher, which was rejected vide order dated 13.5.2005 on the ground that the father of the petitioner had sought retirement on medical grounds after the expiry of prescribed age limit, was assailed by way of writ petition, which was disposed of on 9.3.2011 by quashing the order impugned in the said writ petition, and the respondents were directed to consider the case of the petitioner.

115. Vide order dated 5.5.2012 (Annexure P-14), the case of the petitioner was rejected on the ground of family income and that the father of the petitioner had crossed the age of 55 years at the time of retirement.

116. In view of our findings on point No.(i), coupled with findings on other points, as discussed hereinabove, the impugned order is set aside and the respondents are directed to examine the case of the petitioner in light of the findings supra and also after adverting to the relevant provisions of the Policy.

CWP No.3252 of 2014

117. Father of the petitioner expired on 25.1.1994 while in service as LHC. After attaining the age of majority, he applied for compassionate appointment to the post of Cook in the year 2002, which request remained pending with the respondents till 2013 constraining the petitioner to file writ petition, which was disposed of on 27.11.2013. However, vide order dated 4.2.2014 (P-4), the respondents rejected the case of the petitioner on income criteria and on delay also.

118. In view of findings on points No.(i) and (vii), the impugned order is set aside and the respondents are directed to reconsider the case of the petitioner in terms of our findings recorded on point Nos.(i) to (ix) and also after referring to the Policy.

CWPs No.9094 of 2013, 9113, 10185 of 2011, 2035, 4697, 6286, 8599 of 2012, 1204, 1240 and 6505 of 2013:

119. These cases are clubbed together for the reason that the facts and circumstances of the cases are similar and the policy applicable is also the same.

120. CWP No.9094 of 2013 is taken as lead case in this group of cases and the facts of the said case are thus. Father of the petitioner, who was serving as Patwari right from the year 1973 with the respondent-Department, died in harness on 26th June, 2003. The petitioner applied for appointment on compassionate ground in the month of December, 2003 and documents were required by the respondents from the petitioner,

which were submitted by him in September, 2004. In the years 2005 and 2008, the respondents again raised queries and demanded more documents from the petitioner, which, as per the petitioner, were supplied by him to the respondents. In May 2009, the petitioner again received a letter from the respondents wherein also the petitioner was required to complete certain formalities, which were completed by the petitioner.

121. In May 2011, the petitioner received a letter, dated 3rd May, 2011, (Annexure P-8), whereby it was conveyed that the respondents were considering the cases of only those employees in which either the widow of the deceased employee was seeking employment or the applicant was an orphan. Thus, the petitioner has filed the writ petition for quashing Annexure P-8.

122. Respondents have filed the reply, in which it has been pleaded that the Policy, dated 18th January, 1990, was amended by the Government, vide amendment dated 25th September, 2010, to the following effect:

> *".....Now, it has been decided by the Government that apart from the widow applicants the cases of applicants whose both parents are not alive shall be given priority for considering the matter of providing employment on compassionate grounds subject to fulfillment of other relevant criteria prescribed by the Govt. from time to time. You are requested to please bring these instructions to the notice of all concerned for strict adherence."*

Thus, it was pleaded that the case of the petitioner, being the son of the deceased employee, did not fall within scope of the Policy and was rightly rejected by the respondents.

123. The writ petitions are allowed and the orders impugned are set aside in view of our findings recorded on points No.(ii) and (iii), supra. The respondents are directed to consider the cases of the petitioners afresh in view of our findings on points No.(i) to (ix) and also after adverting to the Policy.

CWP Nos.8342 of 2012, 9115 of 2013, 3568, 3893, 7397, 8895, 9378 of 2014, 2397, 3044, 3546, 3585 and 3652 of 2015:

124. In these writ petitions, the petitioners have applied to the respondents for their appointment on compassionate ground, but, as pleaded, the respondents have not taken any decision so far.

125. Facts of CWP No.8342 of 2012, titled Damodar Ram vs. State of H.P. and others, are being referred to in this group of cases. Father of the petitioner, who was serving as Beldar, with the respondents, died in harness on 18th March, 2008, whereafter, the petitioner approached the respondents for providing appointment on compassionate grounds and as admitted by the respondents in the reply, the case of the petitioner is still pending consideration with the respondents.

126. Thus, in all these cases, the respondents are directed to consider the cases of the petitioners as per our findings on points No.(i) to (ix) and the Policy in question, expeditiously.

CWP Nos.1106, 7967 of 2012, 9006 of 2013, 169, 170, 215, 228 and 1512 of 2014:

127. In this group of cases, the petitioners, after the death of their bread winner, applied for appointment on compassionate ground and the petitioners were appointed on contract basis against different posts, i.e. Clerk, Beldar, Chowkidar etc. Now, by the medium of these petitions, the petitioners are seeking direction to the respondents-

Authorities to give appointment to the petitioners on regular basis against the post they have already joined.

128. Taking CWP No.1106 of 2012 as lead case in this group, the facts of this case are being referred to. Father of the petitioner, who was working as a teacher with the respondents, died in harness on 31st May, 1995. On attaining the age of majority in the year 2005, the petitioner applied for being appointed on compassionate ground and came to be appointed as Clerk on 10th October, 2007, on contract basis. Thus, the petitioner has filed the writ petition praying for a direction to the respondents to give him appointment on regular basis, instead of contract basis, from the date he joined as such on contract basis, with all consequential benefits incidental thereof.

129. Respondents have filed the reply and contested the writ petition on the ground that the petitioner was appointed as Clerk on contract basis and all terms and conditions, as postulated in the appointment letter, were accepted by the petitioner without any protest and acted upon the offer of appointment and joined his duties as Clerk on contract basis. Therefore, the petitioner is precluded from seeking regular appointment.

130. These writ petitions are dismissed in view the findings recorded on points No.(iv), (v) and (vi) supra.

CWP Nos.5115, 8650, 8652, 9954, 10336, 10511, 10512, 10524, 10756 of 2012, 11, 8968 of 2013, 797, 803, 3117 and 3143 of 2014:

131. In this group of cases, the petitioners applied for appointment on compassionate ground and they were offered appointment on contract basis against Class-IV posts on daily wage basis. Now, by the medium of these petitions, the petitioners are seeking direction to the respondents-Authorities to give appointment to the petitioners either against Class-III posts or to a different post than the one offered to them and they joined.

132. CWP No.5115 of 2012 is taken up as lead case and the facts of the said case are thus. Father of the petitioner, who was serving as Plumber, in the respondent-Department, died in harness on 1st September, 2007. Thereafter, the petitioner applied for being appointed on compassionate ground as per the Policy of the State Government, which culminated into offer of appointment to the petitioner as daily wage Beldar and he joined as such. Thus, the petitioner has filed the instant writ petition for direction to the respondents to appoint him as Plumber instead of daily-wage Beldar. It is the case of the petitioner that the respondents has appointed the similarly situated persons against Class-III posts, but the petitioner has been discriminated.

133. The respondents have filed the reply wherein it has been pleaded that the petitioner, at the first instance, after the death of his father, applied for appointment on compassionate ground for the post of Beldar and was accordingly appointed as such on 21st March, 2008. The petitioner joined as such without any protest. It was also pleaded that the instances pointed out by the petitioner viz. a viz. discrimination were entirely different since the claimants in such cases were eligible for the post against which they were appointed. It was also pleaded that since the petitioner initially applied for the post of Beldar and did not possess minimum educational qualification for being appointed as Plumber, his case was rightly rejected for being appointed as Plumber.

134. These writ petitions are dismissed in view the findings recorded by us on points No.(iv), (v) and (vi) supra.

CWP Nos.6547 of 2010, 7536 of 2011, 2758 of 2014 and 3402 of 2015:

135. The Claim of the petitioners, in this group of cases, has been rejected or has been sought to be resisted by filing replies by the respondents, on the ground that the petitioners are not entitled for compassionate appointment since one of the member of the family of the deceased employee was in government/semi government service.

136. Facts, as pleaded in CWP No.6547 of 2010, taken as lead case for this group, are that the father of the petitioner, who was working as Peon with the respondent department, had expired on 4th January, 1997, while in service. The petitioner, on attaining the age of majority, applied for being appointed on compassionate ground, but the case of the petitioner was rejected by the respondents on 25th April, 2008, on the ground that the elder brother of the petitioner was in service.

137. The petitioner has pleaded that his elder brother was living separately, which fact has been sought to be substantiated by the petitioner from the copy of the Ration Card (Annexure P-8) and a copy of the certificate, dated 25.9.2006 (Annexure P-9) issued by the Pradhan of the Gram Panchayat concerned.

138. The respondents filed the reply in which it has been pleaded that the case of the petitioner was rightly rejected since the Policy occupying the field provided that in case one or more members of the family of the deceased employee was in Government service or in employment of Autonomous bodies Boards/Corporations etc., of the State or Central Government, employment assistance, under any circumstances, would not be provided to the second or third member of the family.

139. In view of our findings on point No.(ix), the impugned orders are set aside and the writ petitions are disposed of by directing the respondents to consider the cases of the petitioners afresh in view of our findings recorded on points No.(i) to (ix) supra and also in accordance with the Policy.

CWP Nos.1274 of 2013, 3842, 8396 and 8549 of 2014:

140. In these cases, the petitioners sought appointment on compassionate ground against Class-IV posts on the death of their beard-earner, who died while in service. It is pleaded by the respondents that the case of the petitioner could not be considered since the petitioner did not possess the minimum educational qualification for being appointed against a Class IV post.

141. In this set of cases, the impugned orders are set aside and the writ petitions are disposed of with a direction to the respondents to consider the case of the petitioners afresh in view of our findings recorded on point No.(viii) supra.

CWP Nos.3821 of 2014 and 75 of 2015:

142. In CWP No.3821 of 2014, it is averred that the mother of the petitioner, who was working as daily wage Beldar, had died in harness on 18th June, 2007, after putting in 11 years of service, whereafter the petitioner applied for compassionate appointment on 26th April, 2010. It was also pleaded that the respondents have returned the case of the petitioner to respondent No.4, vide letter dated 7th February, 2014, (Annexure P-1), on the ground that as per the employment policy, case be submitted to the department within three years from the date of death and since the petitioner's case was received after the lapse of the said period, therefore, the claim of the petitioner was returned back for re-examination. Thus, feeling aggrieved, the petitioner has filed the writ petition.

143. The respondents have filed the reply in which it has been admitted that the case of the petitioner was sent to respondent No.4 for reexamination, as pleaded by the

petitioner, and after re-examination, it was found that the case of the petitioner was not time barred and, therefore, was sent to the Government for approval. As and when the approval of the Government is received, the petitioner will be granted appointment assistance on compassionate ground.

144. Thus, in view of the reply filed by the respondents, nothing survives in the writ petition, except to observe that a final decision be taken in the matter expeditiously, preferably within three months from today.

CWP No.75 of 2015:

145. As averred, the father of the petitioner, who was working as Peon, died in harness on 18th March, 2009. The petitioner applied for appointment on compassionate ground and the application of the petitioner was forwarded by the Executive Engineer, IPH, Division Salooni, vide letter dated 4th May, 2010 (Annexure P-2). However, the respondents rejected the application of the petitioner in the month of September, 2014 vide Annexure P-5 on the ground that the case of the petitioner did not fall under para 8 of the Policy as the request of the petitioner was received for the first time in the office on 14th December, 2012 after attaining the age of 21 years by the petitioner.

146. No reply has been filed.

147. It is the case of the petitioner that after the death of his father, he applied for appointment and his case was recommended by the Executive Engineer, IPH, Salooni vide letter dated 4th May, 2010, as is evident from Annexure P-2 placed on record by the petitioner.

148. Thus, the impugned order is set aside and the respondents are directed to consider the case of the petitioner afresh in view of our finding recorded on points No.(i) to (ix), supra, and the Policy/Scheme occupying the field.

CWP No.2236 of 2015:

149. In this writ petition, father of the petitioner, who was working as Part Time Water Carrier since 7th August, 1997, died in April 2007. The petitioner has filed the instant petition for direction to the respondents to grant him appointment on compassionate ground. It is pleaded that at the time of the death of his father, the petitioner was minor.

150. It appears that the petitioner has not applied on the prescribed proforma to the respondents for grant of compassionate appointment and has directly approached this Court for grant of appointment on compassionate grounds.

CWP No.3112 of 2014:

151. The petitioner has filed this writ petition with the prayer that the respondents be directed to appoint the petitioner in service on compassionate ground and also to direct the respondents to release pension and ex-gratia benefits to the petitioner.

152. Respondent No.1 in its reply pleaded that as per the policy of the State Government, the petitioner has not applied to the concerned department for seeking employment on compassionate ground. So far as release of payment of ex-gratia, gratuity and pension is concerned, the same stand already released in favour of the petitioner vide Annexure R-1, Annexure R-II and Annexure R-III, respectively.

153. In the facts of these cases, (CWP No.2236 of 2015 and 3112 of 2014), the petitioners in these cases are at liberty to apply to the respondents for appointment on

compassionate grounds and the respondents are directed to consider the said request of the petitioners in terms of the Policy and the observations made on points No.(i) to (ix), hereinabove, and pass appropriate orders expeditiously.

CWP No.6990 of 2011

154. It is a case where direction is sought to appoint guardian (petitioner No.6/brother of deceased employee), on compassionate ground or one post be reserved till the son/daughter of the deceased-employee attains majority.

Facts:

155. On 21.11.2009, when late Shri Duni Chand was going to his residence after performing his duties, he was found murdered. The said Duni Chand was initially engaged on daily wage basis in the year 1994 and was regularized w.e.f. 19.1.2007. His son and daughters were minor at the time of death of the employee and widow is stated to be not in a fit state of mind, which fact is supported by the medical certificate Annexure P-4. Therefore, the present petition has been filed through their guardian, petitioner No.6, younger brother of deceased employee.

156. In such circumstances the petitioners submitted a representation to respondent No.1 for providing employment to their guardian i.e. petitioner No.6 on compassionate ground. They have also prayed in the representation that case of the petitioners be kept pending till such time the son of the deceased attains majority. Thus, the petitioners prayed directions to the respondents to grant employment to petitioner No.6 or in the alternative keep pending the claim of the petitioners till the son of the deceased attains majority.

157. In the reply filed by the respondents, it has been stated that, as per the Policy, appointment on compassionate ground cannot be granted to petitioner No.6, who is the brother of the deceased-employee. It has also been pleaded that petitioner No.1 submitted an application on 19th January, 2010 in the office of Assistant Engineer, HPPWD, Sub Division, Suni in which she stated that she was not willing to get employment and requested that employment assistance be provided to her son, who was minor at that time.

158. In such circumstances, the respondents are directed to examine the case of the petitioner in accordance with the Policy and the observations made by this Court, supra, and pass appropriate orders within six weeks from today.

CWP No.7074 of 2014

159. Father of the petitioner, who was CID Inspector, died in the year 1993, while in service. The petitioner, being Matriculate, applied for appointment as Clerk in Police Department and the Department informed the petitioner vide letters dated 23.5.1994 and 19.8.1994 that he could not be accommodated as other persons were in the waiting list.

160. As pleaded, in January, 1997, the petitioner was arrested in a criminal case, however, stood acquitted by the Sessions Court as also by the High Court on 29th July, 2010. During the pendency of such proceedings, the petitioner represented for compassionate appointment, but his requests were rejected on the ground that a criminal case was pending against him.

161. After the dismissal of the criminal appeal by the High Court in the year 2010, in January, 2011, the petitioner again approached the respondent Department, but his case was rejected by the respondent-Department on 17th February, 2012 being time

barred. When the petitioner again requested for re-examination of his case, similar view was conveyed to the petitioner vide letter dated 2nd July, 2012**.**

162. Thus, the petitioner has prayed for quashing of Annexure P-5 and P-6, whereby case of the petitioner was rejected being time barred**.**

163. In the facts of the case, the impugned orders are quashed and the respondents are directed to consider the case of the petitioner afresh, after adverting to findings recorded on point Nos.(i) to (ix) and also to the provisions of the Policy.

CMP No.4435 of 2014 in CWP No.1138 of 2014

164. This application has been moved for recalling the order, dated 24th March, 2014, whereby the writ petition was dismissed in default. For the reasons stated in the application, the same is allowed and the writ petition is ordered to be restored to its original number. The application is disposed of.

CWP No.1138 of 2014

165. As pleaded, grandfather of the petitioner died in harness on 6.8.2008. It is further pleaded that the petitioner being the adopted son of deceased employee, applied for compassionate appointment, was rejected by the respondents on the ground that there is no provision for employment to a grandson of the deceased employee. Hence, the writ petition.

166. The respondents have filed the reply, in which they have stated that since the petitioner is the grandson of the deceased-employee, therefore, his case is not covered under the Policy, for grant of employment on compassionate ground.

167. In view of our findings on points No.(i) to (ix), there is no merit in the writ petition and the same is dismissed.

CWP No.8212 of 2014

168. Father of the petitioner, who was working as work charge Beldar, died in the year 1999. In 2001, the petitioner applied for employment as Clerk being unmarried daughter of the deceased-employee. On 6.1.2006, the petitioner was offered appointment as daily waged Beldar, when she was maid, which offer was declined by the petitioner, as has come up in the reply of the respondent, on the ground that since she was eligible for appointment as Clerk, therefore, her case be considered for appointment against the post of Clerk. This is suggestive of the fact that the petitioner was not in indigent circumstances or was not facing any difficulty or was not in distress. In the interregnum, she got married. As per the Policy of the respondents, compassionate employment can be granted to an unmarried daughter of the deceased. Therefore, her case was rightly rejected by the respondents.

169. Having said so, there is no merit in the writ petition and the same is dismissed.

CWP No.142 of 2013

170. As averred, the facts of the case are that the father of the petitioner, who was working as Field Assistant, died in harness on 16.6.2004. In the year 2003, the father of the petitioner had applied for retirement on medical grounds, which request remained pending with the department till his death. After the death of the employee, the petitioner filed application for compassionate appointment, which was rejected by the department on the ground that since the deceased-employee had crossed the age as prescribed under Rule 38

of the CCS (Pension) Rules, 1972, therefore, the petitioner cannot claim appointment on compassionate ground.

171. Feeling aggrieved, the petitioner had approached this Court by way of writ petition and in the reply to the said writ petition, the respondents admitted that the father of the petitioner was in service till his death. Therefore, the writ petition was disposed of with a direction to the respondents to reconsider the matter of the petitioner. However, the respondents again rejected the claim of the petitioner on the same ground.

172. Thus, the petitioner, by way of the instant petition, has sought writ of certiorari for quashing Annexure P-8, whereby the claim of the petitioner came to be rejected. The petitioner has also sought writ of mandamus commanding the respondents to appoint him on compassionate ground.

173. Respondents have resisted the writ petition by filing the reply.

174. Precisely, the ground pressed into service by the respondents while rejecting the claim of the petitioner is that the deceased had crossed the requisite age as per the Policy occupying the field.

175. Clause 2(d) of the policy stipulates that employment assistance shall be provided to those government servants (Class-III and Class-IV only), who retire on medical grounds, provided the employees so retiring have not crossed the age of 53 years in the case of Class-III and 55 years in the case of Class-IV.

176. As per the discussion made hereinabove, appointment can be made only as per the Rules/Scheme/Policy occupying the field and no appointment can be made de hors the Scheme/Policy. It is clear from the reply filed by the respondents that the age of the father of the petitioner was "53 years 10 months and 14 days on the date of his pre-mature retirement on 8.4.2003", which is not in dispute.

177. Viewed thus, the respondents have rightly passed the rejection order. Accordingly, there is no merit in the writ petition and the same is dismissed.

CWP No.10024 of 2012

178**.** Father of the petitioner was working as Shastri teacher and died in harness on 9.9.1987. The petitioner who was having degree of Ayurvedaacharya applied for being appointed against the post of Auruvedic Chikitsa Adhikari on compassionate ground. However, the petitioner was offered appointment against the post of Clerk and he joined against the said post on 19.11.1990. Thereafter, on 23.8.1997 the petitioner was appointed as Ayurvedic Chikitsa Adhikari. The petitioner represented to the respondents for giving him employment as Chikitsa Adhikari from the date of his passing the degree or from 9.9.1987 when his father died or from 19.11.1990 when he joined as Clerk, which representation of the petitioner was rejected by the respondents vide Annexure P-18. Therefore, by way of the present writ petition the petitioner has prayed that he be held entitled to be appointed as Ayurveda Chikitsa Adhikari from 9/1987 when his father died and that the pay of the petitioner be fixed as Ayurvedic Chikitsa Adhikari from 9/1987 to 30.8.1997 when he actually joined as such.

179. The petition, on the face of it, is not maintainable. The petitioner was offered appointment on compassionate ground against the post of Clerk in the year 1990 and he joined against the said post without any protest. Now, he cannot claim appointment as Ayurvedic Chikitsa Adhikari. Moreover, allowing the claim of the petitioner would affect the seniority of the persons who had already joined as Ayurvedic Chikitsa Adhikari prior to his

appointment in the said cadre. The writ petition is also not maintainable in view of the findings recorded by us on points No.(iv), (v) and (vi), supra.

180. Accordingly, it is held that there is no merit in the writ petition and the same is dismissed.

CWP No.5753 of 2012

181. Father of the petitioner, who was serving as Head Constable, died on 25.6.2005, while in service. The petitioner applied for the post of Clerk on compassionate ground. It is further pleaded that respondent No.2 issued an advertisement for recruitment of Constables for which the petitioner applied. The petitioner appeared in the efficiency test, written examination and personality test and qualified the same and figured at Serial No.5 of the waiting list. Respondents did not consider his name for appointment as Constable against 5% quota prescribed in the Policy for compassionate employment. Accordingly, the petitioner filed a writ petition, which was disposed of by providing that in case the petitioner files fresh representation expressing willingness to serve anywhere in the State and vacancy being available against 5% quota, the name of the petitioner shall be considered for such appointment. Thereafter, the petitioner filed representation on 24.7.2011 (P-11), which was rejected on 20.3.2012 (P-12) on the ground that the department was considering the cases of widows, secondly on the ground of income criteria and thirdly the name of the petitioner figures at Serial No.46 of the priority list maintained for offering appointment on compassionate ground against the post of Clerk and he cannot be considered in preference to the persons above him.

182. Thus, it has been prayed that Annexure P-12 be quashed and the respondents be directed to appoint the petitioner against the post of Constable in pursuance to the test and interview held, in accordance with the policy of the State Government which provides that 5% posts, in direct recruitment, shall be reserved for those applicants who are seeking employment on compassionate ground.

183. In the reply filed by the respondents, they have pleaded that there was no post reserved for the wards of the deceased police personnel under 5% quota in the 6th Indian Reserve Battalion or the other battalion. It is further pleaded in the reply that the family of the deceased-employee was not found to be in indigent circumstances which required immediate employment assistance on compassionate ground. It was also pleaded that the petitioner had initially applied for being appointed on compassionate ground against the post of Clerk, therefore, he cannot claim that his case be also considered for appointment against the post of Constable.

184. In view of the reply filed by the respondents, it is clear that there was no post reserved under 5% quota for the dependant of the deceased-employee, who died in harness, against which the petitioner is seeking appointment. Therefore, the respondents are directed to consider the case of the petitioner afresh for the post for which he initially applied in view of the Policy and findings recorded on points No.(i), (ii) and (iii).

CWP No.5446 of 2012

185. The petitioner, being widow, applied for compassionate appointment on the death of her husband, who was in service with the respondent Corporation as driver, when he died on 22.1.2006 in an accident, while performing duty. Vide letter dated 9.9.2009, it was intimated to the petitioner that her case cannot be considered in view of the decision of Board of Directors taken on 26.6.2008. It is averred that copy of the FIR (Annexure P-3) shows that there was no eye witness of the accident and the police had also not made any

investigation with respect to the cause of the accident. Thus, cause of accident cannot be attributed to the husband of the petitioner and the action of the respondents in declining employment to the petitioner on this ground is wrong. Hence, the writ petition.

186. In the reply filed by the respondents it has been pleaded that since the accident in question had taken place due to the negligence on the part of the deceased-employee, therefore, as per the decision of the Board of Directors of the respondent-Corporation, the claim of the petitioner was rightly rejected. The writ petition has also been resisted on other grounds, such as, the appointment on compassionate ground cannot be claimed as a matter of right and the appointment is to be given only in those cases where the family of the deceased was living in indigent circumstances.

187. There is nothing on the record, from a perusal of which it could be inferred that the respondents have ever inquired into the cause of accident and on the basis of such inquiry, have concluded that the accident, in question, had taken place due to the negligence on the part of the husband of the petitioner.

188. Thus, the writ petition is allowed, the impugned order is set aside and the respondents are directed to reconsider the case of the petitioner afresh in light of the Policy and the findings recorded on points No.(i) to (ix) hereinabove.

CWP No.3486 of 2012

189. Husband of the petitioner died on 7.7.2009 while working as water carrier-cum-cook with the respondent department on daily wage basis. The petitioner represented for employment assistance but no action was taken.

190. Facts of the case, in brief, are that the husband of the petitioner was initially engaged in the year 1985 as part time Water Carrier and was granted daily wage status in the year 2004. It is averred that the husband of the petitioner was entitled for daily wage status after completion of 10 years service and thereafter, for work charge status. Therefore, it has been prayed that:

a) The petitioner be granted appointment on compassionate ground;

b) Respondents be directed to grant gratuity, pension and other retiral benefits.

191. Reply of the respondents is to the effect that as per the policy of the State Government dated 16.8.2005, compassionate appointment can be granted in case an employee had put in 7 years continuous service on daily wage basis and in the case of the husband of the petitioner, he has only put in 5 years as daily wage worker.

192. The Policy in question was amended vide Office Memorandum, dated 18th May, 1995, whereby Clause 2(b) of the said policy was amended entitling the family of a daily waged employee, who dies while in service, to seek employment on compassionate ground, irrespective of number of years of service rendered by a daily wage worker.

193. In the instant case, the husband of the petitioner was granted daily wage status in the year, 2004, thus, as per the Policy of the respondents itself, the case of the petitioner for grant of compassionate appointment cannot be rejected on this score.

194. Having said so, the impugned order is set aside and the respondents are directed to reconsider the case of the petitioner afresh, of course, in accordance with the policy and the findings recorded hereinabove on points No.(i) to (ix). As far as the relief of granting other service benefits is concerned, the petitioner is at liberty to pursue that claim independently, if advised.

CWP No.9140 of 2014

195. Petitioner, being son of deceased employee, who was serving in the respondent Department as Forest Worker, applied for compassionate appointment as Chowkidar vide representation Annexure P-2, which representation is stated to be pending with the respondents. Thus, the petitioner prayed for directions to the respondents to offer him appointment against the post of Chowkidar.

196. The respondents in the reply have stated that vide letter No.FFE-A(E)2-85/2014, dated 26th February, 2015, sanction has been accorded for extending employment assistance on compassionate ground in favour of the petitioner against a Class-IV post on daily wage basis.

197. Therefore, in view of the reply filed by the respondents, nothing survives in the writ petition and the same is disposed of as such.

CWP No.7805 of 2014:

198. The father of the petitioner, while on duty and repairing HRTC bus, got seriously injured and suffered 100% disability and thus sought retirement on medical grounds and prayed that his son i.e. the petitioner be provided job, which request of retiring the father of the petitioner was accepted by the Corporation on 13th May, 2014. However, the request for providing employment to the petitioner was rejected vide letter dated 3rd May, 2014, (Annexure P-4). Thus, the petitioner has prayed that the letter, dated 3rd May, 2014, (Annexure P-4), whereby he has been denied employment on compassionate ground, be quashed.

199. No reply has been filed.

200. From the facts of the case, it is apparent that the father of the petitioner suffered 100% disability while discharging his duties. Therefore, it was incumbent upon the respondents not to reject the request of the petitioner for grant of appointment on compassionate ground in a cursory manner. Rather, the fact that the father of the petitioner suffered the injury while performing his duties ought to have been kept in mind by the respondents.

201. Accordingly, in the facts of the case, we deem it proper to quash Annexure P-4 and direct the respondents to consider the case of the petitioner sympathetically and take a decision afresh as early as possible, of course, in accordance with the Policy and as per the findings on points No.(i) to (ix) above. Ordered accordingly.

Letters Patent Appeals

LPA Nos.495 & 507 of 2011, 528, 529, 551, 552, 553, 554 555 & 577 of 2012

202**.** Judgments rendered by the learned Single Judge are the subject matter of these appeals, whereby appellants were directed to offer appointment to the writ petitioner(s) on regular basis from due date with all consequential benefits. The appellants have challenged the impugned judgments mainly on the ground that the learned Single Judge has erred in directing the appellants to offer appointment to the writ petitioners on regular basis from due date with all consequential benefits since the writ petitioners were offered appointment on daily wage basis as per the Policy in vogue and the petitioners also joined against the said posts without any protest.

203. In view of our findings recorded on points No.(iv) to (vi) above, the appeals are allowed, the impugned judgments are set aside and the writ petitions are dismissed.

LPA No.62 of 2014

204. This appeal is preferred by the State of H.P. against the judgment dated 10th September, 2012, whereby the learned Single Judge allowed the writ petition and directed the appellants/writ respondents to consider the case of the petitioner afresh in accordance with the policy prevalent in the year 2007, when the writ petitioner applied for being appointed on compassionate grounds.

205. Facts of the case, in brief, are that father of the petitioner died in harness on 26.12.2003 while working as Drawing Master on regular basis. The writ petitioner filed application for granting compassionate appointment, which was not adhered to on the ground that the family of the petitioner was not in indigent circumstances as the mother of the petitioner was drawing family pension to the tune Rs.16,918/- per month. Another ground of rejection was that the existing policy provided for employment either to the widow of the deceased employee or to an orphan. The learned Single Judge, after dilating on the judgments passed by the Apex Court, held that the stand of the writ respondents was not inconsonance with the policy prevalent in the year 2007, when the writ petitioner applied for appointment.

206. In view of our findings returned on points No.(ii) and (iii) above, the impugned judgment needs to be upheld to the extent that the case of the writ petitioner was to be considered by the writ respondents as per the Policy in vogue at the time of presenting the claim by the writ petitioner, for the first time.

207. Having said so, the Letters Patent Appeal is disposed of by directing the appellants/writ respondents to consider the case of the writ petitioner afresh, in view of our findings on point No.(i), read with the findings recorded on other points, and the Policy/Scheme occupying the field, expeditiously.

LPA No.189 of 2014

208**.** Judgment rendered in CWP No.1575 of 2012 dated 17.5.2014 has been assailed by the writ respondents, whereby the writ petition was disposed of in terms of the judgment passed in CWP No.1343 of 2012, dated 2.11.2012. The writ petitioner (respondent herein) was offered appointment on compassionate ground as daily wage Beldar vide letter dated 7th February, 2006, to which he joined without any protest. Thereafter, the writ petitioner filed the petition with the prayer that the writ respondents (appellants herein) be directed to consider the case of the petitioner for being appointed against a Class-III post.

209. It is worthwhile to mention here that In CWP No.1343 of 2012, the petitioner was appointed as Beldar on daily wage basis, on compassionate ground. The petitioner, by the medium of the writ petition, sought direction to the respondents to give him appointment against the post of Clerk. The learned Single Judge allowed the said writ petition and directed the respondents to appoint the petitioner as Clerk on daily wage basis from the date of his initial appointment.

210. In view of our findings on the above points, the appeal is allowed and the judgment, impugned in the instant appeal, is set aside. Consequently, the writ petition is dismissed.

211. Before parting with, we may place on record that the aim and object of providing employment assistance on compassionate ground is to immediately enable the dependants of an employee to tide over the sudden financial constraints on the death of their bread-earner. Thus, the source of such employment is purely based on humanitarian

grounds taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet.

212. Therefore, it is desirable that efforts are made by the respondents-State for providing employment assistance on compassionate ground promptly and without any loss of time, after the death of the employee, so that the family is provided immediate help and the purpose of carving out such an exception is achieved. To achieve the avowed purpose of framing the policy for grant of employment on compassionate ground, it is also desirable that the Authority, who is vested with the discretion of making appointment on compassionate ground, exercises the said discretion discreetly, without discrimination and without being influenced, strictly in accordance with the provisions envisaged in the Policy.

213. The writ petitions and the appeals are disposed of as indicated above, alongwith all pending CMPs, if any.

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

Taro Devi and another .....Petitioners.

Versus

Union of India and others .....Respondents.

CWP No.1414 of 2011
Reserved on : 03.09.2015
Pronounced on: 06.10.2015.

Constitution of India, 1950- Article 226- The husband of petitioner No. 1 and father of petitioner No. 2 died in service in 2007 - petitioner No. 1 applied for appointment on compassionate ground and her case was approved subject to the condition that she would have to pass matriculation examination within 2 years-she failed to do so hence her case was rejected-thereafter petitioner No. 2 applied and her case was also rejected on the ground that the case of the petitioner No. 1 stands already rejected- held that, since the petitioner No. 1 did not fulfill the minimum education qualification as prescribed under the rules her case was rightly rejected by the committee - the case of the petitioner No. 2 was rightly not considered-petition dismissed. (Para 3 to 9)

Case referred:
State of Gujarat and another vs. Chitraben, 2015 AIR SCW 4305

For the Petitioner: Mr.M.C. Verma, Advocate.
For the respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

The writ petition was de-linked from the group of cases, the lead case of which was CWP No.9094 of 2013, and was taken up separately.

2. By the medium of instant writ petition, the petitioner has invoked the jurisdiction of this Court for grant of employment on compassionate ground.

3. Facts of the case, in brief, are that one Shri Hira Lal, husband of petitioner No.1 and father of petitioner No.2 was in the employment of the respondents, who died on 17th February, 2007, while in service. Petitioner No.1, being the widow of the deceased-employee, applied for appointment on compassionate grounds. Her case was considered and was approved for appointment on compassionate ground, subject to the condition that she would have to pass her matriculation examination within two years. However, she failed to do so and ultimately, her case was rejected. Thereafter, petitioner No.2, being the daughter of the deceased-employee, applied in February, 2009 for being appointed on compassionate ground. Her case was also rejected by the respondents on the ground that since the case of petitioner No.1 already stands rejected, therefore, case of petitioner No.2 cannot be considered for the second time.

4. The said order was questioned by the petitioners before the Central Administrative Tribunal, (hereinafter referred to as the Tribunal), by way of Original Application No.483/HP/2009, which was dismissed by the Tribunal vide order dated 15th April, 2010.

5. Feeling aggrieved, the petitioners have challenged the order passed by the Tribunal by the medium of the instant appeal.

6. Respondents have filed the joint reply, in which it has been pleaded that since petitioner No.1 was not fulfilling the requisite qualification, therefore, her case for appointment was placed before the Circle Selection Committee for relaxation. The said Committee rejected the case of the petitioner on 27th June, 2008 and the petitioner was informed accordingly vide letter dated 4th July, 2008.

7. We have examined the pleadings of the parties and gone through the order passed by the Tribunal.

8. The Tribunal has rightly appreciated the facts of the case and has rightly made discussion in paragraphs 6, 7 and 8, which are reproduced below:

> *"6. It is well settled that appointment to any post is to be made from the open market through selection on merits under the relevant rules. Appointment on compassionate grounds is an exception to this rule which is provided only to help the family to mitigate the hardship caused to the family of the employee on account of unexpected death while in service. The whole object of granting compassionate appointment is thus to enable the family to tide over the sudden crisis. Such appointment cannot be claimed as a matter of right or on hereditary basis. The Govt. or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. In this regard, case of* ***Umesh Kumar Nagpal Vs. State of Haryana and other****, JT 1994(3) SC 525 is cited as an example.*
>
> *7. It will also be relevant to quote Clauses 2 and 3 of the instructions dated 5.5.2003 issued by Govt. of India which are quoted below:-*
>
> > *"2. It has, therefore, been decided that if compassionate appointment to genuine and deserving cases, as per the guidelines contained in the above OMs is not possible in the first year, due to non-availability of regular vacancy, the prescribed committee may review such cases to evaluate the financial conditions of the family to arrive at a decision as to whether a particular case*

warrant extension by one more year, for consideration for compassionate appointment by the Committee, subject to availability of a clear vacancy within the prescribed 5% quota. If on scrutiny by the Committee, a case is considered to be deserving, the name of such a persons can be continued for consideration for one more year.

3. the maximum time a person's name can be kept under consideration for offering compassionate appointment will be three years, subject to the condition that the prescribed committee has reviewed and certified the penurious condition of the applicant at the end of the first and the second year. After three years, if compassionate appointment, is not possible to be offered to the applicant, his case will be finally closed and will not be considered again."

8. From the pleadings, it is evident that the case of applicant No.1 was considered by the Circle Selection Committee. Since the Applicant No.1 did not possess the required minimum educational qualification i.e. Matriculation for appointment as GDSBPM, her case was rejected by the Committee on 27.6.2008 and she was informed vide letter dated 4.7.2008 (Annexure R/1). Since the Committee had already rejected the case of Applicant No.1, the case of Applicant No.2 was not considered."

9. A reference may also be made to the latest decision of the Apex Court in **State of Gujarat and another vs. Chitraben, 2015 AIR SCW 4305,** wherein also the applicant was seeking appointment on compassionate grounds but was not fulfilling the minimum educational qualification, as prescribed under the Rules governing the field. It was held by the Apex Court that the case of the applicant was rightly rejected for compassionate appointment since the applicant was not fulfilling the minimum requisite educational qualification as stipulated in the Rules governing the field.

10. Having said so, no interference is warranted in the order passed by the Tribunal. Accordingly, there is no merit in the writ petition and the same is dismissed, alongwith pending CMPs, if any.

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

Vinod Kumar .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.171 of 2015
Reserved on : 03.09.2015
Pronounced on: 06.10.2015.

Constitution of India, 1950- Article 226- Father of the petitioner died in service- petitioner applied for appointment on compassionate ground on attaining the age of majority and after completing 10+2 - the appointment was denied to the petitioner on the ground of his marriage - held that, compassionate appointment cannot be claimed as a matter of right and can be granted as per the scheme/Policy/ Regulations occupying the filed- since the

petitioner was married son of the deceased, he could not be considered as dependent and the appointment was rightly declined-writ petition dismissed. (Para 3 to 7)

For the Petitioner: Mr.Vikas Rathour, Advocate.
For the respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

The writ petition was de-linked from the group of cases, the lead case of which was CWP No.9094 of 2013, and was taken up separately.

2. By the medium of instant writ petition, the petitioner has sought writ of certiorari for quashing the order Annexure P-6 made by the respondents rejecting the claim of the petitioner for appointment on compassionate ground, and has also sought writ of mandamus commanding the respondents to consider the case of the petitioner for appointment on compassionate ground.

3. Precisely, the case of the petitioner is that father of the petitioner, who was serving as Sepoy General Duty, suffered injuries while on duty and ultimately died on 21.3.1990 at AIIMS, New Delhi. The petitioner, on attaining the age of majority and after completing 10+2 in the year 2011, applied for appointment on compassionate ground. Thereafter, he was called for undergoing physical, medical and written tests, which the petitioner, as pleaded, had qualified. However, vide letter dated 22.10.2013, it was conveyed to the petitioner that compassionate appointment cannot be granted to the petitioner since his father was serving as GD. Thereafter, again the petitioner applied for the post of Clerk and he was called for test, which he qualified. However, this time also appointment was declined to the petitioner on the ground of instructions issued vide Annexure P-4, wherein it is provided that a married man cannot be appointed. Again the petitioner represented vide representation, dated 10.9.2014, (Annexure P-5), however, vide communication Annexure P-6, the petitioner was intimated that since he got married, his case for compassionate appointment cannot be considered. Hence the petitioner sought quashment of Annexure P-6.

4. It was contended that the said rejection order Annexure P-6 is illegal for the reason that at the time of death of the father of the petitioner, the petitioner was minor and after attaining the age of majority, he got married and solemnizing of marriage is not a handicap for getting employment.

5. Respondents have filed the joint reply, in which, in paragraph 2 of the preliminary submissions, the respondents have pleaded that as per the policy in force at the relevant point of time, a married son of a deceased-employee cannot be considered as dependant. It is apt to reproduce the relevant portion of paragraph 2 of the preliminary submissions, hereunder:

> *"2. .....As per para 11 of Government of India, Department of Personnel & Training Office Memorandum No.14014/02/2012-Estt(D), dated 30th May 2013, dependant family members means;*
>
> *a) Spouse; or*
>
> *b) Son (including adopted son); or*

c) Daughter (including adopted daughter); or

d) Brother or sister in the case of unmarried Governmetn Servant; or

e) Member of the Armed Force, as defined in Sl.No.3, who was wholly dependant on the Government servant/member of the Armed Forces at the time of his death in harness or retirement on medical grounds, as the case may be.

However, as per para 3 of Government of India, Department of Personnel & Training Office Memorandum No.14014/02/2012-Estt(D) dated 30th May, 2013, a married son of a deceased government employee cannot be considered as dependant. In the instant case the petitioner got married on 12/10/2011 and he cannot be considered as dependant, hence the case of the petitioner for appointment in CRPF on compassionate grounds was rejected."

6. It is well settled principle of law that the compassionate appointment is to be granted only as per the Scheme/Policy/Regulations occupying the field and no appointment can be made de hors the Rules or the Scheme/Policy. It is also well settled proposition that compassionate appointment cannot be claimed as a matter of right and is an exception to the general rule of recruitment, which has been carved out with an aim to provide immediate assistance to the family of the deceased-employee.

7. Thus, it is apparent that the respondents have rightly rejected the claim of the petitioner.

8. It is also worthwhile to mention that the case of the petitioner was rejected by the Inspector General of Police, Central Sector, CRPF, Lucknow (UP) and all the respondents arrayed in the writ petition are not within the territorial jurisdiction of the State of Himachal Pradesh and the cause of action has also not arisen within the State of Himachal Pradesh.

9. Having said so, there is no merit in the writ petition filed by the petitioner and the same is dismissed, alongwith pending CMPs, if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Dhabe Ram ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 185 of 2015
Judgment reserved on : 17.9.2015
Date of Decision : October 7, 2015

N.D.P.S. Act, 1985- Section 18 & 20- Accused was traveling in a bus, which was checked by the police during a routine naaka-370gm charas and 90 gm opium was recovered on his personal search –the police witnesses gave contradictory versions regarding the time when they left the police station and regarding the fact whether the accused alone was searched or some other passenger was searched besides the accused or not - Police witnesses were not able to remember the vehicle in which they had travelled to the place of naaka- the person who carried the rukka to police station and the one who lodged the FIR not examined in the court - None of the police witnesses stated that the scales were being carried by the police-investigating officer was also silent about it- thus, the arrangement of scales and weights

remains unexplained- all these facts make the prosecution case highly doubtful-accused acquitted. (Para- 11 to 17)

N.D.P.S. Act, 1985- Section 50- consent memo reveals that the accused is an illiterate and has put his thumb mark on the same- No documentary or ocular material available on the record to show that the memo was read over and explained to the accused- compliance of section 50 not established. (Para -20)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793

Lal Mandi v. State of W.B., (1995) 3 SCC 603

For the appellant	:	Mr. G. R. Palsra, Advocate, for the appellant-accused.
For the respondent	:	Mr. R. S. Verma, Addl. Advocate General with Mr. R.M. Bisht, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 7.5.2015, passed by the learned Special Judge, Mandi, Distt. Mandi, H.P. in Sessions Trial No. 35 of 2010, titled as State of Himachal Pradesh vs. Dhabe Ram, whereby the appellant-accused stands convicted for having committed offences punishable under the provisions of Sections 18 and 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of three years and fine of Rs.30,000/- for offence punishable under Section 20 of the Act and rigorous imprisonment for a period of two years and fine of Rs.20,000/- for offence punishable under Section 18 of the Act, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 1.3.2010 police party headed by ASI Mehar Singh (PW-11), comprising of HC Dharam Pal (PW-1), PSI Naveen Jhalta and Constable Amar Singh (both not examined) laid naaka at Bindrabani. At about 2.15 p.m., bus bearing No. HP65 2571, in which accused was sitting was stopped for checking. Seeing the police party, accused who was sitting on seat No. 29, became perplexed. On suspicion, in the presence of driver Kishan Singh (not examined) and conductor Ramesh Kumar (PW-2), after obtaining consent (Ext. PW-1/A), accused was searched. From his personal search, police recovered two polythene packets wrapped around his abdomen with a cello tape containing charas and opium, which upon weighment, were found to be 370 grams and 90 grams respectively. The entire bulk parcel was sealed with seal impression-H and seized vide memo (Ext. PW-1/E). Ruka (Ext. PW-1/F) sent through Const. Amar Singh (not examined), led to registration of F.I.R. No. 82 of 2010, dated 1.3.2010 at Police Station Sadar, Mandi, Distt. Mandi, H.P., against the accused under the provisions of Sections 18/20 of the Act. With the completion of proceedings on the spot, including filling up of NCB forms(Ext. PW-1/C), in triplicate, and arrest of the accused, case property was produced before SI/SHO Mohan Lal (PW-4), who after resealing the same with seal impression-T, deposited it with Addl. MHC Anil Kumar (PW-3) incharge of the Maalkhana. Constable Roshan Lal (PW-5) took the case property for chemical analysis to the State Forensic Science Laboratory at Junga vide Road Certificate (Ext. PW-3/C) and report (Ext. PW-3/E) obtained through HC Sushil Kumar (PW-7) was taken on record by the police which revealed the contraband substance to be charas and opium. Special report (Ext. PW-6/A) was sent through HHC

Dalip Singh (PW-6) to the office of Dy. Superintendent of Police, Mandi. With the completion of investigation, which prima facie revealed complicity of the accused person in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 18 and 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as twelve witnesses and the statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded false implication. No evidence in defence was led by the accused.

5. Appreciating the material placed on record by the prosecution, trial Court convicted the accused for the charged offences and sentenced as aforesaid. Hence the present appeal.

6. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". .... (Emphasis supplied)

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 the accused.

9. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

10. Trial Court convicted the accused on the following grounds: (i) Prosecution was able to establish recovery of the contraband substance from the conscious possession of the accused. (ii) Testimonies of police officials stand corroborated by independent witness. (iii) Contradictions pointed out by the accused, being minor in nature, in no manner render the version of the prosecution case to be false or doubtful. (iv) Statutory presumption remains unrebutted by the accused.

11. The genesis of the prosecution story of the police party having left police station Sadar, Mandi on traffic checking and checking of narcotic substances towards Bindrawani, National Highway No. 21, does not appear to have been proved beyond reasonable doubt. It is common case of HC Dharam Pal (PW-1) and ASI Mehar Singh (PW-11) that the police party left the police station in a private bus. Now significantly PSI Naveen

Jhalta and Constable Amar Singh, the other members of the police party, were not examined in Court. ASI Mehar Singh states that the police party left the police station at 11.15 a.m. whereas Dharam Pal states it to be at 11.45 a.m. The contradiction with regard to the timing being minor acquires significance when it is found that the witnesses do not remember the vehicle in which they left for Bindrabani. Neither the make nor the type of the vehicle is disclosed. Police officials, four in number, left with a purpose, that is, checking of narcotic substances. Was any fare paid? Who hired the vehicle? Did the police take lift? Was there no official vehicle available? All these questions remain unanswered.

12. Further according to Dharam Pal, after reaching Bindrabani police party set up naaka on the National Highway No. 21. But Mehar Singh states that such naaka already stood set up before the party reached Bindrawani. Thus genesis of the prosecution story is rendered to be doubtful.

13. Prosecution wants the court to believe that in the presence of the conductor (PW-2) and driver (not examined) of the bus, Mehar Singh apprised the accused of his statutory rights and after obtaining his consent vide memo (Ext. PW-1/A), not only gave his personal search but all the police officials were searched by the accused and only thereafter, accused was searched and recovery effected from his person, who had tied packets containing 370 grams charas and 90 grams opium with cello tape around his abdomen. At that time accused was sitting on seat No. 29 of the bus which was checked by the patrol party.

14. Perusal of testimonies of these witnesses only establishes contradictions in their versions to be material. (i) Ramesh Kumar states that two police officials entered the bus from each of the two doors of the bus, whereas Mehar Singh states that only he entered the bus from the front door and the remaining three police officials entered from the rear door. (ii) Ramesh Kumar states that accused was sitting on seat No. 29 with another passenger sitting besides him. Though Dharam Pal feigned ignorance about such fact but Mehar Singh is emphatic that accused was alone. (iii) It is common case of all these witnesses that inside the bus there were other passengers (20 to 30). Ramesh Kumar states that except for accused, no other passenger was searched. Why so? He does not clarify. Be that as it may be, though Dharam Pal is silent on this aspect but Mehar Singh is categorical that even other passengers were searched by other police officials. Hence version of Mehar Singh stands belied and contradicted. (iv) Ramesh Kumar states that seat No. 29 was immediately before the rear door, but Mehar Singh states that it was in the middle of the bus. All these contradictions when viewed cumulatively render the testimonies of the witnesses to be shaky and prosecution case to be extremely doubtful. It appears that either all the members of the police party were not present or no recovery was affected in the manner in which the police want the court to believe.

15. But what totally knocks down the prosecution case is the fact that constable Amar Singh, who carried the ruka from the spot to the police station, was given up by the prosecution. Also Kishan Singh, driver of the bus and PSI Naveen Khalta the other police official present on the spot have not been examined. Why so? has not been explained.

16. Now who registered the F.I.R. has not been proved on record. All this acquires significance in view of the fact that there is over writing on document (Ext. PW-1/C) with regard to the time at which the parcel was sent to the police station. It has come in the testimony of Mehar Singh that Amar Singh took ruka to the police station at 3.15 p.m. Now how did Amar Singh travel up to the police station? Who registered the F.I.R.? Who brought the case file alongwith the F.I.R. back to the spot? How did such person travel? All these questions remain un-explained by the prosecution. The unexhibited document i.e. F.I.R.

reveals it to be registered on 1.3.2010 at 3.35 p.m. Now if it took only half an hour for Amar Singh to reach the police station, then how is it that police party, after completing the proceedings on the spot, reached the police station at 6.25 p.m., the time of resealing as per memo Ext. PW-3/A. It is common case of the witnesses that entire proceedings stood completed within four hours and it would not have been possible for the police to have reached the police station, on foot, by that time, for it is not the case of the prosecution that police returned by transport vehicle.

17. There is yet another reason which renders the prosecution case to be fatal. According to police officials accused gave his consent of being searched by the police officials present on the spot. Now consent memo (Ext. PW-1/A) reveals that the accused is illiterate as the document bears his thumb impression. Even his statement under Section 313 Cr. P.C. is thumb marked and not signed. Neither from the testimonies nor from the document it can be inferred that the contents of the document were either read over or explained to the accused. In absence thereof, and in view of recovery having been effected from the person of the accused, it cannot be said that there has been compliance of mandatory provisions of Section 50 of the Act.

18. Police officials want the court to believe that before they searched the accused, he searched them. But then there is no such search memo on record. The improbability or falsehood in the testimonies is quite apparent.

19. Contradiction is also with regard to the link evidence. And it is material. MHC Anil Kumar (PW-3) states that on 20.3.2010, through Constable Roshan Lal (PW-5), the case property was sent for chemical analysis to the State Forensic Science Laboratory Junga. But then Constable Roshan Lal states that he took the parcel on 2.3.2010. The contradiction which is not a typographical error, does not end here with the improbabilities getting bigger, bolder and prominent. According to Roshan Lal, receipt of deposit, on his return, was handed over to the MHC at the police station. But Anil Kumar is absolutely silent and the receipt has neither been placed nor proved on record. Further according to Anil Kumar, on 14.4.2010 he directed constable Sushil Kumar No. 561 to bring the case property and the F.S.L. report, which was duly brought and entered in the record. However, Sushil Kumar (PW-7) by stepping into the witness box has stated that he only brought the report from F.S.L. Junga and that too on 13.4.2010. Constable Roshan Lal does not even remember the time when he received the case property and left for Junga. Anil Kumar does not remember the time when the case property was sent or received from F.S.L. Junga. Now all these contradictions and missing links have not been explained by the prosecution rendering the case to be extremely doubtful.

20. There is yet another unexplained and unanswered doubt emanating from the record. None of the police officials state that the police party was carrying scales with them. The Investigating Officer Mehar Singh does not state that he was carrying the I.O. Kit. If this was so, then from where the scales and weights were brought and how the contraband substance was weighed, remains unexplained.

21. All these contradictions, improbabilities, embellishments stood ignored by the trial Court and as such, findings returned on all the points being perverse and contrary to law are unsustainable in law.

22. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

23. Since prosecution has not been able to establish its case of having recovered the contraband substance from the conscious possession of the accused, no statutory presumption as envisaged under Section 35 of the Act, can be drawn against the accused.

24. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated 7.5.2015, passed by the learned Special Judge, Mandi, Distt. Mandi, H.P. in Sessions Trial No. 35 of 2010, titled as State of Himachal Pradesh vs. Dhabe Ram, is set aside and the accused is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him. Release warrants be prepared accordingly.

Appeal stands disposed of, so also pending application(s), if any.

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

Harjesh Singh & ors .....Appellants.

Versus

Roshan Lal .....Respondent.

RSA No. 530 of 2010.
Reserved on: 6.10.2015.
Decided on: 7.10.2015.

Specific Relief Act, 1963- Section 34- Plaintiff was recorded as non-occupancy tenant of the suit land - his name was deleted during settlement and the names of the defendants were recorded as non-occupancy tenants- defendant admitted in cross examination that plaintiff was in possession of the suit land but claimed that 'K' had got the land resumed in the year 1969 – however, no record was filed to prove this fact- no evidence was led to prove that plaintiff was summoned by issuing notice in Form L.R.-VII- defendant failed to prove that tenancy was relinquished in accordance with law- provisions of the Act were not complied with while effecting the changes – held that entries have been incorporated without any lawful order or any contract and cannot be relied upon. (Para-10)

For the appellant(s): Mr. Virender Singh Rathour, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge-II, Kangra at Dharamshala, H.P. dated 22.4.2010, passed in Civil Appeal No. 22-D/XIII/08.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for declaration and consequential relief of permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants). According to the plaintiff,

he was recorded as non-occupancy tenant of land comprised in Khata No. 96, Khatauni No. 153, Kh. No. 432, area measuring 0-02-64 hectares, situated in Mohal Dar, Mouza Ghaniara, Tehsil Dharamshala, Distt. Kangra, H.P.. However, in the settlement, the claim of the plaintiff was deleted as non-occupancy tenant without any basis. The entry was changed without the knowledge of the plaintiff. The names of the defendants were recorded as non-occupancy tenants. They were trying to interfere with his possession.

3. The suit was contested by the defendants. According to them, the suit land is under the tenancy of the defendants prior to the settlement operation from 1970. The defendants were inducted as tenants at will by owner Kishan Chand. They are continuously coming in possession of the land.

4. The replication was filed by the plaintiff. The learned trial Court framed the issues on 5.8.2003. The suit was decreed by the learned trial Court vide judgment dated 22.2.2008. The defendants, feeling aggrieved, filed an appeal before the learned Addl. District Judge (II), Kangra at Dharamshala against the judgment and decree dated 22.2.2008. The learned Addl. District Judge (II), Kangra at Dharamshala, dismissed the same on 22.4.2010. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 31.10.2012:

> "1. Whether both the courts below have misread, misinterpreted and misconstrued oral as well as documentary evidence of the parties especially the Ext. PW-1/A and oral evidence of PW-2 to PW-4 which has materially prejudiced the case of the appellants?
>
> 2. Whether the Civil Court has jurisdiction specialty where the long standing entries in favour of the defendants are recorded which is continuing even today?
>
> 3. Whether judgment and decree passed by the Courts below is vitiated being contrary to the provision of Section 112 of the HP Tenancy and Land Reforms Act, 1972?"

6. Mr. Virender Singh Rathour, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misread and misinterpreted the oral as well as documentary evidence available on record. On the other hand, Mr. Neeraj Gupta, Advocate has supported the judgments and decrees passed by both the Courts below.

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

8. The entry in the name of plaintiff was recorded as non-occupancy tenant in the jamabandi for the year 1967-68 Ext. P-3. In the column of ownership of the suit land, the name of Kishan Chand was recorded. However, in the Misal Haquiat Ext. P-2, the name of the defendants has been recorded as non-occupancy tenants during the settlement proceedings. The defendants have not placed any tangible evidence on record to establish how the settlement authorities have deleted the name of the plaintiff as non-occupancy tenant and entered the name of defendants.

9. PW-1 Roshan Lal has claimed himself to be owner-in-possession of the suit land. His statement was duly corroborated by owner of the land PW-2 Kishan Chand. According to him, the plaintiff was in possession of the suit land for the last 30-35 years as

non-occupancy tenant. PW-3 Suresh Kumar has also deposed that the plaintiff was non-occupancy tenant in cultivatory possession of the suit land.

10. Defendant Hari Singh, in his cross-examination, has admitted that plaintiff was in possession of the suit land but Kishan Chand has got it resumed in the year 1969. However, there is no such contemporaneous record available on record. Defendants have not led any evidence to prove that the plaintiff was summoned by issuing notice in Form L.R.-VII. It cannot be said on the basis of Ext. DA that the defendants were inducted as tenants by Kishan Chand. There is a detailed procedure under which the entries can be changed. The defendants have miserably failed to prove that the tenancy was relinquished in accordance with law. There is no written contract or agreement between the parties to create tenancy. Tenancy is a bilateral act. The defendants have not examined any witness to prove that they were in possession of the suit land except the bald assertion by the defendant as DW-1. Merely that the plaintiff was residing at a distance of 30-35 kms., would not prove that he was not in possession of the suit land. The Civil Court had the jurisdiction since the authorities have not acted in conformity with the fundamental principles of the procedure. It is reiterated that the revenue authorities have not complied with the provisions of the Act while effecting changes in favour of the defendants. The entries made in favour of the defendants were null and void. The entries have been incorporated without any lawful order or any contract *inter se* defendants and Kishan Chand owner. Both the Courts below have correctly appreciated the oral as well documentary evidence on record. The substantial questions of law are answered accordingly.

11. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Harjesh Singh and others. ...Appellants.

Versus

Vijay Kumar and others. ...Respondents.

RSA No. 1 of 2012
Reserved on: 6.10.2015
Decided on: 7.10.2015

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit that he is owner in possession of the suit land- defendants got their possession recorded as tenant during settlement in collusion with the settlement staff and they are not in possession- defendants claimed that they are tenants at Will over the suit land since 1977- copy of jamabandi for the year 1967-68 shows that Khasra Nos. 370 and 376 were recorded in the ownership and possession of the plaintiff while Khasra No. 377 was recorded in the tenancy of 'C'- defendants claimed the exchange but had failed to prove the same- they had not specified the date on which tenancy was exchanged with the suit land- revenue record was not produced to prove the exchange- defendants have not produced any material on record to show that entries were made on the basis of some order passed by the Competent Authority- defendants have also not produced any evidence to show that they had paid any rent to the owner- entries in the Missal Hakiyat Bandobast Jadid is not sufficient to prove the exchange. (Para-14 and 15)

For the Appellants : Mr. V.S. Rathore, Advocate.
For the Respondents: Mr. Neeraj Gupta, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 19.10.2011 rendered by the Additional District Judge-II, Kangra at Dharamshala in Civil Appeal RBT No. 312-D/10/07.

2. "Key facts" necessary for the adjudication of this appeal are that the respondent-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit against the appellants-defendants and proforma respondent to the effect that he was owner in possession of the suit land bearing Khata No.83 min, Khatauni No. 140 min, Khasra No. 185, measuring 0-24-55 hectares situated at Mohal Jhikli Dar, Mauza Ghaniara, Tehsil Dharamshala, District Kangra. Prior to the settlement, suit land was recorded under Khasra Nos. 370, 373 and 376 in the copy of Jamabandi for the year 1967-68. However, during settlement, defendants in collusion with the settlement staff got their possession recorded as tenant. Defendants were never in possession of the suit land. They never cultivated the suit land. It is in these circumstances, suit for declaration declaring the revenue entries null and void. He has also prayed for consequential relief of injunction restraining the defendants from interfering in the possession of plaintiff over the suit land.

3. Suit was contested by the defendants. According to the defendants, they were tenant at will over the suit land since 1977. They were tenant over Khasra Nos. 504 and 548 and the tenancy of Khasra No. 504 was exchanged with the suit land bearing Khasra No. 185.

4. Issues were framed by the Civil Judge (Jr. Division), Dharamshala on 10.2.2002. He decreed the suit on 28.9.2007. Defendants feeling aggrieved and dissatisfied with the judgment and decree dated 28.9.2007 preferred an appeal before the Additional District Judge-II, Dharamshala. He dismissed the appeal on 19.10.2011. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **"Whether the learned trial court has wrongly entertained the suit since there is specific bar under section 58 (3) of the Tenancy and Land Reforms Act to determine the question of tenancy?**
2. **Whether the learned court below has correctly decided the point of limitation in view of the revenue entries qua the tenancy of the suit land since 1970?**
3. **Whether the learned trial court is right to shift the onus on appellant/defendant to prove tenancy whereas presumption of truth is attached to the revenue record?**

5. Mr. V.S. Rathour, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misread and misinterpreted the material placed on record.

6. Mr. Neeraj Gupta has supported the judgments and decrees passed by both the courts below.

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

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

9. Plaintiff has appeared as PW-1. According to him, defendants or their father were never inducted as tenants by him. Defendants were tenants of different land. The settlement was carried out in the year 1974-75. He was not summoned at the time of settlement. He came to know about the wrong entries in the month of March, 2001 when defendants started causing interference over the suit land. He has denied the suggestion that defendants exchanged tenancy of the suit land with Khasra No. 504.

10. PW-2 Vipan Kumar has deposed that he knew the parties. The suit land was in ownership and possession of the plaintiff. Defendants never cultivated the suit land.

11. DW-1 Karam Chand has deposed that at the time of settlement, plaintiff was present on the spot. Entry qua his tenancy was made in the presence of plaintiff. According to him, written exchange deed was prepared. However, he could not produce the deed. Volunteered that the exchange of tenancy was incorporated in the revenue papers. The written deed was executed in Tehsil. It was written by the deed writer.

12. DW-2 Vidhi Chand has testified that plaintiff was present during the settlement. He has admitted that the plaintiff neither inducted the defendants nor their father as tenants over the suit land. Defendants have not paid any rent to the plaintiff in his presence. Settlement staff never summoned the plaintiff. He was not present at the time of settlement.

13. DW-3 Rattan Lal, Reader to A.D.M. Dharmashala has produced the record of LR-V No. 102/D dated 25.11.1975.

14. According to Jamabandi for the year 1967-68 Ex.P-3, prior to settlement Khasra Nos. 370 and 376 were recorded in the ownership and possession of the plaintiff and Khasra No. 373 was recorded in the tenancy of Chuhru. Defendants have failed to prove the exchange. Defendants have not specified the date on which tenancy was changed with the suit land. No independent witness was examined to this effect. According to defendant No.1, exchange of the tenancy was incorporated in the revenue record. However, revenue record has not been produced to prove the exchange. It was only during settlement that names of defendants were recorded in the possessory column as non-occupancy tenants. Defendants have not placed any material on record that entries were made on the basis of some orders passed by the competent authority. DW-2 Vidhi Chand has admitted that plaintiff has neither inducted the defendants nor their father as tenants over the suit land. He has also admitted that settlement staff never summoned the plaintiff. Tenancy is a bilateral act. Defendants have not produced any evidence that they have paid any rent to the owner. Defendants have not proved the submission of application by the plaintiff. There is no material also on record to prove that Chuhru has ever relinquished his tenancy and has exchanged his land.

15. Mr. V.S. Rathour has placed reliance on Ex.D-1 order dated 20.3.1991. Fact of the matter is that this order was set aside by the Divisional Commissioner on 13.11.1998 vide Annexure P-6. DW-3 Rattan Lal has admitted that as per record, plaintiff never inducted the defendants or their father as tenants over Khasra Nos. 370 and 376. Regarding these Khasra numbers, plaintiff did not file LR-V form. The entry made in the Missal Hakiyat Bandobast Jadid Ex.A-1 is not sufficient to prove the exchange over the suit land. It was for the defendants to prove the exchange. It is reiterated that defendants have failed to prove that there was exchange of tenancy over Khasra No. 504 with the suit land.

Plaintiff has duly proved that entries were changed illegally by the settlement staff without hearing him.

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

17. The substantial questions of law are answered accordingly.

18. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Jagat Pal .....Petitioner

Versus

Himachal Pradesh State Electricity Board ....Respondent

CWP No. 10613 of 2011
Date of decision: 7.10.2015

Constitution of India, 1950- Article 226- Petitioner's father retired on 30.09.2003 and passed away on 10.10.2003- request of the petitioner for employment on compensatory ground declined-order of denial challenged by way of writ petition-held, that the case of the petitioner does not fulfill the requirements laid down in the policy framed in the year 1990- request rightly denied- petition dismissed. (Para 5 & 6)

Case referred:
Surinder Kumar versus State of Himachal Pradesh and others, I L R 2015 (V) HP Page-840 (D.B.)

For the petitioner : Mr. Lalit Kumar Sharma, Advocate.
For the respondents: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioner has sought quashment of order dated 21.03.2011, whereby his request for employment on compassionate ground came to be rejected and further sought writ of mandamus commanding the respondent to consider his case for appointment to the post of Clerk/Driver on compassionate ground.

2. Heard.

3. Admittedly, Sohan Lal, father of the petitioner, was in the employment of the respondent department, retired on 30th September, 2003 and thereafter passed away on 10th October, 2003.

4. The moot question is whether the petitioner can claim appointment on compassionate ground.

5. The Court in a batch of writ petitions, the lead case of which is **CWP No. 9094 of 2013**, titled **Surinder Kumar versus State of Himachal Pradesh and others**, decided on 6th October, 2015, has passed a detailed judgment and laid down the test for considering the case(s) of the applicants(s) for appointment on compassionate ground.

6. The Policy framed in the year 1990 provides that if an employee dies during service before attaining the age of 53 years or 55 years, as the case may be, his dependants can claim compassionate appointment, provided other eligibility conditions are fulfilled.

7. Having said so, we are of the considered view that the petitioner cannot claim the compassionate appointment.

8. Viewed thus, the impugned order dated 21.03.2011 is upheld. Accordingly, the writ petition is dismissed alongwith pending applications.

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

Kali Charan ..Appellant.

Versus

ICICI Bank ..Respondent.

RFA No.135 of 2005 with Cross Objections No.198 of 2005.

Judgment reserved on 5th August, 2015.

Date of Decision: 7th October, 2015.

Code of Civil Procedure, 1908- Section 2 (12) - Premises was given to the defendant by the predecessor of the plaintiff for running a canteen- licence was revoked but the defendant did not hand over the possession to the plaintiff- plaintiff claimed mesne profit- trial Court held that plaintiff became owner w.e.f. 1.7.2001 and in absence of the sale deed, it cannot be said that plaintiff had right to claim use and occupation charges- held, that plaintiff became owner of the premises on 1.7.2001 and the license was revoked on 30.9.2001; therefore, plaintiff is entitled for mesne profits- trial Court had wrongly denied the mesne profits to the plaintiff- mesne profit @ Rs.5,000/- per month awarded in favour of the plaintiff.

(Para-32 to 38)

Specific Relief Act, 1963- Section 5- Suit premises was made available to the defendant on licence for providing canteen facility to the employees and award staff of the plaintiff- defendant was not permitted to sell the food articles to the outsiders but was to supply the same to the employees and award staff– no rent was to be paid for the premises- licence of the defendant was revoked w.e.f. 30.09.2001- however, defendant did not remove his belongings and started serving the food to the outsiders- defendant pleaded that licence was granted for one year which was never renewed or extended and he is in adverse possession of the premises – suit of the plaintiff was decreed by the trial Court for possession - it was duly proved on record that canteen was given to the defendant for the benefit of the Award staff- services of Award staff were dispensed with which led to automatic revocation of the licence - no rent was payable; therefore, provisions of H.P. Urban Rent Control Act are not

applicable- defendant had failed to prove the plea of adverse possession- hence, suit was rightly decreed for the possession (Para-21 to 31)

Cases referred:
Dhurandhar Prasad Singh v. Jai Prakash University and others, (2001) 6 SCC 534
Braham Dutt Sharma v. Life Insurance Corporation of India, AIR 1966 Allahabad 474
Shakti Chand v. Chamaru Ram etc. ILR (1974) Himachal Series 1154

For the appellant: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.
For the respondent: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This judgment shall dispose of the present appeal and also Cross Objections aforesaid arising out of the judgment and decree dated 4th March, 2005, passed by learned District Judge, Shimla, in Civil Suit No.15-S/1 of 2002.

2. While the appellant, hereinafter to be referred as 'the defendant' is aggrieved by the decree of possession of the suit premises shown in site plan Ext.P-12 against him, whereby he has been directed to deliver the vacant possession thereof to the respondent, hereinafter to be referred as 'the plaintiff-bank' within a period not exceeding more than one month from the date of decree and also return the articles of crockery supplied to him by the plaintiff-bank, at the same time the plaintiff-bank is aggrieved by that part of the decree whereby its suit for recovery of Rs.5,40,000/- on account of damages has been dismissed.

3. The suit premises shown in the site plan Ext.P-12, is situated in the sub-basement of the building owned by the erstwhile ANZ Grindlays Bank Limited, The Mall, Shimla. The Bank lateron came to be named as Standard Chartered Grindlays Bank Limited, The Mall, Shimla on and with effect from 1st day of August, 2000. In the year 1981, the suit premises was made available to the defendant by the Bank on license basis for providing canteen facilities to its employees and Award staff. Under the arrangement so made the affairs of the canteen were to be managed by the Secretary of the employees-union and its office bearers. It was for them to supervise the day-to-day pursuits of the canteen and also to fix the rates of the items to be cooked and prepared in the canteen by the defendant. Even the quality of the food was also to be checked by the Secretary of the Union. The purpose to run the canteen was to supply good food stuff to the employees of the bank at cheaper rates and for that the bank was subsidizing for the electricity charges at the rate of Rs.80/- per month, besides the supply of furniture, crockery and cutlery etc. The defendant was not authorized to sell eatable and other food articles prepared in the canteen to outsiders. The facility of canteen being not of commercial venture, was absolutely for the benefit and use of the members of the bank-staff. The defendant was not required to pay any rent or ever demanded by the plaintiff-bank.

4. The services of the Award staff of the bank were dispensed with totally on and with effect from 30th September, 2001. Therefore, there being no need of the canteen facilities any further the defendant was asked to remove himself and his belongings from the canteen premises, as his license had already been revoked. However, the defendant did not

remove either himself or his personal belongings from the premises in question and to the contrary in a clandestine manner he started permitting outsiders to enter into the canteen premises, exclusively the property of the plaintiff-bank. The outsiders were being served with eatables and beverages by him irrespective of the fact that the canteen was given only for the staff members of the plaintiff-bank. The entry of outsiders has become a source of danger to the safety and security of the plaintiff-bank.

5. The defendant instead of removing his personal belongings and handing over vacant possession of the suit premises to the plaintiff-bank filed Civil Suit No.209-I of 1991, Ext.P-5, for seeking the relief of permanent prohibitory injunction against it. The relief was sought on the sole ground that the plaintiff herein can only evict him from the canteen premises under due process of law and not by use of force. The suit accordingly was decreed having been compromised vide order Ext. P-11.

6. The plaintiff in order to avoid legal complications, has served the defendant with legal notice dated 4th July, 1992 and thereby he was called upon to remove himself and also his personal belongings from the suit premises, failing which he will render himself liable to pay use and occupation charges, but of no available. The same was followed by another notice dated 3rd May, 2002, Ext.P-2, but despite the receipt of the same also he failed to remove himself and his belongings from the suit premises, hence the present suit for the grant of following relief:

> "a) To issue a mandatory injunction in favour of the plaintiff bank and against the defendant directing him to remove himself, his personal belongings, his servants and their personal belongings and/or any persons claiming through or under him from the suit premises comprising one room in the sub basement portion of the premises known as Standard Chartered Grindlays Bank Ltd. popularly known as "Grindlays Bank Building". The demised premises being properly described in para 8 of the plaint and having been coloured in red in the building plan filed with the plaint. In the alternative, this Hon'ble Court may kindly be pleased to pass a decree of possession in favour of the plaintiff and against the defendant directing the defendant to hand over vacant and peaceful possession of the canteen premises described hereinabove to the plaintiff bank alongwith the crockery, cutlery and other articles that have been supplied to him by the plaintiff bank.
>
> b) This Hon'ble Court may further be pleased to pass a decree at the rate of Rs.500/- per day in the sum of Rs.5,40,000/- in favour of the plaintiff bank and against the defendant on account of unauthorized use and occupation charges in respect of the suit premises alongwith interest at the rate of 18% p.a. from the date of filing of the suit till the recovery of the aforementioned amount. This Hon'ble Court may further be pleased to pass a decree against the defendant and in favour of the plaintiff for unauthorized use and occupation charges at the aforementioned rate of Rs.500/- per day from the date of filing of the suit till the date that the defendant complies with the terms and decree that may be passed against him for removing himself and or his servants and belongings from the premises in question or till the date that the vacant and peaceful possession of the premises is handed over by the defendant to the plaintiff bank. The decree for unauthorized use and occupation charges as claimed, be passed alongwith pendente lite and future interest at the rate of 18% p.a.

c) Allow any other relief deemed fit by this Hon'ble Court in favour of the plaintiff bank and against the defendant in the peculiar facts and circumstances attending to the case;

d) Allow costs of the suit in favour of the plaintiff bank and against the defendant."

7. The defendant on entering appearance has contested the suit. In preliminary, the objections that the same on behalf of Standard Chartered Grindlays Bank Limited in view of the sale of the building by it to ICICI bank is not maintainable and that he being in adverse possession of the suit premises decree for mandatory injunction cannot be granted, were raised. On merits, he has not disputed the suit premises made available to him in the year 1981 by the bank for providing canteen facilities at subsidized rates to its employees. However, according to him, he was not a licensee of the plaintiff-bank so far as the suit premises is concerned. The license, according to him, was granted in his favour for a period of one year by the employees-union, which was never renewed or extended. Therefore, he is in adverse possession of the suit premises. In the year 1989, the Municipal Corporation, Shimla has issued a license under the Shop and Commercial Establishment Act in his favour. He has installed electricity and water connection in his own name in the suit premises in the year 1982. He, therefore, allegedly become owner of the same and as such question of revocation of the license not at all arises. It is denied that he was not authorized to sell eatables and other food articles to outsiders and that he has un-authorisedly started commercial venture in the suit premises. He has also disputed his liability to pay damages to the plaintiff.

8. In replication, the plaintiff has denied the contents of the preliminary objections being wrong and on merits reiterated the entire case as set out in the plaint.

9. On the pleadings of the parties, the following issues were framed:

1. Whether the defendant was inducted as licensee in the disputed premises by the predecessor of the plaintiff bank? OPP.
2. Whether the license in favour of the defendant has been lawfully revoked and the plaintiff is entitled to recovery of possession of the disputed premises from the defendant? OPD.
3. Whether the suit in the present form is not maintainable, as alleged? OPD.
4. Whether the suit is barred by limitation, as alleged? OPD.
5. Whether the defendant has become the owner of the disputed premises by way of adverse possession? OPD.
6. Whether the plaintiff is entitled to claim damages against the defendant as use and occupation charges, if so, how much? OPP.
7. Relief.

10. The parties were put to trial on all these issues. The plaintiff in turn has examined three witnesses in all. PW-1 Shri Joginder Kumar, is Junior Assistant General Record Room, Shimla, who has produced the record of Civil Suit No.209-I of 1991, titled Kali Charan versus Grindlays Bank and proved the copies of order sheets Exts.P-6 to 11. PW-2 Shri L.D. Pal, Manager of the plaintiff bank has instituted the suit and has proved the plan of the suit premises Ext.P-12, list of articles supplied to the defendant by the plaintiff bank, Ext.P-14, copy of notice Ext.P-2, postal receipt Ext.P-14, acknowledgement Ext.P-1, copy of bank account of the defendant Ext.P-3, copy of plaint in the previous suit filed by the

defendant, Ext.P-5 and copy of written statement Ext.P-4 filed by the plaintiff bank. PW-3 Shri Devinder Kumar Sharma, Senior Manager of Indian Bank, The Mall Shimla has been examined to prove the lease deed Ext.P-15 qua the premises under the use and occupation of the Indian Bank as well as the area leased out and the amount being paid towards monthly rental thereof.

11. The defendant, on the other hand, has examined DW-1 Shri Naresh Sood, Estate Officer, Municipal Corporation Shimla, who has proved the certificate Ext.D-5 and the receipt Ext.D-6. DW-2 Shri Murali Gupta is Junior Assistant Electricity Board, Idgah Sub Division, Shimla, who has proved the installation of electricity connection in the suit premises in the name of the defendant. The defendant has himself stepped into the witness box as DW-3.

12. Learned trial Court on hearing the parties on both sides and appreciation of the evidence available on record has decreed the suit partly to the extent as pointed out at the outset, however, dismissed the same for the relief of recovery of damages to the tune of Rs.5,40,000/- vide impugned judgment and decree, hence the present appeal and Cross Objections aforesaid in this Court.

13. The defendant has assailed the decree for possession of the suit premises passed against him on the grounds, *inter alia*, that there was no privity of contract between him and the plaintiff-bank and as the suit initially was filed by Standard Chartered Grindlays Bank Limited, the plaintiff was not entitled to take any benefit out of the agreement, if any, between the Standard Chartered Grindlays Bank and the defendant. The suit for the relief of mandatory injunction was incompetent and had the Court below construed the pleadings in its right perspective the irresistible conclusion would have been that the status of the defendant was not that of a licensee. The ingredients of license in terms of Indian Easements Act were also not established on record. The suit premises was governed by the provisions of HP Urban Rent Control Act, therefore, the trial Court had no jurisdiction to pass a decree for mandatory injunction. The status of the defendant ought to have been held to be that of a tenant and not a licensee. Merely that he was catering to the employees of the plaintiff-bank would not change his status to that of a licensee that too when no iota of evidence was available on record to show that license was ever created by the plaintiff-bank in favour of the defendant. The frame of issues No.1 and 2 itself shows the non-application of mind on the part of learned trial Court. The plaintiff was not competent to issue a notice revoking thereby the alleged license. The plaintiff rather had no locus-standi to institute the suit for the relief of mandatory injunction and to continue therewith even after the sale of the suit premises. The provisions of Specific Relief Act have been ignored and the provisions of Easements Act misconstrued. The notice Ext.P-2 itself was bad in the eyes of law and there is no question of revocation of the alleged license.

14. The findings on issue No.3 are stated to be erroneous being not based upon the proper appreciation of the pleadings and evidence available on record. Also that issues No.4 and 5 could have not been clubbed for determination. After the expiry of one year the then owner of the suit premises has not made any effort to recover the possession thereof from him. Also that the defendant right from the very beginning was running a canteen in the suit premises not only catering to the needs exclusively of the employees of the bank but that of the public at large also. Merely that the rates of eatables in respect of the employees of the bank were being fixed in consultation with the employees-union would not have any adverse affect on the rights of the defendant to use the premises in his own right. Learned trial Court misdirected itself in not properly construing the evidence oral and documentary which has led into miscarriage of justice to the defendant.

15. The plaintiff-bank in Cross-Objections has assailed that part of the impugned judgment and decree whereby the relief of recovery of Rs.5,40,000/- towards use and occupation charges has been declined on the grounds *inter alia* that the findings recorded on issue No.6 are based upon conjectures and surmises and not on proper appreciation of evidence available on record. As a matter of fact, in view of the findings on issues No.1 to 5 recorded in favour of the plaintiff, issue No.6 could have also not been decided against it. The defendant having not denied the facts in paras-3, 4 and 5 of the plaint qua conversion of the award staff canteen into a proper commercial venture to cater to the needs of the outsiders and the general public also, the plaintiff was entitled to the recovery of use and occupation charges also. It is duly proved on record that the defendant had been supplying eatables from the canteen at the rates fixed by him independently according to the market rates to the outsiders. The findings to the contrary recorded on issue No.6 are stated to be far-fetched and not based upon the evidence available on record. The factum of the plaintiff-bank had dispensed with the award staff for whose benefit the license was given for opening the canteen in 1981-82, has also been erroneously ignored. The services of the award staff were dispensed with on 30th September, 2001 as held by the trial Court itself in the impugned judgment, therefore, contrary stand could have not been taken while answering issue No.6 against the plaintiff. There being cogent and reliable evidence as has come on record by way of the testimony of PW-2 Shri L.D. Pal and PW-3 Shri Devinder Kumar Sharma qua use and occupation charges of the premises like the suit premises in the area, the suit should have been decreed for the recovery of use and occupation charges as claimed. It is also pointed out that even the defendant has also not disputed the payment of use and occupation charges, however, according to him, he is not liable to pay the same at the rate of Rs.500/- per day. The findings on issue No.7 have also been sought to be modified and it is urged that costs be also awarded in favour of the plaintiff-bank against the defendant.

16. Mr. Bhupender Gupta, learned Senior Advocate representing the defendant, has pointed out that the suit premises was given to the defendant by the employees-union and as such the plaintiff could have not filed the present suit. In the written statement Ext.P-4 filed by the plaintiff in the previous suit Ext.P-5, the plaintiff has admitted the suit premises having been given to the defendant by the employees-union. It is, therefore, the union who had inducted the defendant in the suit premises and as the union is not the party, therefore, according to Mr. Gupta, the suit is not maintainable. The plaintiff could have not maintained the suit, as according to learned Counsel, there is nothing in the sale deed to show that after the transfer of the suit premises to the plaintiff, it could have continued with the suit initially filed by its previous owner, i.e., Standard Chartered Grindlays Bank Limited. The suit has not been filed after the alleged revocation of the license for about ten years. The plaintiff, therefore, cannot claim the damages.

17. On the other hand, Mr. R.L. Sood, learned Senior Advocate representing the plaintiff-bank, has strenuously pointed out that the plea of adverse possession is not legally permissible. It was also not the case of the defendant that he was inducted as tenant by the employees-union. Since it is the plaintiff, the owner of the suit premises, could have only inducted the defendant as licensee. The license was revoked in the year 1991. The plaintiff is now not supplying the gas-cylinder nor paying the electricity charges in respect of the suit premises after the year 1992. When as per the case of the defendant himself the license was not got renewed after 1991 he started supplying the eatables in the canteen on market rates, therefore, the suit should have been decreed for the recovery of the use and occupation charges also. The plaintiff is erroneously non-suited on the ground that it is not owner of the building, as according to learned Counsel, the ownership was changed in the name of the plaintiff in the month of July, 2002 and the application under Order 22 Rule 10 of the Code

of Civil Procedure filed for seeking permission to allow the present plaintiff to continue with the suit by learned trial Court was allowed vide order dated 28th October, 2002 in view of the plaintiff having acquired title in the suit premises during the pendency the suit and allowed to continue with the suit in place of Standard Chartered Grindlays Bank Limited. Therefore, on this score also the suit for the recovery of use and occupation charges could have been decreed.

18. It is also pointed out that in the interim, the execution of the judgment and decree has been stayed during the pendency of this appeal subject to payment of Rs.5,000/- per month towards use and occupation charges by the defendant vide order passed on 22nd December, 2005, in CMPs No.301 and 584 of 2005 and as the said order has not been challenged by the defendant, therefore, according to learned Counsel, the plaintiff is entitled to recover the use and occupation charges as claimed in the plaint. Since the defendant is in unauthorized possession of the suit premises right from 1992, therefore, the plaintiff is also said to be entitled to the award of costs also against him.

19. In order to decide the fate of the appeal and the Cross-Objections, following points arise for determination:

Point No.1 Whether the findings recorded by learned trial Court on issues No.1 to 5 holding thereby the plaintiff entitled to vacant position of the suit premises are not legally and factually sustainable?

Point No.2 Whether that part of the judgment and decree whereby the decree for recovery of a sum of Rs.5,40,000/-towards use and occupation charges has been declined is not based on proper appreciation of the material available on record, hence not legally sustainable; if yes, to what effect?

Point No.3 Relief.

20. For the reasons to be recorded hereinafter my findings on the aforesaid points are as under:

Point No.1.

21. The sum and substance of the arguments addressed on behalf of the defendant is that there was no privity of contract between the plaintiff and the defendant, the status of the defendant as that of a licensee is not proved, the ingredients of a valid license in terms of the Indian Easements Act are not at all established, the status of the defendant was that of a tenant and not licensee, it is HP Urban Rent Control Act, which is applicable in this case and that the procedure prescribed under the Act for eviction of a tenant is required to set in motion for the eviction of the defendant from the suit premises.

22. As a matter of fact, all such contentions raised have been dealt with by learned trial Court while answering issues No.1 to 3. As per admitted case of the parties, the suit premises was given to defendant by the then ANZ Grindlays Bank Limited for setting up canteen and providing canteen facilities to its Award staff. The defendant has also not denied this aspect of the matter. It is satisfactorily proved on record that the affairs of the canteen were to be managed by the Secretary of the employees-union. The rates of the items to be cooked and prepared in the canteen were also being fixed by the union. It is also satisfactorily proved that the canteen facilities were to be provided exclusively to the employees of the bank and not to the outsiders.

23. As a matter of fact, the canteen was not given to the defendant to run the same as a commercial venture, however, only for the benefit of the Award staff of the bank.

The defendant was not required to make the payment of rent nor is it his case that he paid any amount by way of rent to the plaintiff. It can only reasonably be believed that the license of suit premises in favour of the defendant was not the result of any written agreement and rather oral. Irrespective of the suit premises was given to the defendant for providing facilities of canteen only to the employees of the bank, allegedly started selling of eatables to the outsiders and apprehending endanger to the safety of the bank at one point of time the predecessor of the plaintiff, i.e., ANZ Grindlays Bank Limited initiated action to get the suit premises vacated from him. He, however, filed Civil suit No.209-I of 1991 for permanent prohibitory injunction against ANZ Grindlays Bank Limited, as is apparent from the copy of plaint, Ext.P-5. It was his specific case that he is running the canteen as per the terms and conditions imposed upon him by the bank and also that the affairs of the bank were being managed by the Secretary of the employees union. It was his further case that he cannot be evicted from the suit premises except for due process of law. The ANZ Grindlays Bank had contested the suit, however, during the course of trial agreed to seek eviction of the defendant from the suit premises in accordance with law and the said suit was decreed vide judgment dated 9th April, 1992, Ext.P-11, having been compromised.

24. There is again no quarrel so as to the name of ANZ Grindlays Bank which has granted license in respect of the suit premises to the defendant was subsequently changed on 1st August, 2000 as Standard Chartered Grindlays Bank Limited. The defendant continued to provide the facilities of canteen to Award staff of the bank after its name changed as Standard Chartered Grindlays Bank Limited. In the absence of any evidence to the contrary produced by the defendant it can reasonably be believed that the license granted in his favour came to be renewed orally from time to time up to September, 2001 because the then Standard Chartered Grindlays Bank Limited dispensed with the services of its Award staff on 30th September, 2001 and asked the defendant to vacate the suit premises.

25. The defendant has not disputed the plaintiff's case qua dispensation with the services of its Award staff. When as per own case of the defendant the suit premises was given to him for running the canteen to provide canteen facilities to the employees of the bank, the license on dispensation with the services of such staff stood automatically revoked. Otherwise also, in terms of Section 60 of the Easements Act, 1882, the license can be revoked by the grantors at any time unless the property to which it pertains stood transferred to the licensee or the licensee during the currency of the license has executed the work of a permanent character and incurred expenses on the execution of such work to the notice and knowledge of the grantors of the license.

26. Here neither the suit premises is transferred to the defendant nor he has raised any structure of permanent character by making investment, therefore, it lies ill to claim that the defendant is not a licensee for the reasons that in terms of Section 52 of the Act ibid when some immovable property is granted by its owner to some other person(s) to do something therein without creating any easementary right or any other interest in such property, the right so given is called the license. As per own case of the defendant, the suit premises was given to him for running a canteen that too for providing facilities of canteen only to the employees of the bank. Though the defendant has denied providing of any such facility to the outsiders, however, the evidence as has come on record by way of his own testimony leads to the only conclusion that he started entertaining the outsiders also and sold food items to them on market rate.

27. Anyhow, on dispensation with the services of its Award staff by the plaintiff-bank and having called upon the defendant to vacate the suit premises he failed to do so, this has led in issuance of legal notice Ext.P-2 dated 3rd May, 2002. The notice vide

acknowledgment Ext.P-1 was received by the defendant, but he again failed to vacate the premises in question. This has led in institution of the present suit in the trial Court on 11th June, 2002 by the Standard Chartered Grindlays Bank Limited. It is after few days of the institution of the suit the building in which the suit premises situated came to be conveyed to the present plaintiff vide conveyance deed dated 1st July, 2002. The conveyance deed though is not on record, however, necessary information qua the same which was reproduced in the application under Order 22 Rule 10 of the Code of Civil Procedure registered as CMA No.618-S/6 of 2002, reads as under:

> "1. That the present case is pending adjudication before this Hon'ble Court. However, during the pendency of the present case, a subsequent development has taken place inasmuch as, the premises known as "Grindlays Bank Building" in which building the premises in dispute are situate have been sold to ICICI, Applicant Bank, by means of Registered Sale Deed dated 28th June, 2002, Registered in the Office of the Sub-Registrar at Sl. No.264, Book No.1. Volume 116 and Page 40 and additional copy of which is pasted in Book No.1, Volume 361 at pages 27 to 36. The ICICI has its Registered Office at Land Mark, Race Course Circle, Vadodara-390 007 and Corporate Office at ICICI Towers, 2nd Floor, Bandra, Kural Complex, Bandra (East), Mumbai-4000051.
>
> 2. That in accordance with the terms of the Sale Deed, the Applicant, ICICI Bank has become owner of the aforesaid building. The premises in dispute in the present case form part and parcel of the building in question.
>
> 3. That according to the terms of the Sale Deed, the Applicant, ICICI Bank has been assigned the right title and interest in the said building and has been specifically given the right to continue with the present litigation and proceedings through its various stages. The Applicant Bank is also placing on record of this case a copy of the sale deed."

In reply to the application, the defendant has not disputed the conveyance of the building in which the suit premises situate to the present plaintiff, however, disputed its right to continue with the suit. Anyhow, learned trial Court has considered the application and decided the same vide order dated 28th October, 2002, though relevant portion of the order so passed reads as follows:

> "Having regard to the provisions laid down in the Registration Act, Transfer of Property Act and in view of the fact that the suit was instituted on 11.6.2002 and the premises were alienated on 28.6.2002, the plea of the applicant is granted and the application is allowed. It will remain tagged with the main matter file, after registration. The ratio laid down in the precedent referred to above is distinguishable on facts. Let necessary correction in the cause title be made with red ink as also in the relevant register. Amended memo of parties be also taken on record. Replication filed by the plaintiff is also taken on record."

28. Therefore, it lies ill to claim that the plaintiff-bank has no right to seek the eviction of the defendant from the suit premises. The arguments that there is no privity of contract between the present plaintiff and the defendant have also no legs to stand.

29. The defendant cannot claim the status of a tenant for the reason that the defendant within the meaning of Section 3(j) of the HP Urban Rent Control Act is not a person by whom or on whose behalf rent, is payable for a residential or non-residential, building. Neither it is the case of the defendant nor is there any iota of evidence to show that he had been paying any amount by way of rent to the plaintiff or its predecessor. He was not only given the suit premises free of rent, but was being also provided cooking gas, utensils, crockery etc. etc. because there is no denial to this part of the plaintiff's case. Therefore, the defendant was granted a license so far as the suit premises is concerned for running a canteen exclusively for the Award staff of the bank as the ingredients of a license in accordance with the provisions contained under the Easements Act stand established. Learned trial Court has rightly decided issues No.1 to 3 in favour of the plaintiff-bank on appreciation of evidence available on record as well as the legal provisions applicable in its right perspective.

30. If coming to the findings on issues No.4 and 5, in the given facts and circumstances and also the evidence available on record the defendant cannot be said to have become owner of the suit premises by way of adverse possession. He was simply a licensee so far as the suit premises is concerned. The suit premises was given to him to run a canteen exclusively for the employees of the bank. As per his own case, the affairs of the canteen were being managed by the employees-union. He himself filed Civil Suit No.209-I of 1991 for seeking relief of permanent prohibitory injunction against the plaintiff in the year 1991. It was his case that he cannot be evicted from the suit premises except for due process of law. That suit was decreed having been compromised vide judgment dated 9th April, 1992, Ext.P-11. True it is that immediately after 9th April, 1992 the plaintiff has not filed the suit for possession of the suit premises and rather allowed the defendant to run the canteen therein till 30th September, 2001, the day when the bank totally dispensed with the services of its Award staff. The defendant was also called upon to vacate the suit premises as the facility of canteen on dispensation with the services of the Award staff was not required. He, however, failed to vacate the same. This has led in serving him with legal notice dated 3rd May, 2002 Ext.P-2. The plaintiff allowed the defendant to run canteen in the suit premises upto 30th September, 2001 and thereafter called upon him orally and also by way of notice to vacate the premises in question. Therefore, there is no element of hostility nor his possession over suit premises can be said to be continuous, peaceful, uninterrupted and to the knowledge and notice of the plaintiff. His possession rather was permissive in nature. Otherwise also, from 9th April, 1992, the day when the suit filed by him was decreed as compromised till he was called upon in September, 2001 to vacate the premises in question the period of twelve years was not complete. True it is that the suit was instituted against him on 11th June, 2002, however, in the facts and circumstances discussed hereinabove, the period of twelve years to raise the plea of adverse possession is not complete as well before that he was called upon to vacate the suit premises.

31. Under Article 65 of the Limitation Act owner of immovable property can file a suit for possession thereof within twelve years from the date when the possession of the defendant becomes adverse to the plaintiff. The onus was upon the defendant to prove that his possession over the suit premises was adverse for a period over twelve years before the institution of the suit by the plaintiff. There is no iota of evidence to show that the defendant was in continuous and peaceful possession of the suit premises. Therefore, there is no question of his acquiring title in the suit premises by way of adverse possession. The suit in

the given facts and circumstances cannot also be said to be beyond limitation. Learned trial Court, therefore, has not committed any illegality or irregularity while deciding issues No.4 and 5 against the defendant. Though, it is canvassed that clubbing of issues No.4 and 5 was not legally sustainable, however, such plea seems to be raised merely for rejection as nothing has been brought to the notice of this Court during the course of arguments as to what prejudice by clubbing and deciding these issues is caused to the defendant. Point No.1 is accordingly answered in favour of the plaintiff-bank.

Point No.2.

32. Now if coming to the findings recorded on issue No.6 under challenge in the Cross Objections, from the arguments addressed on both sides the points such as in view of findings on issues No.1 to 5 in favour of the plaintiff and against the defendant, issue No.6 could have been decided against the defendant, the impact of the admission qua conversion of the facility of canteen in commercial venture, qua supply of eatables at market rates, the dispensation with the services of Award staff on 30th September, 2001and the impact and assignment of the building in which the suit premises situate in favour of the present plaintiff during the pendency of the suit etc. etc. arise for determination.

33. The question of ownership of the plaintiff-bank has been hotly contested and learned lower Court has also not held entitled to the plaintiff-bank for the use and occupation charges on the ground that the plaintiff-bank became owner of the building in which suit premises situate on 1st July, 2001. Also that in the absence of sale deed it cannot be said that the plaintiff have the right to claim use and occupation charges. The findings so recorded are not legally sustainable for the reasons that allowing the application under Order 22 Rule 10 of the Code of Civil Procedure by the trial Court itself lead to the conclusion that the suit premises was assigned to the plaintiff and all interests qua it devolved upon the plaintiff during the pendency of the suit. The plaintiff, therefore, was allowed by the Court itself to continue with the suit against the defendant. The scope of Order 22 Rule 10 of the Code of Civil Procedure came to be considered by the Apex Court in ***Dhurandhar Prasad Singh*** v. ***Jai Prakash University and others, (2001) 6 SCC 534.*** The relevant portion of this judgment reads as follows:

> "7. Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in Moti Lal v. Karab-ud-Din, he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in Prannath Roy Chowdry v. Rookea Begum, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on

at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings."

34. Similar is the ratio of Division Bench judgment of Allahabad High Court in ***Braham Dutt Sharma*** v. ***Life Insurance Corporation of India, AIR 1966 Allahabad 474***. The relevant portion of this judgment reads as follows:

> "8. Section146 C. P. C. provides that "save as otherwise provided by the Code any proceeding that can be taken by a person may also be taken by any person claiming under him". The Supreme Court in Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394, held that the expression 'claiming under' is wide enough to include cases of devolution and assignment of interest mentioned in Order XXII, Rule10, C. P. C. The assets and liabilities of the control business of insurers devolved on the Life Insurance Corporation of India under Section 7 and, therefore, by operation of law they became the successors-in-interest of the Company in respect to matters relating to insurance business of the Company. We, therefore, overrule the objection."

35. Similar is the ratio of the judgment rendered by this Court in ***Shakti Chand*** v. ***Chamaru Ram etc. ILR (1974) Himachal Series 1154,*** which reads as follows:

> "6. The first contention on behalf of the appellant is that he should have had an opportunity of being heard in the appeal before it was disposed of by the lower appellate court and that for want of such hearing he has been gravely prejudiced. It is open to the appellant or respondent in appeal to apply under Order 22 Rule 10 read with Order 22 Rule 11 of the Code of Civil Procedure for bringing on the record the transferee of a party to the appeal if during the pendency of that appeal the property in dispute has been sold to such transferee. No such application was made during the pendency of the appeal. Learned Counsel for the appellant relies on *Smt. Saila Bala Dassi* vs. *Smt. Nirmala Sundri Dassi*. In that case, which was an appeal from the Calcutta High Court, the Supreme Court held that the transferee should have been impleaded in the appeal before the Calcutta High Court having regard to the circumstances which clearly showed that the transferor although purporting to pursue the proceedings before the trial Court, was acting against the interests of the transferee. The facts disclosed that the application by the transferee to be brought on the record in the appeal before the High Court had been opposed by the transferor. The allegation of the transferee was that the transferor had entered into collusive arrangements with the contesting parties with a view to defeat her rights, and she prayed that she should be brought on the record in order that she could protect t her interest. It was in those circumstances that the Supreme Court took the view that the Calcutta High Court should have exercised its discretion in favour of the transferee in that case and should have brought her on the record as an appellant. In the present case, there is nothing to show that the vendors have been acting against the interests of the transferee in the appeal before the lower appellate Court. The law does not require that if property is transferred during the pendency

> of an appeal and that the transferors are already on the record it is still necessary that the transferee should be brought on the record. A discretion has been vested in the court, and all that is necessary to see is that the discretion is properly exercised. The mere circumstance that the property has been transferred during the pendency of the appeal does not give a right to the transferee to be brought on the record. In my opinion, there is nothing to suggest that *ex debito justitiace* the present appellant and the respondents No.7 and 8 should have been brought on the record before the lower appellate Court."

36. In the given facts and circumstances and the evidence discussed supra, it would not be improper to conclude that there is no question of payment of use and occupation charges by the defendant before 30th September, 2001 because the defendant was allowed to run the canteen in the suit premises till that day as it is on that day when the services of the Award staff were totally dispensed with and the defendant was called upon to hand over the vacant possession of the suit premises. The plaintiff, therefore, can claim the use and occupation charges thereafter because as per own admission of the defendant he was supplying eatables to the outsiders at the market rates. He rather has set up the case by producing on record the receipt, issued by the Municipal Corporation, Shimla to run the canteen in the suit premises. Not only this, but as per Ext.D-2 he even got installed the electricity connection in the suit premises in his own name without the consent of the plaintiff-bank. Meaning thereby that he converted the suit premises from staff canteen to commercial venture and did not hand over the vacant possession thereof even after revocation of the license orally on and after 30th September, 2001 and even by serving him with legal notice dated 3rd May, 2002, Ext.P-2. His plea qua oral revocation of the license with effect from 30th September, 2001 is not believed to be true. From 3rd May, 2002 when legal notice Ext.P-2 was served upon him, he is liable to pay use and occupation charges to the plaintiff.

37. Now on what basis the plaintiff has claimed the same at the rate of Rs.500/- per day, the evidence as has come on record by way of testimony of PW-3 Shri Devinder Sharma, Manger of the Indian Bank, The Mall Shimla Branch has been pressed in service. The said bank has hired 2638 square feet area on the Mall at the monthly rent of Rs.43,750/- to house its branch. The use and occupation charges payable by the defendant, however, cannot be assessed at the rate of Rs.500/- per day or in view of the evidence as has come on record by way of the testimony of PW-3 for want of any other and further link evidence contemporaneous in nature to show that the rent per day of the premises like the suit premises is Rs.500/- in the area or the space hired by the Indian Bank is similar to the suit premises. However, the use and occupation charges payable by the defendant can be assessed at the rate of Rs.5,000/- per month because this Court vide order dated 22nd December, 2005, passed in CMP No.301 of 2005 filed in the appeal and CMP No.584 of 2005 in the Cross-Objections has stayed the execution of the impugned judgment and decree on payment of Rs.5,000/- per month as use and occupation charges by the defendant to the plaintiff from the date of judgment and decree passed by the trial Court. Neither the defendant nor the plaintiff has assailed this order any further meaning thereby that both parties are in agreement so far as use and occupation charges qua the suit premises at the rate of Rs.5,000/- per month is concerned.

38. In view of the legal and factual position discussed hereinabove, learned trial Court was not justified in holding that the plaintiff cannot claim use and occupation charges. I, therefore, decree the suit for the recovery of use and occupation charges from

the date of institution of the suit at the rate of Rs.5,000/- per month. The defendant to deposit the entire amount in the Registry of this Court within two months, failing which together with interest at the rate of 9% per annum from the date of institution of the suit till realization of the entire amount. Point No.2 is answered accordingly.

Relief.

39. In view of the discussion hereinabove, the appeal fails and the same is accordingly dismissed, whereas the Cross-Objections succeed and the suit is decreed for the recovery of use and occupation charges at the rate of Rs.5,000/- per month from the date of institution of the same till the vacant possession is handed over to the plaintiff with a further direction to pay the decretal amount within two months from the date of this judgment, failing which interest at the rate of 9% per annum from the date of institution of the suit till realization of the entire amount. There is, however, no order so as to costs. The appeal and the Cross-Objections stand disposed of accordingly.

****

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

Karam Chand (dead through LRs) & ors. .....Appellants.

Versus

Vijay Kumar and another. .....Respondents.

RSA No. 176 of 2005.
Reserved on: 6.10.2015.
Decided on: 7.10.2015.

H.P. Land Revenue Act, 1954- Section 38- Plaintiffs were shown to be owners of the suit land in the copy of jamabandi for the year 1991-1992- defendants were shown to be non-occupancy tenants on the payment of the rent- 'D' and others were shown to be owners and 'R' was shown to be tenant in the jamabandi for the year 1967-68- an entry was made vide mutation that 'D' had sold the suit land in favour of 'V'- 'R' admitted on oath that he had relinquished his tenancy right in favour of 'D' and others and 'D' had sold the suit land in favour of the plaintiffs- entry was changed during settlement in favour of the defendants- neither rent receipt nor any other documentary evidence was filed regarding payment of rent by the defendants to the plaintiffs - it was also not proved that any notice was issued to the plaintiffs before changing the entry- entry had been changed without following due process of law. (Para-12)

For the appellant(s): Mr. Virender Singh Rathour, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, (FTC) Kangra at Dharamshala, H.P. dated 29.12.2004, passed in Civil Appeal No. 45-D/04/01. Appellant Karam Chand is reported to have expired. However, his estate is duly represented by his legal representatives, who are already on record.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for declaration to the effect that they were owners-in-possession of the land comprised in Khata No. 80, Khatauni No. 154, Kh. No. 429, measuring 0-02-40 hectares, situated in Mohal Khikli Dar, Mauza Ghaniara, Tehsil Dharamshala, Distt. Kangra, H.P., as per jamabandi for the year 1990-91, with consequential relief of permanent injunction restraining the appellants-defendants (hereinafter referred to as the defendants) from interfering in the suit land. The land was purchased by the plaintiffs from one Dulo Ram vide registered sale deed dated 24.9.1968 and possession was also delivered to the plaintiffs by the owner. The plaintiffs became owners-in-possession of the suit land. Mutation No. 654 dated 20.1.1969 was also sanctioned on the basis of the registered sale deed. Earlier one Roshan Lal was the tenant at will under Sh. Dulo Ram and Sh. Roshan Lal relinquished his tenancy rights in favour of Dulo Ram and as such Dulo Ram came into possession of the suit land. The settlement took place in the year 1975-76. However, during the settlement operations, the suit land was recorded in possession of appellants-defendants (hereinafter referred to as the defendants) without any order from the competent authority. The defendants got themselves recorded in possession as tenant at will on payment of rent under the plaintiffs in connivance with the settlement staff. The defendants were never inducted as tenants by Sh. Dulo Ram nor there was any agreement to that effect. No rent was ever paid by the defendants to the plaintiffs nor the defendants were in possession of the suit land.

3. The suit was contested by the defendants. According to them, the plaintiffs had nothing to do with the possession of the suit land and the defendants were in possession of the suit land from the time of their forefathers and prior to the settlement. The settlement took place in the area in the presence of the parties and the revenue entries were made according to the spot position. The revenue entries were correct.

4. The replication was filed by the plaintiffs. The learned trial Court framed the issues on 15.1.2000. The suit was decreed by the learned trial Court vide judgment dated 31.3.2001 to the extent that the plaintiffs were declared owners-in-possession of the land as per the details given in the plaint as per jamabandi for the year 1990-91. The defendants, feeling aggrieved, filed an appeal before the learned Addl. District Judge (FTC), Kangra at Dharamshala against the judgment and decree dated 31.3.2001. The learned Addl. District Judge (FTC), Kangra at Dharamshala, dismissed the same on 29.12.2004. Hence, this regular second appeal.

5. The regular second appeal was admitted on 16.9.2005. However, the substantial questions of law were not framed. Now, the RSA would be deemed to have been admitted on substantial questions of law No. 1 & 2, which read as follows and the parties were put to notice:

> "1. Whether the judgments passed by the Courts below are vitiated on the ground that the jurisdiction of Civil Court is barred under the H.P. Land Revenue Act in the facts and circumstances of the case?
>
> 2. Whether the suit filed by the plaintiffs/respondents was barred by limitation and as such the judgment is vitiated on this account?"

6. Mr. Virender Singh Rathour, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the Civil Court had no jurisdiction in the matter. He then contended that the suit was barred by limitation. On the other hand, Mr. Neeraj Gupta, Advocate has supported the judgments and decrees passed by both the Courts below.

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

8. PW-1 Vijay Kumar is one of the plaintiffs. He deposed that the suit land was purchased on 24.9.1968 vide registered sale deed Ext. PW-1/A. The possession was also delivered on the spot and mutation was also sanctioned vide Ext. PW-1/B. Sh. Roshan Lal was tenant of this land before the purchase of the land. Roshan Lal had relinquished the tenancy rights and delivered the possession to the plaintiffs. The defendants got their entries effected during settlement operation behind their back. The defendants were never inducted as tenants over the suit land. PW-2 C.R.Sharma is one of the marginal witnesses of the registered sale deed Ext. PW-1/A. PW-3 Roshan Lal deposed that he was tenant of the suit land before the purchase of land by the plaintiffs. According to him, he had relinquished the tenancy rights about 30-32 years ago in favour of the owners and the possession was also delivered to them. He has admitted that no writing was prepared regarding the relinquishment of the tenancy. PW-4 Hari Ram deposed that he has not seen the defendants over the suit land. The suit land was in possession of the plaintiffs.

9. Defendant No. 2 has appeared as DW-1. According to him, the land was about 12 marlas. He was tenant over the same. The land belongs to Kishan Chand and now it belongs to Vijay and Ajay and they are cultivating the suit land since 1970 and prior to that, his father was cultivating the same. He died in the year 1975. They are coming in cultivation. Settlement also took place in the area. DW-2 Ramesh Chand deposed that he knew the parties. The disputed land is about 17 kanals which was cultivated by Karam Chand and after that the defendants are cultivating the same. In his cross-examination, he deposed that he was working as Daily Wager in PWD. He was residing at Dharamshala.

10. The plaintiffs have proved copy of jamabandi for the year 1991-92 Ext. P-1. The plaintiffs, according to Ext. P-1 have been shown as owners of the suit land and the defendants have been shown as non-occupancy tenants of the suit land on payment of rent. The plaintiffs have also proved copy of jamabandi for the year 1967-68 Ext. P-2. According to Ext. P-2, jamabandi Dulo Ram and others have been shown as owners of the suit land and Roshan Lal has been shown as tenant of the suit land. In the column of remarks, there is an entry that vide mutation No. 654, Dulo Ram had sold the suit land in favour of Vijay Kumar etc. The plaintiffs have also proved copy of missal haquiat bandobast jaded for the year 1975-76 vide Ext. P-3 wherein the plaintiffs have been shown as owners of the suit land and the defendants and others have been shown as non-occupancy tenants. In Ext. D-1 copy of missal haquiat bandobast jaded, plaintiffs have been shown as co-owners of the suit land and defendants have been shown in possession of the suit land as non-occupancy tenants.

11. It is evident from the copy of jamabandi for the year 1967-68 Ext. P-2 that Dulo Ram and others have been shown as owners and Roshan Lal as non-occupancy tenants. Roshan Lal in his statement, while appearing as PW-3 has admitted that he relinquished his tenancy rights in favour of Dulo Ram and others. The possession was also given up by him.

12. The copy of the sale deed is Ext. PW-1/A and copy of mutation is Ext. PW-1/B. It is also stated in mutation Ext. PW-1/B that the suit land has been sold by Dulo Ram in favour of the plaintiffs. The possession was also delivered. The change of entry was only during the settlement operation. There is no order of any competent Officer/Authority on record for changing the entries in favour of the defendants. There is no rent receipt or any other documentary evidence regarding payment of rent by the defendants to the plaintiffs. The defendants have failed to prove as to whether any notice was issued to the

plaintiffs before the change was made during the settlement proceedings. The detailed procedure is laid down for effecting changes in the revenue entries and in the present case, that has not been followed. Since the entries have been changed in violation of principles of natural justice and without following the due procedure of law, the Civil Court had the jurisdiction to try and decide the lis between the parties.

13. Mr. V.S.Rathour, Advocate has also vehemently argued that the suit was barred by limitation. The learned trial Court has framed a specific issue qua limitation on 15.1.2000 but the issue was not pressed during the course of the arguments by the learned Advocate appearing on behalf of the defendants before the trial Court.

14. The defendants have also not raised the issue of ouster of jurisdiction of Civil Court in the matter in the grounds of appeal while assailing the judgment and decree dated 31.3.2001 before the learned Addl. District Judge (FTC), Kangra at Dharamshala. Thus, the defendants are also precluded from raising this question before this Court. The substantial questions of law are answered accordingly.

15. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Principal, Jawahar Navodaya Vidyalaya, Kothipura .....Petitioner.

Versus

Suresh Kumar and others .....Respondents.

CWP No.1684 of 2009
Decided on: 07.10.2015.

Constitution of India, 1950- Article 226- Selection and appointment of respondent No. 2 was quashed by C.A.T., Chandigarh Bench- the employer feeling aggrieved challenged this order by way of present writ – respondent No. 2 did not feel aggrieved and challenge the order- held that, the employer /petitioner has no locus standi to challenge the order quashing appointment of respondent No. 2 when respondent No. 2 had not felt aggrieved and had not challenged the same- petition dismissed. (Para No. 2 to 5).

Case referred:
Sub-Inspector Roop Lal and another vs. Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 Supreme Court Cases 644

For the Petitioner: Mr.Pawan Gautam, Advocate.
For the respondents: Nemo for respondents No.1 and 3.
Mr.Ajay Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Challenge in this writ petition is to the order, dated 23rd October, 2008, passed by the Central Administrative Tribunal, Chandigarh Bench, (hereinafter referred to

as the Tribunal), whereby Original Application, being OA No.317-HP-2008, titled Suresh Kumar vs. Union of India and others, was allowed, and the selection and appointment of original respondent No.3, namely, Budhi Chand, (respondent No.2 herein), was quashed, (for short, the impugned order).

2. Feeling aggrieved, the petitioner-employer has sought the quashment of the impugned order on the ground that the impugned order works adversely against Budhi Chand, respondent No.2 herein.

3. The impugned order adversely affected the rights and interests of respondent No.2, namely, Budhi Chand, who has not questioned the impugned order on any count, thus, the same has attained finality so far as it relates to him.

4. Only the employer has laid a challenge to the impugned order on the grounds taken in the writ petition. Thus, the moot question is – Whether the employer has a right to challenge the impugned order, whereby the selection and appointment of respondent No.2 has been quashed?. The answer is in the negative for the following reasons.

5. In case selection of an appointee is quashed in view of the judgment rendered by a judicial forum, it is only the appointee who is aggrieved and not the employer and the employer has no right to question the impugned judgment. Our this view is fortified by the decision of the Apex Court in **Sub-Inspector Roop Lal and another vs. Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 Supreme Court Cases 644,** wherein, in paragraph 24, the Apex Court has observed thus:

> *"24. Before concluding, we are constrained to observe that the role played by the respondents in this litigation is far from satisfactory. In our opinion, after laying down appropriate rules governing the service conditions of its employees, a State should only play the role of an impartial employer in the inter se dispute between its employees. If any such dispute arises, the State should apply the rules laid down by it fairly. Still if the matter is dragged to a judicial forum, the State should confine its role to that of an amicus curiae by assisting the judicial forum to arrive at a correct decision. Once a decision is rendered by a judicial forum, thereafter the State should not further involve itself in litigation. The matter thereafter should be left to the parties concerned to agitate further, if they so desire. When a State, after the judicial forum delivers a judgment, filed review petition, appeal etc. it gives an impression that it is espousing the cause of a particular group of employees against another group of its own employees, unless of course there are compelling reasons to resort to such further proceedings. In the instant case, we feel the respondent has taken more than necessary interest which is uncalled for. This act of the State has only resulted in waste of time and money of all concerned.*

6. Having glance of the above discussion, the writ petition is not maintainable and the same is dismissed, alongwith pending CMPs, if any.

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

Surjeet Singh

...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 3338 of 2015
Reserved on: 23.09.2015
Decided on: 07.10.2015

Constitution of India, 1950- Article 226- Petitioner sought directions to respondents to not to merge Branch of K.C.C Awha Devi with Samirpur Branch- reply filed justifying the merger being the decision taken by higher authorities as the branch was running in loss- held that the writ petitioner has not challenged the proceedings of the meeting in which this decision was taken-it is a prerogative of the concerned authorities to take the policy decision and the court cannot sit in appeal to decide the correctness of the policy- since the decision making process was not challenged- petition is not maintainable- petition dismissed. (Para 7 to 15)

Cases referred:

Sanjeev Kumar and others versus State of H.P. and others, Latest HLJ 2014 (HP) 1061

Chandresh Kumar Malhotra versus H.P. State Coop. Bank and others, 1993 (2) Sim.L.C. 243

Vikram Chauhan versus The Managing Director and ors., Latest HLJ 2013 (HP) 742 (FB)

Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399

Manohar Lal Sharma Vs. Union of India and another,(2013) 6 SCC 616,

Asha Sharma versus Chandigarh Administration and others, 2011 AIR SCW 5636

Bhubaneswar Development Authority and another versus Adikanda Biswal and others, (2012) 11 SCC 731

For the petitioner: Mr. Vinod Thakur, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 and 2.

Mr. Umesh Kanwar, Advocate, for respondents No. 3 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the writ petitioner has invoked the jurisdiction of this Court seeking quashment of resolution No. 46, dated 15.06.2015 (Annexure P-2/A) and office order, dated 06.07.2015 (Annexure P-2). He has also sought writ of mandamus commanding the respondents not to merge the Branch Office of the Kangra Central Co-operative Bank Limited at Awah Devi, Tehsil Bamsan (Touni Devi), District Hamirpur, H.P., with Samirpur Branch, Disrict Hamirpur, H.P., on the grounds taken in the memo of the writ petition.

2. The respondents have filed the replies.

3. It is contended that the Branch Office at Awah Devi, Tehsil Bamsan (Touni Devi), District Hamirpur, H.P. was running in losses and in terms of the decision taken by the higher authorities in the meeting held on 05.02.2014 (Annexure R-1), the respondents have passed the follow-up orders, whereby the said Branch Office stands merged with Samirpur Branch and is now functional in that Branch.

4. Learned counsel for the respondents also argued that the respondent-Bank is a registered cooperative society under the Himachal Pradesh Cooperative Societies Act, 1968, thus, is neither a State nor an instrumentality of the State, and the writ petition is not maintainable against a Society as this Court in **CWP No. 6709 of 2013,** titled as **Sanjeev Kumar and others versus State of H.P. and others,** reported in **Latest HLJ 2014 (HP) 1061,** while relying on the earlier decision of this Court in **Chandresh Kumar Malhotra versus H.P. State Coop. Bank and others,** reported in **1993 (2) Sim.L.C. 243,** which decision was also affirmed by the Full Bench of this Court in **Vikram Chauhan versus The Managing Director and ors.,** reported in **Latest HLJ 2013 (HP) 742 (FB),** has held that the Societies cannot be termed as 'State' within the meaning of Article 12 of the Constitution of India.

5. The grievance of the writ petitioner is that the decision of the respondents is adversely affecting the interests of the account holders and it is against public interest.

6. The moot question for determination in this writ petition is - whether the writ petitioner can invoke the jurisdiction of this Court and seek the reliefs sought for.

7. Before we will deal with the said issue, it is apt to record herein that the writ petitioner has not questioned the proceedings of the meeting of the Sub-Committee of the State Level Task Force, held on 05.02.2014 (Annexure R-1), which is the foundation of the resolution No. 46, dated 15.06.2015 (Annexure P-2/A) and order, dated 06.07.2015 (Annexure P-2), but has only questioned Annexure P-2/A and Annexure P-2, which are just follow-up orders.

8. It is the prerogative of the concerned authorities to take a policy decision to open a branch of the Bank at any suitable place and it is also for the said authorities to take policy decision to close or merge the same with other branch.

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

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

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

11. The Apex Court in the case titled as **Mrs. Asha Sharma versus Chandigarh Administration and others,** reported in **2011 AIR SCW 5636** has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise,

scientific or logical and in the interest of society. It is apt to reproduce para 10 of the aforesaid judgment herein:

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

12. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court cannot sit in appeal and examine correctness of the policy decision.

13. The Apex Court in the case titled as **Bhubaneswar Development Authority and another versus Adikanda Biswal and others,** reported in **(2012) 11 SCC 731** has laid down the same principle. It is apt to reproduce para 19 of the judgment (*supra)* herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."*

14. This Court in the cases titled as **Nand Lal & another versus State of H.P. & others,** being **CWP No. 621 of 2014; Sher Singh versus State of H. P. & others,** being **CWP No. 7115 of 2013 and Gurbachan versus State of H.P. & others,** being **CWP No. 4625 of 2012** has also laid down the same proposition of law.

15. Applying the test to the instant case, the writ petitioner has not questioned the decision-making process but has questioned the decision arrived at by the authorities.

16. Learned counsel for the respondents, while addressing the arguments, have relied upon the decision made by the Allahabad High Court in the case titled as **Raja Ram Diwakar versus Aaryawart Gramin Bank and others,** being Writ Petition No. 1866 (MB) of 2009 (PIL), decided on 20.02.2009, wherein it has been held that it is the discretion of the authorities concerned to shift a Bank and the account holders cannot question the same. It is apt to reproduce relevant portion of the judgment herein:

> *"In our opinion, the discretion to shift the Bank lies with the Board of Directors and unless it is absolutely mala fide, arbitrary or wholly undesirable, the High Court would rarely enter into such matters."*

17. Keeping in view the discussions made in para 4 (supra), the writ petition merits to be dismissed.

18. Having glance of the above discussions, the writ petition is not maintainable and is dismissed accordingly alongwith all pending applications.

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

Ashwani Kumar & ors. ...Petitioners
Versus
M/s Kehar Winge Agency & ors ...Respondents

Civil Revision No. 174 of 2015
Date of decision: 08. 10.2015.

Limitation Act, 1963- Section 5- The Appellate Court condoned the delay of 27 days in filing of the appeal subject to payment of cost of Rs.1000/- - held, that delay of short duration or few days calls for a liberal delineation- there is no infirmity in condoning the delay- revision dismissed. (Para-5 and 6)

Case referred:
Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & ors (2013) 12 SCC 649

For the Petitioners: Mr. Ajay Sharma, Advocate.
For the Respondents: None.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

This Petition under Section 115 of the Code of Civil Procedure is directed against the order dated passed by learned District Judge, Hamirpur on 12.8.2015, whereby he condoned the delay of 27 days in filing of the appeal subject to payment of cost of Rs.1000/-

2. It is vehemently contended by Sh.Ajay Sharma, learned counsel for the petitioner that the learned court below while condoning the delay has over stepped the jurisdiction vested in it. It is further contended that when the averments made in the application were false and unsubstantiated, then the court had no jurisdiction to condone the delay.

3. It would be noticed that while filing application for condonation of delay, petitioner had explained the same in the following manner:

> *"2.That the applicant applied for copies of judgment and decree on 27.9.2014. The same was prepared and was delivered on 27.10.2014."*

> *"3.Tht the applicant was out of station in connection with his work from 20.11.2014 to 29.11.2014 as such when he turned up on 29.11.2014 and contacted the present counsel then present appeal was prepared after withdrawal of court fees."*

Reply to the aforesaid paras reads as under:

> *"2.It is admitted that appeal has been filed against the judgment and decree passed by the trial court vide which the suit of the appellant was dismissed. Rest of the contents are denied for want of knowledge."*
>
> *"3. Incorrect. The applicant/appellant was not out of station as alleged. Moreover, no proper document to prove this fact has been produced. The appeal has not been filed within time and the applicant/appellant is negligent and is not entitled to any discretionary relief under the said provision of law."*

4. It is evident from the reply that the case of the petitioner was only a case of denial and based on these pleadings, learned court below condoned the delay.

5. I see no illegality, infirmity or even perversity in the impugned order as the same was based on the pleadings and arguments of the parties. Now at this stage, it is not open for the petitioner to make out a case which had not been set up by him before the learned court below, after all this court is to adjudge the correctness of the order on the basis of the pleadings and other materials available before the court which passed the order. Moreover, no new ground can normally be permitted to be raised, that too in proceedings under Section 115 of CPC.

6. That apart, unless there is an inordinate delay or in other words, the delay is only of a short duration or few days, then the same calls for a liberal delineation. The principles applicable to an application for condonation of delay have been culled out by the Hon'ble Supreme Court in **Esha Bhattacharjee** Vs. **Managing Committee of Raghunathpur Nafar Academy & ors (2013) 12 SCC 649,** wherein after taking into consideration the entire case law on the subject it was held:

> *"i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.*
>
> *ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.*
>
> *iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*
>
> *iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.*
>
> *v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*
>
> *vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are*

required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

xiv) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

xv) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

xvi) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

xvii) The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

7. In view of the aforesaid exposition of law coupled with the fact that there was a delay of short duration of only 27 days in filing of the appeal, I find no illegality, irregularity or perversity in the order passed by the learned court below and accordingly the petition being devoid of any merit is dismissed in limine.

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

Chairman-cum-Deputy Commissioner and another ...Appellants.

Versus

Smt. Seema Mehta ...Respondent.

LPA No. 160 of 2015
Decided on: 08.10.2015

Constitution of India, 1950- Article 226- Writ Court directed to consider the case of writ petitioner for regular appointment – an appeal preferred against this order- held, that since the Writ Court had only directed to consider the case of the writ petitioner for appointment on regular basis, therefore, no rights have been determined- Appeal is without merits, and is dismissed. (Para 7 & 8)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondent: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP (M) No. 1242 of 2015

By the medium of this limitation petition, the appellants-applicants have sought condonation of delay of 79 days, which has crept-in in filing the present Letters Patent Appeal.

2. We have gone through the limitation petition read with the impugned judgment and are of the considered view that the appellants-applicants have carved out a sufficient cause for condoning the delay. Accordingly, the delay is condoned. The application is disposed of.

LPA No. 160 of 2015

3. Appeal is taken on Board.

4. Issue notice. Mr. Deepak Kaushal, Advocate, waives notice on behalf of the respondent.

5. This Letters Patent Appeal is directed against the judgment and order, dated 08.05.2015, made by the learned Single Judge in CWP No. 5318 of 2013, titled as Smt. Seema Mehta versus Chairman-cum-Deputy Commissioner and another (for short "the impugned judgment").

6. We have perused the record.

7. In terms of the impugned judgment, the writ respondents-appellants herein were directed to consider the case of the writ petitioner-respondent herein for regular appointment, is just a consideration order, which the respondents have to examine and no rights have been determined.

8. In the given circumstances, the impugned judgment merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications with a direction to the writ respondents-appellants herein to make the consideration order within eight weeks.

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

M/s Trishul Traders and another .....Petitioners.

Versus

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

CWP No.2589 of 2009
Decided on: 08.10.2015.

Constitution of India, 1950- Article 226- Petitioner challenged the order of Assessing Authority PWD-II District Solan on various grounds-petition contested on the plea of maintainability as efficacious remedy of filing of appeal was available- writ petition permitted to be withdrawn with liberty to file an appeal within three weeks - further time spent in prosecuting this petition shall be excluded while computing the period of limitation in filing the appeal. (Para 2 to 6)

For the Petitioners: Mr.Goverdhan Sharma, Advocate.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Petitioners have laid challenge to the order, dated 11th September, 2008, passed by the Assessing Authority, PWN-II, District Solan, H.P., on the grounds taken in the writ petition. Respondents have filed the reply.

2. Mr.Romesh Verma, learned Additional Advocate General, stated that the writ petition is not maintainable since the petitioners have alternative efficacious remedy in terms of Section 30 of the Himachal Pradesh General Sales Tax Act, 1968, (for short, the Act).

3. A reference may be made to Section 30 of the Act as under:

"30 (1) An appeal from every original order passed under this Act or rules made thereunder shall lie –

(a) if the order is made by an assessing authority or by an officer-in-charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner;

(c) if the order is made by the Commissioner or any office exercising the powers of the Commissioner, to the Financial Commissioner.

(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Commissioner or any officer on whom the powers of the Commissioner are conferred, shall be further appealable to the Financial Commissioner.

(3) xxxxxxxxxxxxx xxxxxxxxxxxx

(4) xxxxxxxxxxxxx xxxxxxxxxxxx

(5) xxxxxxxxxxxxx xxxxxxxxxxxx

(6) xxxxxxxxxxxxx xxxxxxxxxxxx"

4. Having glance of the above Section, we are of the considered view that the instant writ petition is not maintainable for the simple reason that the petitioners have alternative efficacious remedy available.

5. At this stage, the learned counsel for the petitioners stated that the petitioners have filed the writ petition under the bona fide belief and prays for the withdrawal of the same with liberty to the petitioners to file appeal before the competent Authority and period spent in pursuing the instant writ petition may be ordered not to be counted while computing the period of limitation.

6. Keeping in view the prayer made by the learned counsel for the petitioners read with the facts, we deem it proper to dismiss the writ petition as withdrawn, with liberty to the petitioners to file an appeal before the competent Authority. Ordered accordingly. It is made clear that in case the appeal is filed within three weeks from today, the period spent by the petitioners in prosecuting the instant writ petition shall be excluded, while computing the period of limitation.

7. Pending CMPs, if any, also stand disposed of. Copy dasti.

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

Prem Bahadur alias Digamber Nath ....Appellant

Versus

State of H.P ....Respondent

Cr.A. No. 153/2015
Reserved on: 7.10.2015
Decided on: 8.10.2015

Indian Penal Code, 1860- Section 376, 506, 323 & 201 - **Protection of Children from Sexual Offences Act 2012-** section 6 - Prosecutrix an orphan, aged about 9-10 years residing in the Kutia of the accused was subjected to vaginal penetrative assault by the accused- the prosecutrix was also beaten up and threatened to be killed in case she disclosed this fact to anyone- the prosecutrix disclosed the occurrence in the school-she categorically spoke about the incident in the court- the medical officer also stated categorically that the victim was sexually assaulted- held that the prosecution has conclusively proved the guilt of the accused- sentence imposed by the trial court proper- appeal dismissed. (Para 7 to 18)

For the appellant: Mr. H.S. Rangra, Advocate.
For the Respondent: Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment/order dated 1.12.2014/2.12.2014 rendered by the Judge, Special Court, Una in Sessions Trial No. 30/2014, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under section 6 of the Protection of Children from Sexual Offences Act No.32 of 2012, under sections 376, 506, 323 and 201 of the Indian Penal Code has been convicted and sentenced to imprisonment for whole of his life and to pay a fine of Rs. 10,000/- for the offence punishable under section 6 of Protection of Children from Sexual Offences Act No.32 of 2012 and in default of payment of fine he was further directed to undergo simple imprisonment for six months. He was further sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 1,000/- for the offence punishable under section 323 of IPC and in default of payment of fine he was further directed to undergo simple imprisonment for one month. He was also sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- each for the offences punishable under sections 506 and 201 of IPC and in default of payment of fine, he was further directed to undergo simple imprisonment for two months each. All the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that accused was living in a Kutia (cave) in the forest of village Saloh, Tehsil Haroli, District Una. The victim was 9 years old. About 3 years back, one Kastoori Nath, resident of Haridwar, alleged God father of victim, left the victim with the accused. Accused got the victim admitted in the Government Primary School, Saloh. On 11.4.2014, Ashwani Kumar, Pradhan, Gram Panchayat, Saloh gave information to Police Post, Pandoga through his mobile phone that the victim was being sexually harassed by the accused. Rapat Ex.PW-7/A was registered. The victim got her statement recorded under section 154 Cr.P.C. to the effect that for the last 4 years she was living with her God uncle accused Digamber Nath. She was student of 4th standard. Accused used to give her beatings and threatening for doing bad act (vaginal penetrative assault) with her. About a month back, he stripped off his and her clothes and did bad act with her. The accused threatened her not to tell about this act to anybody otherwise she would be killed by him. According to the victim, last night also accused stripped off his clothes and asked her too to strip off the clothes and when she refused to do so accused gave her beatings and ousted her from the Kutia. FIR Ex.PW-19/A was registered. The victim was medically examined at R.H. Una. The Radiologist opined the age of the victim between 9-10 years. Statement of the victim was also recorded under section 164 Cr.P.C. Blood samples of accused as well as victim were taken for D.N.A. test. The 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 23 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. According to him, the villagers wanted to oust him from the village and once they had also set his Kutia on fire. He has been falsely implicated in the case. Learned trial Court convicted and sentenced the accused as noticed hereinabove. Hence, this appeal.

4. Mr. H.S. Rangra, learned counsel for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused.

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

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

7. PW-1 Dr. Shivani has conducted the medical examination of the prosecutrix in the presence of lady constable Poonam. She issued MLC Ex.PW-1/B. In reply to the quarries raised in police request Ex.PW-1/A, she gave the following opinion:

1. "Intercourse has been done with the victim many times.
2. Last time it has been done yesterday night according to her.
3. No mark of external injury or struggle present anywhere on the body.
4. Intercourse has been done with her."

In her opinion, there was nothing to suggest that sexual intercourse has not taken place with her.

8. PW-2 is the prosecutrix (name withheld). Her statement was recorded on oath. She has deposed that Kasturi Nath was her God father. He told her that her real father and mother have died. She was residing with Kasturi Nath at Hardwar. About 3-4 years back, Kasturi Nath left her with the accused. She recognized the accused. She and accused used to reside in the Kutia. She was admitted in 1st class in Government Primary School, Saloh about 3-4 years back. Accused for the last 3-4 years was doing vaginal penetrative sexual assault upon her. Accused was threatening her to kill, if she disclosed to any one about the incident. On 10.4.2014, during night time, accused started teasing her. Thereafter, he committed sexual intercourse with her. Accused used to give her beatings. She was thrown out of Kutia. On the next day, she went to school. She was not feeling well. Her teacher Rajiv Kumar called her to play volleyball. She refused to play. She disclosed to him that accused was doing bad act with her. Rajiv took her to the office of Head Madam, Balbir Kaur. She disclosed the act of wrong doing of the accused with her to her Madam. Pradhan was also called. Police recorded her statement. She was taken to hospital for medical examination. She also disclosed about the wrong act to the doctor in the hospital. Her salwar and underwear were taken into possession. Her statement was also recorded before the Judicial Magistrate 1st Class, Una. Statement is Ex.PW-2/B. She has denied the suggestion that accused had quarreled with Pradhan, Gram Panchayat, Saloh and at his instance false case has been registered against the accused.

9. PW-3 Rajiv Kumar has deposed that on 11.4.2014 at about 9 a.m., students of 4th class were playing volleyball. He noticed that victim was in a sad mood. He asked about the reasons. She told that she has lost her parents and her uncle used to beat her and was doing bad acts with her. He took the victim to head teacher.

10. PW-4 M.S. Balbir Kaur has deposed that PW-3 Rajiv Kumar came to her office along with PW-2. She was crying at that time. She told that accused used to give her beatings and on the last night, he had given her beatings and asked to remove the clothes. Accused used to commit wrong acts with her. She informed the Pradhan. He came to the school.

11. PW-5 Ashwani Kumar has deposed that he reached the school in the office of PW-4 Balbir Kaur. The victim was crying. The Head Teacher disclosed him the name of

victim. She was student of 4th class. The victim had disclosed to her that her uncle used to do wrong things with her. He informed the police post Pandoga on telephone. He also joined the investigation. Demarcation of the Kutia was undertaken.

12. PW-6 Kasturi Nath has deposed that the victim was orphan 3-4 years ago. She started living with him and his wife. His wife died. Victim was interested to study. He had no means to provide education to her. He left the victim with accused about four years ago. Accused has raised a kutia in village Saloh near forest. The victim was residing with the accused.

13. PW-13 Dr. O.P. Ramdev has taken X-rays of various joints of the body of the victim. He has proved report Ext. PW-13/B. According to ossification and fusion of epiphysis of various bones, the age of victim was between 9-10 years.

14. PW-18 Dr. G.S. Didhra has medically examined the accused. He issued MLC Ext. PW-18/A. Accused was found capable of performing sexual act.

15. PW-21 Bishesh Kumar is the Investigating Officer. Rapat Ext. PW7/A was entered on the basis of the information received from Ashwani Kumar. Statement of prosecutrix was recorded. She was got medically examined. Accused was arrested. Site plan was prepared. Photographs of the spot were also taken. D.N.A. report is Ext. PW19/A.

16. PW-2 victim has categorically deposed the manner in which accused used to sexually assault her. He used to give her beatings. He had thrown her out of kutia. Statement of the prosecutrix was also recorded under Section 164 Cr. P.C. vide Ext. PW-2/A. She has narrated the incident to PW-3 Rajiv Kumar. PW-3 Rajiv Kumar had taken the prosecutrix to PW-4 Balbir Kaur. The prosecutrix had disclosed to PW-4 Balbir Kaur the manner in which accused used to sexually assault her. PW-4 Balbir Kaur informed PW-5 Ashwani Kumar, Pradhan Gram Panchayat Saloh. PW-5 Ashwani Kumar has informed the Police on the basis of which FIR was registered. The age of the prosecutrix was between 9-10 years. The X-ray report is Ext. PW-13/B. PW-1 Dr. Shivani has categorically stated that sexual intercourse has been done with the victim. Hymen was ruptured. Tenderness was present. Vagina easily admitted two fingers.

17. The prosecution has conclusively proved that accused was sexually exploiting the girl aged between 9-10 years. It was the duty of the accused to protect her instead of exploiting her.

18. Accordingly, in view of the analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

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

Suli Ram .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 127 of 2015
Reserved on: October 07, 2015.
Decided on: October 08, 2015.

Indian Penal Code, 1860- Section 302- Deceased had gone to market to fetch nails but had not returned-the body of the deceased with face smeared with blood was found in the fields in a nearby village by his father and a stone of about 20kg was found placed on the stomach-complainant, the father of deceased suspected the role of accused in this murder as on the date of occurrence son of the accused was going with the deceased and the accused did not allow any person to mix-up with his son- 'H' and 'K' also saw the manner in which the deceased was murdered by the accused-held that, the motive attributed to the accused for killing the deceased is unbelievable- witness H exhibited abnormal conduct by not disclosing the incident witnessed by him from 18-12-2011 to 22-12-2011despite of the fact that he knew the father of deceased well-his further admission that village was very near to the spot and one call could attract the attention of the villagers and still he did not inform the villagers makes his conduct abnormal-witness K had not identified the accused but had merely tried to identify the stones and clothes-he referred to the assailant as a person having long beard and hair and wearing black clothes- his admission that the inhabitants of the village wear black and shabby clothes makes the case doubtful-his version that he met his father and 2-3 other persons and told them about this brawl is also not acceptable- had it been so, other persons and the father of this witness would have informed the police- his conduct is thus also abnormal-neither the version of the eye-witnesses nor the alleged motive of the accused is believable and the accused entitled to benefit of doubt- appeal accepted - conviction and sentence set aside. (Para 17 to 22)

Case referred:
Maruti Rama Naik vrs. State of Maharashtra, (2003) 10 SCC 670

For the appellant:	Mr. Y.P.S. Dhaulta, Advocate.
For the respondent:	Mr. M.A.Khan, Addl. AG with Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 22.12.2012, rendered by the learned Addl. Sessions Judge(FTC), Chamba, H.P. in Sessions Trial No. 5/12, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 302 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 20,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 18.12.2011 at around 6:05 PM, on receipt of telephonic information from Madho Ram (PW-5), vide rapat No. 21 in daily diary at PS Tissa, Inspector Jagdish Chand (PW-19) alongwith other police officials reached near village Kandwas and found dead body of a boy, namely, Harish son of Bhagat Ram (PW-1). It was dark, therefore, the dead body was kept safe. On next day, i.e. 19.12.2011 in the morning, after post mortem examination of the deceased, complainant Bhagat Ram (PW-1) father of the deceased gave his statement under Section 154 Cr.P.C. vide Ext. PW-1/A to the effect that on 18.12.2011, he deputed his deceased son Harish to bring nails from the shop in Village Sagluga. He had given him Rs. 60/-. He kept on waiting for his son till 5:00 PM but he did not turn up. He rang up at Village Sagluga to Himmat Singh (PW-3) to inquire about the whereabouts of his deceased son. PW-3 Himmat

Singh told him that he had not seen his son. Then he went in search of his deceased son and at around 5:00 PM, he found the dead body of his son lying in the fields of Baldev at Khill in Village Fuldwas at a distance of 500-600 meters from his village. His son was lying with his face upwards and heavy stone Ext. P-2 weighing about 20 kg was found kept on his belly. His face was smeared with blood. He raised screams and after a while Himmat Singh (PW-3) came on the spot and informed about the dead body of deceased to his family members. Himmat Singh PW-3 informed Narli Devi (PW-4) on telephone and thereafter other villagers also came to the spot. It transpired during investigation that on 18.12.2011, accused was sitting in the orchard of Chatro while his son accompanied deceased Harish Kumar to Village Sagluga. Accused on seeing his son accompanying Harish Kumar used provocative language and he was sent back to home. Thereafter, deceased Harish Kumar was walking towards Village Sagluga alone and when he reached the place Khill, accused followed and chased him. Accused caught hold of the deceased and threw him on the ground. He also pelted stones on him and ran away from the spot after killing him. Inquest papers were prepared. Recoveries were effected from the spot. The dead body was sent for post mortem examination. The post mortem examination was conducted by Dr. Akshay Minhas (PW-13). The accused was arrested on 23.12.2011. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 19 witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded that he was falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Y.P.S. Dhaulta, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 22.12.2012.

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

6. PW-1 Bhagat Ram, father of the deceased deposed that he had commenced construction work in his house. On 18.12.2011 at around 9:00 AM, he deputed his deceased son Harish to bring nails from the shop in Village Sagluga. He had given him Rs. 60/- for the same. He kept on waiting his son till 5:00 PM, but he did not turn up. Then he rang up at Village Sagluga to Himmat Singh to ascertain whereabouts of his son. He told him that he had not seen his son. He went in search of his son at around 5:00 PM. He found dead body of his son lying in the fields of Baldev at Khill in village Fuldwas at a distance of 500-600 meters from his village. His son was lying on the ground with heavy stone weighing about 30 kgs. on his belly. His face was smeared with blood. He raised screams. Himmat Singh who was on the way after doing his work came to the spot. Himmat Singh rang up his family members and also informed about the recovery of dead body of his son to Narli Devi on phone. Narli Devi asked her father on phone to inform the police. The police arrived at the spot late in the evening at around 7:30 PM. His statement was recorded by the police. The police took into possession stone kept on the belly of his deceased son vide memo Ext. PW-1/B. Accused was over possessive of his sons. He did not allow them to mix up. The son of accused had accompanied his deceased son to bring nails from village Sagluga. In his cross-examination, he deposed that he had disclosed to the police that accused was over jealous about his children and did not allow them to mix up. Confronted with the statement Ext. PW-1/A and statement mark “B”, where it is not so recorded. He disclosed before the police that the son of accused had accompanied his son to bring nails from village Sagluga. Confronted with the statement Ext. PW-1/A and mark “B”

where it is not so recorded. He came to know after 3-4 days that accused had murdered his son. He rang up Himmat Singh to know whereabouts of his son at about 4:30 PM and at once Himmat Singh had disclosed him on phone that he had not seen his son at village Sagluga. He did not have personal knowledge as to how his son was killed but he came to know from Harish son of Tokha Ram. Harish had not disclosed to him that accused had murdered his son but to the police in his presence. He disclosed this fact to the police after 4-5 days. Harish son of Tokha Ram is known to him since his childhood. Harish was well aware of his residence in village Kandwas. He could not say whether Harish son of Tokha also knew about his deceased son. His statement was recorded on the spot. In his cross-examination, he categorically admitted that his deceased son and the son of accused after school hours used to play together in the village.

7. PW-2 Smt. Kundnu is the grandmother of deceased Harish. She left home to graze cattle in the nearby fields. She returned in the evening around 5:00 PM. Her son disclosed to her that Harish had not returned back. Bhagat Ram went in search of his deceased son. She received call from Himmat Singh and heard screams of his son on phone.

8. PW-3 Himmat Singh deposed that on 18.12.2011, he was in village Sugloga. At 4:30 PM, he received phone call from his sister-in-law (Bhabhi), namely, Narli Devi who asked him whether deceased Harish son of Bhagat Ram had visited any of the shops in village Sugloga to purchase nails as he had not returned to village Kandwas. He visited the shop of Depot Holder and inquired whether any person from village Kandwas had visited to purchase nails. He rang up Narli Devi and told her that Harish had not visited village Sugloga to purchase nails. He left for his village at around 5:00 PM. On the way he heard screams of Bhagat Ram in the fields near village Fuldwas. He heard Bhagat Ram calling the villagers by saying that his son had been killed by someone. He had seen the dead body of Harish lying in the fields smeared with blood with big stone lying on his belly. He again rang up Narli Devi and informed that the dead body of Harish was seen lying in the fields near Fuldwas. In his cross-examination, he did not recall whether while giving statement before the police, he had disclosed that he had inquired about the visit of Harish on the shop of Depot Holder. Confronted with the statement mark "H", where it is not so recorded. He did not recall whether while giving statement before the police, he had stated that on reaching the spot Bhagat Ram was seen calling villagers from village Fuldwas. Confronted with statement mark "H" where it is not so recorded. He did not know whether he had stated before the police that again he visited the spot. Confronted with the statement mark "H", where it is not so recorded. He had not disclosed phone number to the police from which he called Narli Devi from village Sugloga. He admitted that village Fuldwas was at a distance of 150 meters from the spot where the dead body of Harish was seen lying.

9. PW-4 Narli Devi deposed that on 18.12.2011 Bhagat Ram father of deceased came to her around 4:30 PM and told her that he had sent his son to purchase nails from village Sugloga. He asked her to inquire from Himmat Singh who used to work as mason in village Sugloga, whether his son Harish had visited Sugloga to purchase nails. She called her brother-in-law Himmat Singh on phone to inquire about Harish. He called her after a while that Harish had not visited Sugloga to purchase nails. Again, she received call from Himmat Singh around 6:15 PM that Harish had been killed. She informed the villagers accordingly.

10. PW-5 Madho Ram deposed that Narli Devi is his daughter and is married in village Kandwas. On 18.12.2011 around 6:00 PM, he received phone call from his daughter Narli Devi to the effect that Harish had been murdered by someone in the fields and she asked him to inform the police.

11. PW-6 Smt. Devki is the mother of deceased Harish. According to her, son of accused also accompanied her son Harish while on way to Sugloga to purchase nails. Accused called back his son on seeing him accompanying Harish. Her son did not return back till late evening. Her husband went in search of his son towards village Sugloga. The dead body of her son was seen lying in the fields at a place known as Khill in village Sugalwas. She came to know after investigation that accused has murdered her son. In her cross-examination, she admitted that her son had good equation with the son of accused but the accused did not like this proximity.

12. PW-8 Harish son of Tokha Ram is the most material witness. According to him, on 18.12.2011, at around 9:30 AM, he was in his fields. He had taken cow dung from his house in village Fuldwas and thereafter he broke stones. He had seen one boy coming from village Kandwas proceeding towards village Sugloga. In the meanwhile, he saw accused calling that boy while coming from village Kandwas. Accused called that boy and asked him to stop. Accused bodily lifted the boy and brutally threw him down on the rocky surface. Accused also hurled stones on the boy. Thereafter, he made him lie on the ground and kept huge stone on his belly. He abused the accused of his inhuman conduct. He was at a distance of around 100 meters and was standing on higher altitude from the place where the accused was seen beating the boy. He reached the spot and by that time, accused had left the spot. When he reached the spot Harish had already expired. He heard accused saying to the victim that as to why he used to take his son alongwith him. Accused left for his home and he also went to his home. He went to his home quietly out of fear and did not share this incident with anyone. On 22.12.2011, when the police came in connection with investigation, the villagers of Fuldwas and nearby villages Kandwas and Padhar, he disclosed the incident to the police on their asking. He had shown the place to the police where accused had beaten and killed the deceased. Accused had beaten and killed Harish since he did not like his son to be accompanied by anyone either to School or elsewhere. The blood stained half sleeves shirt was discovered by the accused from the bushes. The shirt is Ext. P-18. The pants were also taken into possession on 25.12.2011 vide Ext. PW-8/B. The pants are Ext. P-20. The accused had made disclosure statement vide Ext. PW-8/F. He identified blood stained stones Ext. P-4, P-6 and P-8. He also identified stone Ext. P-2. In his cross-examination, he deposed that he had six members in his family. He did not share this fact with his family members. He admitted that there are 20-25 houses in village Fuldwas where 100-150 people reside. On 18.12.2011, he reached home within 10 minutes. After reaching home, he confined himself and did not go out due to fear in his mind. On 19.12.2011, he confined himself at home since he was under shock. On 20.12.2011 and 21.12.2011, he continued to confine at home being under shock. He had disclosed to the police while giving statement that after witnessing occurrence on 18.12.2001, he continued to confine himself at home for next 3-4 days since he was under shock. Confronted with the statement mark “H-1” where it is not so recorded. He also admitted that Pradhan and Up-Pradhan as well as members of local Gram Panchayat reside in the area. No one came to meet him during the span of those 3-4 days. He admitted that he was moving in and around his house and in the neighborhood as well. Accused Suli Ram was known to him since long but deceased Harish was not known to him. Bhagat Ram was also known to him since his childhood. He raised hue and cry after seeing the accused lifting and throwing deceased Harish on rocky surface, however, no one turned up. He also admitted that the place where accused was beaten and killed was nearer to village Fuldwas. He also admitted that one call was enough to attract attention of the villagers.

13. PW-9 Kiran Kumar was minor at the time of recording his statement. He was student of 9th standard at Govt. Sr. Secondary School, Tissa. According to him, on 18.12.2011, he had gone to Kalkundi Nag temple, which is at a distance of 2 kms. from his

village Padhar. He had gone there to offer milk on the advice of his parents. During offering, one aunt, namely, Veena from his village met him and gave him one bag of green vegetable to take the same to home. After offering, he walked downwards to the place known as Khill between village Kandwas and Fuldwas. He reached there around 9:45 AM. While on the way to home through the place known as Khill, he had seen one person giving beatings to one boy. He did not recognize the person who was beating. He later on came to know the name of the person who was giving beatings to the boy as Suli Ram and the name of the boy as Harish. The person who was beating had a long beard and was wearing black clothes and supporting long hair. He was wearing clothes like Ext. P-18 and P-20. He had seen one more person sitting above at a distance of 50 meters and later on he came to know that his name was Harish. In his cross-examination, he deposed that when he reached home, he met his father, two-three persons-Surinder Kumar and his wife Premi Devi. He disclosed to them about the brawl witnessed by him on the way while coming from the temple. He stood for about 5-6 minutes to witness the brawl. He had not seen any person visiting the spot to rescue anyone. He had not seen any other person in and around the place of occurrence but only Harish (PW-8) who was sitting at a distance of 50 meters. He admitted that in villages Kandwas, Fuldwas and Sugloga, generally the inhabitants of these villages wear black and shabby clothes.

14. Pw-13 Dr. Akshay Minhas, has conducted the post mortem examination and issued report Ext. PW-13/B. According to his opinion, the deceased had sustained internal abdominal injury leading to rupture of spleen which led to hemorrhage and head injury leading to fracture of bone and blood loss. It caused acute hemodynamic shock, which finally led to death.

15. PW-19 Insp. Jagdish Chand has carried out the investigation in the matter. He visited the spot. Inquest papers were filled in. He recorded the statement of Bhagat Ram vide Ext. PW-1/A. He identified stone Ext. P-2. Three blood stained stones lying in and around the dead body were taken into possession, which are Ext. P-4, P-6 and P-8. Sample soil was also lifted. On 25.12.2011, when accused was arrested, he made statement Ext. PW-1/F in presence of witnesses Madho Ram and Harish son of Tokha to the effect that he could get the shirt discovered worn by him at the time of occurrence. The accused was taken to the place of occurrence where shirt Ext. P-18 hidden in the bushes was recovered at his instance. Pants Ext. P-20 were also taken into possession. The case property was sent to RFSL Dharamshala on 26.12.2011 and 28.12.2012.

16. The case of the prosecution, precisely, is that PW-1 Bhagat Ram had sent his son to bring nails from village Sagluga. His son in the company of son of accused was going towards village Sagluga. The accused did not like his son going with deceased. The accused hurled stones on the deceased. He also placed 20 kg stone on the belly of deceased Harish. PW-8 Harish son of Tokha Ram came to the spot. PW-9 Kiran Kumar had also seen the incident. The post mortem of the dead body was got conducted.

17. The motive attributed to the accused for killing Harish was that he did not like his son with the deceased. According to the prosecution, the accused was very possessive about his sons. However, in Ext. PW-1/A, it is not mentioned that the accused did not like his son with the deceased. In his cross-examination, PW-1 Bhagat Ram deposed that he had disclosed before the police that the son of accused had accompanied his son to bring nails from village Sagluga. he was confronted with the statement Ext. PW-1/A and statement mark “B”, where it is not so recorded. In his cross-examination, he also deposed that he had disclosed that accused was over jealous about his children and did not allow them to mix up. He was confronted with the statement Ext. PW-1/A and statement mark “B”, where it is not so recorded.

18. PW-8 Harish son of Tokha Ram testified that he had seen the accused administering beatings to deceased from a distance of 100 meters. He had heard accused saying to the deceased as to why he used to take his son alongwith him. The incident has taken place on 18.12.2011. PW-8 Harish son of Tokha Ram has not disclosed this incident to any person, though Pradhan, Up-Pradhan and Members of the Panchayat were also residing nearby. The explanation given by PW-8 Harish son of Tokha Ram is that he confined himself in the house from 18.12.2011 to 22.12.2011. However, he has admitted that he was moving around in his house and also in the neighborhood. The normal human conduct would have been to inform the people if he had seen the accused giving beatings to the deceased. He has also admitted that he was acquainted with the faces of accused and Bhagat Ram, the father of deceased Harish. If he had seen the incident, he would have visited the house of Bhagat Ram, father of deceased to inform him about the incident. In his cross-examination, he deposed that he had raised screams when he saw accused giving beatings to deceased. He has also admitted that the place where the accused had beaten and killed deceased was nearer to village Fuldwas. He also admitted that the screams on the spot could be heard in the village Fuldwas. He also admitted that one call was enough to attract the attention of the villagers. The conduct of PW-8 Harish son of Tokha Ram is abnormal. Firstly, he has not informed the villagers or family members of the deceased and if according to him he had shouted and raised screams, it would definitely have invited the attention of the villagers of village Fuldwas.

19. Their lordships of the Hon'ble Supreme Court in the case of ***Maruti Rama Naik vrs. State of Maharashtra,*** reported in ***(2003) 10 SCC 670,*** have held that when PW-4 (a close relative of deceased K) saw the assault on K, but neither tried to shift K to a hospital who was alive by then nor informed anybody about the incident, and went to his factory and even after coming back from factory, he did not inform anyone about the same, his testimony was not relied upon. Their lordships have held as follows:

> "7. We will now consider whether the evidence of PW-4 in any manner corroborates the evidence of PW-3 or for that matter the said evidence of PW-4 is acceptable at all. PW-4 has admitted that he is a close relative of deceased Krishna Mahada Naik. While he had noticed the incident of the attack on the deceased Krishna Mahada Naik, he has not spoken in any manner about the subsequent attack which includes the attack on PW-3. According to this witness, at the relevant time, he was going to the bus-stand to board a bus to reach his factory where he was working when he saw the assault on the deceased Krishna Mahada Naik by the assailants including the appellants. Having noticed the incident, he did not go to any one of his relatives' house to inform about the attack in question. He knew at that point of time that Krishna Mahada Naik was injured and still alive, still he did not make any effort whatsoever to get any help to shift the injured to a hospital. According to this witness, even after seeing Krishna Mahada Naik lying injured in a critical condition, he without informing anybody about the incident, went to the bus-stand, took a bus and went to his factory and even at that point of time, he had sufficient opportunity to inform the other people about the incident or for that matter, even the Police which he did not do. It is interesting to note from the evidence of this witness that even though he had an opportunity of approaching the police, he did go to them because he did not know whom he had to inform about the incident in the Police Station. The witness further states that he went to the factory, worked for a while, took leave from the factory and went back home. Even after reaching home, he did not bother to find out from anybody there about the fate of the

> victims nor did he inform anybody about he having witnessed the incident. It is only at about 6 p.m. when PW-21 recorded the statement for the first time, he came out with the fact of having witnessed the incident. It is rather surprising as to how and in what manner, PW-21 came to know that PW-4 was a witness to the incident. The prosecution has also failed to explain the delay in recording the statement of this witness, therefore, bearing in mind the conduct of PW-4 in not informing anybody about his having witnessed the incident and the delay in recording his statement makes us hesitant to place any reliance on his evidence. The only other piece of evidence relied by the prosecution to support its case against these two appellants is that of recovery which even according to prosecution, was made from a place which was not in the exclusive possession of the appellants and the said place was easily accessible by other people and also the fact that recovery was made almost 9 days after the incident in question, in our opinion, this piece of evidence also would not at all be sufficient to base a conviction of these appellants without further acceptable corroboration. Therefore, we are of the opinion that these appeals must succeed. The conviction and sentence imposed on the appellants are set aside and the appeals are allowed."

20. In the instant case also, PW-8 Harish son of Tokha Ram has not disclosed the incident from 18.12.2011 to 22.12.2011 to any person. Thus, it would be unsafe to sustain the conviction of the accused on his testimony. Similarly, PW-9 Kiran Kumar, though stated to be eye witness of the incident but has not seen the accused hitting the deceased. He tried to identify him only with stones Ext. P-18 and P-20 and half sleeve shirt and pants. According to PW-9 Kiran Kumar, the person who was beating the deceased had a long beard and long hair. He was wearing black clothes. In his cross-examination, he admitted that in villages Kandwas, Fuldwas and Sugloga, generally the inhabitants of these villages wear black and shabby clothes. The conduct of PW-9 Kiran Kumar was also abnormal. He also met his father and 2-3 persons Surinder Kumar and his wife Premi Devi. He disclosed to them about the brawl on his way while coming from the temple. If he had seen the incident and narrated it to his father about the brawl, they would have definitely informed the father of the deceased who was resident of nearby village.

21. The deceased has died due to rupture of spleen which led to hemorrhage and head injury leading to fracture of bone and blood loss. The motive attributed to the accused for killing the deceased is not believable. Why a man would kill a child if he was seen in the company of his son ? It has come on record that deceased and son of the accused were good friends and used to pay together. The statement of PW-8 Harish son of Tokha Ram does not inspire confidence. It is reiterated that it is not believable why he would have kept quiet from 18.12.2011 to 22.12.2011. PW-9 Kiran Kumar has not recognized the accused on the spot. According to him, the accused was wearing clothes like Ext. P-18 and P-20. PW-8 Harish son of Tokha Ram knew the father of the deceased and despite that he has not informed him about the incident. PW-1 Bhagat Ram has also admitted that PW-8 Harish son of Tokha Ram knew his residence. There is no reference of the motive in the statement Ext. PW-1/A. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

22. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 22.12.2012, rendered by the learned Addl. Sessions Judge (FTC), Chamba, H.P., in Sessions trial No. 5/12, under Section 302 IPC is set aside. The accused is acquitted of the charge framed under Section 302 IPC, by giving him benefit of doubt. Fine amount, if any,

already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Surat Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 155 of 2015
Reserved on: October 07, 2015.
Decided on: October 08, 2015.

N.D.P.S. Act, 1985- Section 20- Accused while carrying red-gray coloured bag was apprehended by the police on suspicion-11kg 50gm charas was recovered from the bag- personal search of the accused was conducted and consent memo was prepared- no independent witness was associated- held that, the accused was given a third option also to be searched before the police officer- accused should be apprised of his right to be searched either before magistrate or the Gazetted Officer- there is non-compliance of mandatory provision contained in Section 50(1) of ND& PS Act- conviction and sentence of the accused liable to be set aside- appeal allowed. (Para 17 to 21)

Cases referred:
Suresh and others vrs. State of Madhya Pradesh, (2013) 1 SCC 550,
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345

For the appellant: Mr. Vivek Sharma, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 31.12.2014, rendered by the learned Special Judge (I), Shimla, H.P, in Sessions Trial No. 21-S/7 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 13.3.2013, police party headed by SHO Daya Ram consisting of ASI Raj Kumar and others was present during Nakabandi at place Pandranu from 4:00 AM to 6:00 AM. The police party while coming back in vehicle No. HP-07A-0839 reached near Dhangu Dhank. The accused was found coming downward carrying red-gray coloured bag pack. On seeing the police party, the accused became perplexed and tried to run away. On suspicion, accused was apprehended by the police party. The consent was taken vide consent memo Ext. PW-1/A. The police official has given the personal search vide memo Ext. PW-1/B. On search of the bag of accused, one plastic bag was found containing charas in the form of balls and sticks. The charas weighed 11 kg 50 grams. The charas Ext. P-4 was repacked in the same bag and sealed with three seals of "H" in parcel Ext. P-1 in the presence of witnesses and taken into possession vide memo Ext. PW-1/D. Sample of seal "H" was also taken on a piece of cloth vide Ext. PW-1/C. Rukka Ext. PW-11/A was prepared on the basis of which FIR Ext. PW-7/D was recorded. I.O. sent the rukka and sealed parcel containing charas through HHC Babu Lal who deposited it in the malkhana register. The abstract of malkhana register is Ext. PW-7/A. The IO prepared NCB form in triplicate vide Ext. PW-1/E. The case property was sent to FSL Junga vide RC No. 4. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. According to him, he was falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Vivek Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated 31.12.2014.

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

6. PW-1 ASI Raj Kumar deposed that on 13.3.2013, he accompanied SI Daya Ram and other police officials in official vehicle for detection of crime and laying of Naka towards Pandranu. When they came back from Pandranu after patrolling and reached at place named Dhangu Dhank about 1 ½ km. from Snail at about 7:00 AM, they witnessed one person coming from downside towards the main road. The person was carrying a red-grey coloured bag on his back. The accused got frightened. He was apprehended. SI Daya Ram disclosed the accused that he was suspecting some narcotic substance in the bag being carried by him. No independent witness was available on the spot at that time as the place where the accused was apprehended was not having any houses nearby. The accused was apprised by SI Daya Ram about his right of being searched in the presence of Magistrate or a Gazetted Officer. The accused gave his consent to be searched by the police officials present on the spot. Memo Ext. PW-1/A was prepared to this effect. The bag was searched. It contained white coloured plastic sack. The plastic sack was opened and was found to be containing the black coloured substance in the shape of sticks and balls. It was identified as charas. It weighed 11 kg. 50 grams. The charas was placed in the poly sack and the plastic sack was tied and placed in the same bag which the accused was carrying. The bag was placed and packed in a cloth parcel and the parcel was sealed with three seal impressions of "H". NCB forms in triplicate were filled in. In his cross-examination, he deposed that there was no habitation visible from the spot where the accused was apprehended. Volunteered that there is a colony in front of that place but the road to that colony leads from the other side which is 3 to 4 km from the spot. The place Kuddu and

Sanail is at a distance of about 2-1/2 km from Dhangu Dhank. No effort was made to associate any independent witnesses from Kuddu and Sanail. He admitted that the barrier stationed at Kuddu is operated throughout the day.

7. PW-2 HC Babu Lal also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot. S.I. Daya Ram prepared rukka Mark-A and handed over the same to him for being deposited at PS Jubbal for registration of case. He handed over the same to MHC at PS, Jubbal on the basis of which FIR No. 14/2013 was registered. In his cross-examination, he admitted that they had checked 4 light vehicles and one bus. Only 5 vehicles were checked there without fixing any barricades at Pandranu. They did not check any vehicle while returning from Pandranu to Dhangu Dhank. They crossed Kuddu barrier while going and coming back to the Police Station. He admitted that each and every vehicle which crosses through the barrier is entered at the Kuddu barrier. Volunteered that sometime the entry of the police vehicle is not made. Their vehicle was not entered in the Kuddu barrier either while going or coming back from Pandranu. He admitted that the spot is on the National highway which connects Rohru areas with Poanta Sahib. He admitted that the road is a busy road. There were some houses visible on the other side of the river and people were residing there. He boarded one vehicle from the spot when he brought the rukka and case property to the Police Station. The rukka was written in his presence by the SHO. In his cross-examination, he further admitted that option was given to the accused that he could get himself searched from the police party present and no other option was given to get the police party searched. He signed Ext. PW-1/A after reading its contents.

8. PW-3 HC Gopal Singh also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that they have crossed the Kuddu barrier on 13.3.2013 while going and coming back from Pandranu. He also admitted that no instructions were given to him to bring any witness from Kuddu.

9. PW-4 HC Attar Singh (retd.) deposed that on 16.3.2013, he was holding the charge of MHC PS Jubbal as per directions of SHO. he handed over the parcel stated to be containing charas weighing 11.50 grams in a bag sealed with three seal impressions of "H" alongwith a docket, sample seal, NCB forms, copy of memo to Const. Jagjeet Singh vide RC No. 100/12-13 dated 16.3.2013 for being deposited at FSL, Junga. In his cross-examination he admitted that there was overwriting over the FIR number written in FC Ext. PW-4/A. Only one parcel was sent. He admitted that there was no entry of NCB form being sent through the RC. Volunteered that he had sent the NCB form in a docket. There is no reference in the RC about any docket sent alongwith the case property.

10. PW-5 Const. Jagjeet Singh deposed that he carried the case property to FSL, Junga for chemical analysis and deposited the same on the same day.

11. PW-7 HC Jagat Ram has proved copy of malkhana register vide Ext. PW-7/A.

12. PW-10 LC Babita has also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot.

13. PW-11 SI Daya Ram also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot. He prepared rukka Ext. PW-11/A and sent alongwith case property, NCB forms through HC Babu Lal to PS Jubbal. FIR Ext. PW-7/D

was got registered against the accused. In his cross-examination, he admitted that there was no exemption of police vehicle from being entered in the records of the Kuddu barrier. He admitted that there was no entry of the police vehicle in which he was travelling in the record either at the time of going towards Pandranoo or coming back to PS Jubbal on that day. He also admitted that the distance between Dhangu Dhank and Pandranoo is about 8 kms. He also admitted that no efforts were made to call any independent witness from the places known as Snail and Kuddu. He also admitted that Kuddu and Snail places are having residential and non residential accommodation. HC Gopal was sent in the police vehicle to Kuddu who came back after half an hour. He admitted that the places Snail and Kuddu are at a distance of five minutes drive from the spot. No vehicle crossed during the period when they had carried out the proceedings in the present case. He admitted that the place where they had apprehended and carried out the proceedings is a road which connects Rohru area to Paonta Sahib.

14. It has come in the statement of PW-1 ASI Raj Kumar that no effort was made to associate independent witnesses from the places Kuddu and Snail. He admitted that the barrier stationed at Kuddu is operated throughout the day. The place Kuddu and Sanail are at a distance of about 2-1/2 km from Dhangu Dhank. PW-2 HC Babu Lal deposed that they have checked 4 light vehicles and one bus. Only 5 vehicles were checked there without fixing any barricades at Pandranu. They did not check any vehicle while returning from Pandranu to Dhangu Dhank. They crossed Kuddu barrier while going and coming back to the Police Station. He admitted that each and every vehicle which crosses through the barrier is entered at the Kuddu barrier. Volunteered that sometime the entry of the police vehicle is not made. Their vehicle was not entered in the Kuddu barrier either while going or coming back from Pandranu. He admitted that the spot is on the National highway which connects Rohru areas with Poanta Sahib. He admitted that this road is a busy road. The houses are visible on the other side of the river and people were residing there.

15. PW-11 SI Daya Ram has also admitted in his cross-examination that every vehicle that crosses the Kuddu barrier is duly entered in the records of Kuddu barrier. Volunteered that the police vehicles were not entered. He also admitted that there was no exemption of police vehicle from being entered in the records of the Kuddu barrier. There was no entry of the police vehicle in which he was travelling in the record either at the time of going towards Pandranoo or coming back to PS Jubbal on that day. He also admitted that the distance between Dhangu Dhank and Pandranoo is about 8 kms. He also admitted that on suspicion of accused carrying some contraband, no efforts were made to call any independent witness from the places known as Snail and Kuddu. He also admitted that Kuddu and Snail places are having residential and non residential accommodation. HC Gopal was sent in the police vehicle to Kuddu who came back after half an hour. He also admitted that the places Snail and Kuddu are at a distance of five minutes drive from the spot. The place where they had apprehended the accused and carried out the proceedings is a road which connects Rohru area to Paonta Sahib. Neither the place was isolated nor secluded where the accused was apprehended.

16. PW-11 SI Daya Ram has deposed that he has sent HC Gopal in police vehicle to Kuddu to get independent witnesses. However, PW-3 HC Gopal has categorically deposed in his cross-examination that no instructions were given to him to bring any witness from Kuddu. The police has not made any sincere efforts to associate independent witnesses at the time of search, seizure and sealing proceedings on the spot. The police ought to have associated independent witnesses, being available to inspire confidence the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot.

17. The accused was apprehended on 13.3.2013 while carrying a bag. However, despite that his personal search was carried out. The police has given option to the accused either to be personally searched before the Magistrate or the Gazetted Police Officer. The accused was also given option whether he wanted to be searched by the IO in the presence of witnesses mentioned in Ext. PW-1/A. According to Section 50 of the ND & PS Act, the accused has to be apprised of his legal right to be searched either before the Magistrate or the Gazetted Officer. There is no third option to be searched before the Police Officer. Thus, the consent obtained from the accused was not in conformity with Section 50 of the Act. It has vitiated the entire trial.

18. Their lordships of the Hon'ble Supreme Court in the case of ***Suresh and others vrs. State of Madhya Pradesh,*** reported in ***(2013) 1 SCC 550,*** have held that in a case where the accused were merely asked whether they would offer their personal search to police officer concerned or to gazetted officer and the appellants gave their consent for their personal search by police officer concerned, it will amount to non-compliance of Section 50(1) of the ND & PS Act. Their lordships have held as follows:

> "16) The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev singh's case.
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> 17. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernadez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law."

19. In the instant case the accused was to be apprised of his legal right to be searched either before the Gazetted Officer or before the Magistrate and not before the Police Officer.

20. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held that if merely a bag is carried by person is searched without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.
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> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

21. The prosecution has failed to prove the case against the accused for the commission of offence under Section 20 of the N.D & P.S., Act.

22. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 31.12.2014, rendered by the learned Special Judge-I, Shimla, H.P., in Sessions trial No. 21-S/7 of 2013, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Union of India and others .....Petitioners.

Versus

Sanjay Kumar and others .....Respondents.

CWP No.2196 of 2013
Decided on: 08.10.2015.

Constitution of India, 1950- Article 226- Respondents were held entitled to the benefit of Non-Executive Promotion Policy by the Central Administrative Tribunal- the applicants feeling aggrieved challenged the order by way of present petition- held that, the order passed by the Tribunal is well reasoned and requires no interference - the decision to regularize the services of the respondents was taken long back and its implementation was delayed for no fault on their part- the benefit of NEPP Scheme could not have been denied to them-writ petition dismissed. (Para 4 to 8)

For the Petitioners: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Rajinder Dogra, Advocate.

For the respondents: Mr.Rajnish K. Lal, Advocate, for respondents No.1 to 76, 78 to 83, 88 to 106 and LRs of respondent No.77.
Mr.B.B. Vaid, Advocate, for respondents No. 84, 85 and 86.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

CMP(M) Nos.11609 of 2013 & 11608 of 2013

The application, being CMP(M) No.11608 of 2013, has been filed by the applicants/petitioners for bringing on record the legal representatives of deceased respondent No.77, while CMP(M) No.11609 of 2013 has been filed for condoning the delay in filing the application i.e. CMP(M) No.11608 of 2013.

2. For the reasons mentioned in the applications, the same are allowed, the delay is condoned and the persons mentioned in paragraph No.1 of CMP(M) No.11608 of 2013 are ordered to be brought on record as legal representatives of respondent No.77 and are arrayed as respondents No.77(a) to 77(d). The Registry is directed to make necessary correction in the cause title.

3. Issue notice to the newly added respondents. Mr.Rajnish K. Lal, Advocate, waives notice for the said respondents.

CWP No.2196 of 2013:

4. By the medium of this writ petition, the petitioners have questioned the order, dated 16th January, 2013, passed by the Central Administrative Tribunal, Chandigarh Bench, (hereinafter referred to as the Tribunal), whereby Original Application, being OA No.279/HP/2012, titled Sanjay Kumar and others vs. Union of India and others, was allowed, and the Original Applicants (respondents herein) were held entitled to the benefit of Non-Executive Promotion Policy, (for short, the NEPP).

5. Feeling aggrieved, the petitioners (respondents before the Tribunal) have filed the instant writ petition challenging the order passed by the Tribunal on the grounds taken in the memo of writ petition.

6. Precisely, the case of the Original Applicants (respondents herein) before the Tribunal was that they were denied the benefit of pension, family pension, leave and provident fund on the ground that they were direct recruits in the Bharat Sanchar Nigam Limited (for short, the BSNL), constraining them to file CWP No.545 of 2006, wherein orders entitling the Original Applicants for the benefit of NEPP, were passed. However, notwithstanding the orders passed in the writ petition, the petitioners were denied the benefit of NEPP.

7. We have heard the learned counsel for the parties and have gone through the impugned order. The Tribunal, while allowing the Original Application, has rightly made the discussion in paragraphs 3 and 4 of the impugned order, which are reproduced below:

> *"3. There is a precise averment, in the course of the O.A., that the process of consideration for regularization of the applicants had concluded on 30.08.2000 and the issuance of formal orders in pursuance thereof were delayed due to delay on the part of the department itself which (delay) could not visit the applicants with onerous consequences.*
>
> *4. It is apparent, from a perusal of the pleadings raised by the parties and the documentation placed on record, that the consideration on point of grant of status of Temporary Mazdoor/Casual Labourer and the consequential regularization came to be concluded on 30.08.2000 but implementation thereof came to be delayed for no fault on the part of the applicants. They cannot, accordingly, be made to suffer for the delay in the relevant context. The competent authority having issued the Presidential Order (Annexure A-4) cannot validly deny the requested benefit to them on the premise that they were direct recruits into BSNL which they, in fact, were not. There is plethora of documentation on record to prove that the applicants were erstwhile DoT employees who were absorbed into BSNL w.e.f. 01.10.2000, vide order dated 30.08.2008 (Annexure A-4). We would, accordingly, allow the O.A. and uphold the entitlement of the applicants to the benefit of NEPP Scheme."*

8. We have examined the pleadings and the law applicable and are of the considered view that the impugned order is well reasoned and requires no interference.

9. Having said so, there is no merit in the writ petition and the same is dismissed, alongwith pending CMPs, if any.

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

Yudhvir Singh ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 4133 of 2015
Decided on: 08.10.2015

Constitution of India, 1950- Article 226- Petitioner applied for appointment on compassionate ground on the death of his father and his claim was rejected- directions were given in the writ to re-consider the case- claim of the petitioner was again rejected on the ground that income of the family does not fall under the income ceiling fixed by the Government- held that, family pension and other retrial benefits received by the family of the deceased are not to be included in the family income to deny the compassionate appointment - the scheme of 1990 also does not prescribe any income slab- writ petition allowed and the impugned order quashed with the direction to re-consider the case of the petitioner. (Para 3 to 6)

Case referred:
Surinder Kumar versus State of H.P. and others, ILR 2015 (V) H.P. Page- (D.B.)

For the petitioner: Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashistha, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, waives notice on behalf of the respondents.

2. The writ petitioner has landed in second round of litigation and has been dragged from pillar to post and post to pillar.

3. The bone of contention in this writ petition is - whether the order, dated 07.09.2015, (Annexure P-10) made by the respondents in terms of the directions of the Court in CWP No. 10257 of 2012 is illegal or correct?

4. Learned counsel for the parties stated at the Bar that this Court has already determined the issue in a batch of writ petitions, **CWP No. 9094 of 2013, titled as Surinder Kumar versus State of H.P. and others,** decided on 06.10.2015 and this writ petition be also disposed of in terms of the judgment (supra). Their statements are taken on record.

5. It appears that the father of the writ petitioner died while in service, the writ petitioner laid an application in terms of the policy framed in the year 1990 for appointment on compassionate grounds, which was rejected, constraining him to file CWP No. 10257 of

2012, which was disposed of on 02.04.2015 with a direction to the respondents to consider the case of the writ petitioner for appointment on compassionate ground afresh.

6. Thereafter, the respondents examined the case of the writ petitioner afresh and rejected the same vide order, dated 07.09.2015, on the ground that the case of the writ petitioner does not fall under the income ceiling fixed by the Government for providing employment on compassionate grounds, which is impugned in this writ petition.

7. This Court in **Surinder Kumar's case (supra)** has held that the family pension and other retiral benefits received by the family of the deceased employee are not to be included in the family income for denying the compassionate appointment. It has also been held that no income slab has been prescribed in the scheme of 1990. It is apt to reproduce relevant portion of the judgment herein:

> *"**Point No.(i) : Whether the amount of family pension and other retiral benefits, received by the family of the deceased-employee, can be included in the family income for denying the compassionate appointment?***
>
> *46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
>
> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.*
>
> *xxx xxx xxx*
>
> *54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance*

Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/ communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law. Point No.(i) is answered accordingly."

8. In view of the above, the impugned order, dated 07.09.2015 (Annexure P-10) is quashed, the writ petition is allowed and the respondents are directed to consider the case of the writ petitioner for appointment on compassionate ground without taking into account the income slab in terms of the tests and principles laid down in **Surinder Kumar's case (supra).**

9. Pending applications are also disposed of accordingly.

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

Asgar Ali and others .....Appellants.

Versus

Shri Imran Khan and another ...Respondents

FAO (MVA) No. 7 of 2009.
Date of decision: 9th October, 2015.

Motor Vehicles Act, 1988- Section 166- The Tribunal dismissed the claim petition holding that the driver was not proved to be driving the offending scooter – on feeling aggrieved, claimants filed appeal – held that, no evidence was led by claimants to prove that alleged driver was driving scooter at the relevant time- alleged driver is deaf and dumb and statement of one police constable to the effect that offending driver by way of gesture stated that he was driving scooter is not sufficient–claim petition rightly dismissed by the Tribunal – appeal also dismissed. (Para 3 to 7)

For the appellant: Mr. Karan Singh Kanwar, Advocate.

For the respondents: Ms. Jyotsna Rewal Dua Sr. Advocate with Ms. Amrita Messie, Advocate, for respondent No.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP No.1125/2015.

This application has been moved for bringing on record the legal representatives of deceased respondent No.2. Shri Imran Khan one of the legal

representatives is already on record, I deem it proper to bring on record the other legal representatives of deceased respondent No. 2 as mentioned in the application. Thus, the application is granted and the legal representatives mentioned in the application are ordered to be brought on record. Registry to carry out necessary correction in the memo of parties. The application is disposed of.

FAO No. 7 of 2009.

2. Challenge in this appeal is to the judgment and award dated 30.10.2008, made by the Motor Accident Claims Tribunal-1, Sirmaur District at Nahan, in MAC Petition No. 148-MAC/2 of 2004, titled *Asgar Ali and others versus Shri Imran Khan and another,* for short "the Tribunal", whereby the claim petition came to be dismissed, hereinafter referred to as "the impugned award", for short.

3. The claimants had sought compensation to the tune of Rs.6.5 lacs, as per the break-ups given in the claim petition, on the ground that Imran Khan had driven Scooter No. HP18-7862 rashly and negligently and caused the accident wherein deceased Kesar Ali sustained injuries and succumbed to the injuries.

4. The claim petition was resisted and contested by the respondents and following issues were framed.

(i) *Whether Kesar Ali (since deceased) was traveling on scooter No. HP-18-7862 as a pillion rider on dated 4.3.2002, on nahan-Shimla road near Jhamiria, the scooter was being driven by respondent No.1 Imran Khan as alleged? OPP*

(ii) *If issue No. 1 is proved in affirmative, whether Kesar Ali died being a pillion rider of scooter No. HP-18-7862 which met with an accident, as alleged? OPP*

(iii) *If issue No. 1 and 2 are proved in affirmative, to what extent the petitioners are entitled to receive compensation and from whom.? OPP*

(iv) *Whether the petition is not maintainable in the present form as alleged in preliminary objection NO. 1? OPR 1 and 2.*

(v) *Whether the petition is bad on account of mis-joinder of parties and causes of action? OPR1 &2.*

(vi) *Whether the petitioners are not dependents of late Sh. Kesar Ali, if so, its effect? OPR1 and 2.*

(vii) *Whether Kesar Ali (since deceased) was driving the scooter at the time of the accident, if so its effect? OPR 1 and 2.*

(viii) *Relief.*

5. The Tribunal has discussed the evidence and held that the claimants have failed to prove that the scooter was involved in the accident and Imran Khan had driven the said scooter rashly and negligently.

6. I have examined the record. The claimants have examined five witnesses, namely HC Kuldeep Kumar (PW1), Asgar Ali (PW2), Sanjay Kumar (PW3), Constable Baldev Singh (PW4) and Sirmaur Singh (PW5). The respondents have also examined five witnesses, namely N.K. Barwal (RW1), Sheikh Imtiaz (RW2), Satish Duggal (RW3), Imran Khan (RW4) and Khursheed Ahmed (RW5).

7. The claimants have not led any evidence, oral as well as documentary, to prove that Imran Khan was driving the scooter at the relevant point of time. However, one PW4 constable Baldev Singh stated that Imran Khan, by way of gesture, stated that he was driving the scooter. It is not known how he came to know about the gesture of Imran khan. Imran Khan is stated to be deaf and dumb and he is not trained to know and understand the language and gesture of deaf and dumb people.

8. The Tribunal has rightly discussed the evidence in para 18 of the impugned award. It is apt to reproduce para 18 of the impugned award herein:

> "*18.In the FIR Ext. PW1/A it was mentioned that the scooter was bearing No. HP-18-7862. Even in the statement recorded by the court during the trial of criminal case, it appears that the identity of the scooter could not be established. Statement of PW @ ASI Dhan Singh, who had investigated the case, has stated that he was told about this number of the scooter, but who had told him has not been disclosed by him. Although he was stated that it was Ram Gopal, Head constable who had told him about the scooter, but Ram Gopal was not an eye witness and Ram Gopal had not disclosed the source of information about number of the scooter. The scooter was not available even at the site of accident when the investigating officer went on the spot. In these circumstances, who disclosed the number of the scooter to the police is a mystery, although, the police states that it was Imran Khan who had disclosed so at the hospital, but he is deaf and dumb. PW3 Sanjey Kumar's version regarding the number of the scooter is not reliable. He has stated that at the time when he had deposed in the criminal court the number was not known to him. How later on when he appeared as PW3 in this case, he came to remember the number of the scooter is not disclosed by him, so he cannot be trusted. The statement of Constable Baldev Singh PW4 that Imran Khan had disclosed the number of scooter by gestures is not convincing. It is so because Baldev Singh is not trained in understanding by gestures of deaf and dumb people. Then in his cross-examination he has admitted that the possibility of Imran Khan might have told that some scooter was brought by Kesar Ali cannot be ruled out. Also no photographs of the scooter which had met with accident have been produced on record. If this scooter was involved it must have been damaged. For the non-production of the photographs of the scooter adverse inference has to be drawn against the petitioner's claim.*

9. Having said so, the findings on issue No. 1 are upheld.

10. At this stage, the learned counsel for the respondents stated at the Bar that the challan was presented against Imran Khan before the Court of competent jurisdiction wherein he was acquitted on the ground that the scooter was not involved in the accident. The State has also carried the appeal to this Court which was registered as Cr.A No. 224 of 2003 and this Court has held that the scooter was not involved in the accident. It is apt to reproduce para 7 of the said judgment herein.

> *"7.In the instant case, there is no eye witness nor there is any direct or circumstantial evidence to prove that respondent, at the relevant time, was driving the Scooter in question rashly or negligently which caused the accident."*

11. Having said so, the appeal is dismissed and the impugned award is upheld.

12. Send down the record, forthwith, after placing a copy of this judgment.

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

Bhupesh Kumar @ Kaka @ Tinku .....Appellant.

Versus

State of H.P. ...Respondent.

Cr. Appeal No.: 83 of 2015
Reserved on: 24.09.2015
Date of Decision: 9.10.2015

Indian Penal Code, 1860- Section 302 and 307- PW-6 'R' and PW-12 'S' were sleeping when they heard the cries- PW-6 ran towards the spot- PW-12 followed him- PW-12 heard the cries of PW-6 and when he reached at the spot, he found PW-6 in an injured condition- accused was inside the room having one blood stained Khukari in his hand – accused tried to run away on which PW-12 bolted the door from outside – PW-6 told PW-12 that accused had given Khukari blow to him and 'V' and the accused had killed 'P'- prosecution witnesses had corroborated the testimonies of each other- there was no contradiction in their cross-examination- Khukari was duly identified by the witnesses- medical evidence also corroborated the testimonies of eye-witnesses- accused had taken a plea of insanity but the medical evidence shows that accused was examined much prior to the incident- there is no evidence that accused suffered from the insanity on the date of incident- subsequent medical examination of the accused will also not make any difference – held that plea of insanity was not established and the accused was rightly convicted. (Para-9 to 20)

For the Appellant: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement rendered on 31.12.2014 by the learned Sessions Judge (Forests), Shimla, in Sessions trial RBT No. 37-S/7 of 2013/88, whereby the latter convicted and sentenced the accused for his having committed offences punishable under Sections 302 and 307 IPC.

2. The accused convict is aggrieved by the renditions of the learned Sessions Judge (Forests), Shimla. Being aggrieved he has assailed the findings recorded therein by instituting the instant appeal before this Court. Moreover, obviously a prayer has been made therein that his appeal be accepted and the findings of conviction recorded against him by the learned trial Court qua his having committed offences punishable under Section 302 IPC as well as under Section 307 IPC be reversed and set-aside in exercise of its appellate jurisdiction by this Court.

3. The prosecution story, in brief, is that in the early hours of the morning of 24.3.1988 at about 4 a.m when Sanjeev Sharma and his brother Raj Kumar were sleeping,

some cries were heard from the house of Tara Chand whereupon brother of Sanjeev Sharma, Mr. Raj Kumar went there and thereafter Sanjeev Kumar heard the cries of his brother Raj Kumar, so he also ran after him. When Sanjeev Sharma reached at the door of Tara Chand house he found Raj Kumar in an injured condition outside the room and another person Bhupesh Kumar, who was working in the A. G. Office and was known to him was inside the room having one Khukhari in his hand, which was blood stained and that person Bhupesh tried to run away, so he bolted the door from outside so that he cannot ran away from the spot. When he reached, his brother Raj Kumar told him that Bhupesh had given Khukhari blows to him and to Vivek and had also killed Kumari Poonam. Vivek had run away by jumping from the window. He brought Raj Kumar to the Ripon hospital and then reported the matter to the police.

4. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Sections 302 and 307 IPC to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 21 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused person was given an opportunity to adduce evidence, in, defence, and he chose to adduce evidence in defence.

6. The accused/appellant is aggrieved by the judgement of conviction recorded by the learned trial Court. Shri Satyen Vaidya, learned Senior Advocate, has concertedly and vigorously contended that the findings of conviction recorded against the accused/appellant by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction recorded against the accused/appellant be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Assistant Advocate General appearing for the State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the trial Court, 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 ill-fated occurrence took place on 24.03.1988 at about 3.45 a.m. On the aforesaid date and time the accused/convict is alleged to have ingressed the house of deceased Poonam and put her to death by delivering blows on her person with a Khukhari Ext.P-1. Ext.P-1 was found lying at the site of occurrence and was taken into possession vide seizure memo Ext.PW-2/A. Both Raj Kumar and Vivek who interceded in the assault perpetrated by the accused on deceased Poonam with Khukhari were too subjected to assault by the accused with Khukhari Ext.P-1. Both Raj Kumar and Vivek sustained injuries on their respective persons as manifested in MLCs Ext.PW-14/B and Ext.PW-7/A prepared respectively qua their persons by PW-14 and PW-7. A complaint qua the occurrence was lodged before the authorities concerned by PW-12 Sanjeev Sharma.

10. The evidence on which the prosecution relies to sustain the charges against the accused, is embedded on direct evidence or on eye witness account qua the occurrence having been rendered by injured victims PW-9 Vivek Sharma, PW-6 Raj Kumar. The

deposition of PW-9 who sustained injuries on his person as reflected in Ext.PW-14/B, has in his ocular version deposed on oath qua the incident bespoken therein with vividity besides with graphic enunciation the factum of on 23.03.1988 after he and his deceased sister having had dinner at about 10 or 10.30 p.m theirs having bolted the house and theirs having proceeded to go to sleep. He proceeds to depose the fact that the bed of his sister was near the door. In the morning at about 3.45 or 4.00 a.m the door bell of his house rang and his rearing an impression that it had been sounded by his brother who had returned from Delhi he asked his deceased sister Poonam to open the door. On the door of his house having come to be opened by his deceased sister, he deposes that he over heard the accused outpouring invectives "Kuti Haramjadi Main Tujhe Chhodunga Nahin Khatam Kar Dunga" against her. He continues to depose that he over heard the cries of his sister and noticed that she had fled towards the bed room. Further more, he deposes that the accused was wielding a Khukhari in his hand and in his presence he delivered with it 2-3 blows on the head of his deceased sister sequelling her to fall near the almirah. Besides he deposes that when he tried to come out of the bed room the accused gave 2 blows of Khukhari on her left arm and in order to avert his attempt to deliver more blows of Khukhari on the person of his deceased sister Poonam he took to fling a quilt at the accused. Despite the aforesaid effort on the part of PW-9 to concert to avert the assault by the accused on his deceased sister as well as on his person with Khukhari, the accused still delivered 2-3 blows with Khukhari yet on account of a quilt having been flung by him at the accused, the said blows of Khukhari delivered by the accused on his person proved abortive. He testifies that he delivered a kick at the abdomen of the accused which sequelled the Khukhari to be freed from the hands of the latter. He deposes that though he ran to wield the Khukhari yet the accused succeeded in wielding it and proceeded to deliver blows with Khukhari on his head and on other part of his body. On his raising alarm 'Bachao Bachao' Raj Kumar PW-6 the other injured witness came to the site of occurrence and rescued him from the accused. Even though the accused ran towards PW-9 yet he jumped out of the drawing room through the window. PW-9 was rendered unconscious and was hospitalized. During the course of the recording of his deposition in Court he identified Ext.P-1 to be the Khukhari wielded by the accused and with which he delivered blows on his person as well as on the person of his deceased sister. The testimony of PW-9 who rendered an eye witness account qua the ill fated occurrence has been with aplomb lent corroboration by PW-6 Raj Kumar. PW-6 in his deposition has unearthed the fact that on 24.3.1988 he and his brother Sanjeev were sleeping in the room. He has proceeded to depose that at about 4. a.m they over-heard cries emanating from the house occupied by PW-9. On hearing cries emanating from the house of deceased Poonam and of PW-9, he proceeded towards their premises. He deposes that he found the door of the premises bolted. On his opening the door, he deposes that he noticed that the electricity was on and the accused was delivering blows with Khukhari on the person of Poonam, who was sitting near the almirah. Besides he deposes that he observed that PW-9 Vivek, the younger brother of deceased Poonam, was in an injured condition. On PW-6 entering the premises occupied by deceased Poonam and PW-9 the injured eye witness to the ill fated occurrence, the latter egressed from the room. He continues to depose that he concerted to repulse the assault perpetrated with Khukhari by the accused on deceased Punam yet the accused proceeded to also assault him by giving blows on his left arm with Khukhari. Moreover, he deposes that the accused also delivered blows on his head and near his eye-brows. Despite his attempt to repulse the assault perpetrated on his person by the accused by raising his right arm the latter proceeded to deliver blows with Khukhari on his arm as well. He deposes that the accused proclaimed that he would kill Poonam and would also kill PW-6. On hearing the noise his younger brother has been deposed by him to have also arrived at the site of occurrence. He continues to testify that he also came out of the room whereafter his brother bolted the door from outside and carried him to hospital for medical

aid. This witness has deposed that the accused was his class fellow and was also class fellow of Poonam's brother Rakesh. This witness has also deposed that about 2-3 days before the occurrence the accused had apprised him that he wanted to marry Poonam and had solicited his services to negotiate his marriage with deceased Poonam, which requisition made to him by the accused has been deposed to have been declined by PW-6.

11. PW.12 is the informant, who visited the site of occurrence on his hearing cries emanating from the house occupied by PW.9 and by deceased Poonam. On his arriving at the site of occurrence, he deposes that he saw PW.6 in an injured condition besides he deposes that he saw the accused wielding a blood stained Khukhari in his hand. He also testifies that he dragged his brother from outside and bolted the door from outside.

12. The evidence comprised in the testimonies of the aforesaid eye witnesses to the occurrence is not ridden with any taint of theirs while rendering in their respective examinations in chief a graphic besides a vivid ocular account qua the ill-fated occurrence having contradicted the said rendition, in their deposition comprised in their respective cross examinations, so as to spur an inference that they have deposed a version qua the incident ridden with the vice of inter se contradiction. Apart therefrom, an incisive scrutiny of their testimonies upsurges an inference that they have deposed an ocular version qua the incident bereft of any vice of intra se disharmony or inconsistency, which malady of intra se contradictions afflicting their respective testimonies would have rendered them to be construable to be tainted, hence, incredible. Sequelly when they have respectively deposed a version qua the incident with aplomb consistency besides with intera se harmony renders open an inference that they, hence, corroborate their respective versions qua the incident on oath deposed by each of them. Furthermore, when a threadbare analysis of their respective testimonies on oath omits to portray that either of them have while testifying in Court improved or embellished upon their previous statements qua the occurrence recorded in writing at their instance by the Investigating Officer concerned hence fosters an inference that their testimonies qua the occurrence are both inspiring, trustworthy besides obviously credible. Both PW-9 and PW.6 have during the course of recording of their respective depositions on oath identified Khukhari Ext.P.1, recovered under memo Ext.PW-2/A to be the weapon wielded by the accused to assault deceased Poonam as well as to inflict on their respective persons the injuries as pronounced in their respective MLCs comprised in Ext.PW.14/A and Ext.PW.7/B. Moreover, PW.14 who subjected PW.9 to medical examination and proved MLC Ext.PW.14/B prepared by him on his subjecting PW.9 to medical examination, has deposed that the injuries comprised in Ext.PW.14/B the relevant portion whereof stands extracted hereinafter are sequellable by the user of Khukhari Ext.P.1 shown to him in Court. He has also deposed that the injuries are dangerous to life, if the victim's bleeding was not controlled well in time .

> "1. Five incised wounds measuring 4-8 cms in length with 1-1&½ cms graping on vertex and occipital region of scalp. All wounds were spindle shaped and freshly bleeding. There were bone deep.
>
> 2. Multiple incised wounds on posterior aspect of right forearm measuring 4-8 cms X 1-3 cms with spindle shape and muscle deep. These were bleeding as shown in the adjacent figure. Muscle tendons were exposed.
>
> 3. Left upper limb was showed multiple incised wounds, which were spindle shape and muscle deep. Near left wrist these were bone deep with marked swelling and bony tenderness over left forearm in lower half. All wounds were freshly bleeding and were on posterior aspect of left upper limb.

4. Right lower limb had two contused lacerated wounds and one was 8X3 cms. Obliquely placed incised wound which was bone deep and muscle tendons were exposed.

13. Also PW.7 who subjected PW.6 Raj Kumar to medical examination and prepared qua him MLC Ext.PW.7/A has in his deposition recorded on oath communicated the fact that the hereafter extracted injuries comprised in Ext.PW.7/A as stand proven by him are sequellable by the user of Khukhari Ext.P.1 shown to him in Court. Besides he has deposed that the injuries depicted therein and found occurring in the skull region are dangerous to life.

"(i). Incised wound spindle shaped, borader towards right and narrower towards left in the middle of scalp 10 CM X 2½ X ½ . The margins were clean cut and gaping. The injury was bleeding profusely. The galeaponeuritica was cut and would was bone deep.

(ii). Incised wound on right parietal region 3 cm X 1½ cm X 1 cm, spindle shaped. The margins of wound were clean cut and gaping. Bleeding was present.

(iii) Incised wound over the left upper lid in the eye brow region in the centre 2½ cm X 1½ cm X 1 cm. Bleeding was present. There was avulsion of the eye brow.

(iv) Lacerated wound ½ cm X ½ cm just below the left lower lid margin contusion around the wound.

(v) incised wound over the left arm in the deltoid region, spindle shaped (on antero lateral aspect of the arm) 8 cm X 2½ cm X 1½ cm. The deltoid muscle was partially cut. Margins were clean cut and gaping. Bleeding was present.

(vi) Incised wound four inches above the right wrist joint. 5 cm X 1½ cm X 1 cm spindle shaped on the dorsal aspect of forearm. Wound was clean cut. The margins were gaping. The extentesor digitorum, extetesor carpiulnoris and extentesor pollisus longus were partially cut and the bone was exposed on the middle part of the wound and cut was present on the ulna on dorsonediel aspect.

(vii) Abrasion over the chest on left side, streak like 3 cm long reddish in colour.

(viii) Abrasion over the left hand 1 cm X ½ cm reddish in colour."

14. With this Court having on an incisive analysis of the depositions of the eye witnesses to the occurrence besides for the reasons attributed hereinabove concluded that their testimonies are natural then when the invincible and formidable conclusion which ensues therefrom is that the oral evidence qua the ill-fated occurrence stands on a sacrosanct evidentiary pedestal, naturally then it carries probative vigor as well as efficacy. Even their oral version qua the incident is meted out corroboration by both MLCs Ext.PW.14/B and Ext.PW.7/A prepared and proven respectively by PW.14 and PW.7. Besides with both PW.14 and PW.7 deposing in harmony qua the factum of injuries noticed by each of them in Ext.PW.14/B and Ext.PW.7/A being sequellable by user of Khukhari Ext.P.1, as also theirs deposing that for the reasons assigned therein, the injuries occurring on the vital portions of the bodies of the respective victims of the assault perpetrated on their persons by the accused, are dangerous to life, prods this Court to conclude that given the gravity, enormity and severity of the assault perpetrated on the persons of both PW.9 and PW.6, by the accused with the user by him of a Khukhari, a lethal weapon, renders the aforesaid enormity of the assault perpetrated on their respective persons by the accused to be acquiring an accentuated proportion of gravity besides severity. The factum that the injuries with its user were delivered upon vital portions of the bodies of each of the victims, renders the conclusion drawn by the learned trial Court that the prosecution, hence, has been able to prove the charge against the accused of his having committed an offence

punishable under Section 307 IPC qua both PW.9 and PW.6 to be un-amenable to any interference by this Court.

15. The testimonies of PW.6 and PW.9 both eye witnesses to the occurrence and whose testimonies for the reasons assigned hereinabove are imbued with tenacious credibility or obviously hence are not got to be discounted by this Court for thereupon also drawing a conclusion that on the ill-fated day a lethal assault was also perpetrated by the accused upon deceased Poonam. Therefore, while imputing credibility to the testimonies of the aforesaid eye witnesses to the occurrence, a firm conclusion which is ensuably enjoined to be drawn by this Court is that the accused on the ill-fated day, brutally with the user by him of Khukhari Ext.P.1 murdered deceased Poonam.

16. The post mortem of deceased Poonam was conducted by PW.21. PW.21 has proven the post mortem report Ext.PW.21/A. He has in his deposition pronounced therein the fact that the anti mortem injuries noticed by him to be occurring on the body of deceased Poonam while his subjecting it to post mortem are sequellable by user of Khukhari Ext.P.1.

17. Even though the aforesaid ocular version qua the factum of the accused having caused the gruesome murder of deceased Poonam by his inflicting injuries with Khukhari Ext.P.1 on her person and which injuries stand pronounced in post mortem report, hence, when the ocular version qua the incident stands corroborated by post mortem report comprised in Ext.PW.21/A would render it to command efficacious probative sinew for prodding this Court to on anvil thereof draw a formidable conclusion of the prosecution having proved the charge against the accused of his having committed an offence punishable under Section 302 of the IPC. Nonetheless, with the defence having concerted to exculpate the penally culpable liability of the accused by relying upon the exceptions to criminal liability comprised in Section 84 of the Indian penal Code, necessarily then it is imperative for this Court to fathom from the evidence adduced on record, whether the concert of the defence in seeking to, while relying upon the provisions of Section 84 of the Indian penal Code while its constituting a tenable exception for exculpation of the penal culpability of the accused, garners any efficacious evidentiary muscle or strength for it to hence to succeed. Now this Court is beset with the task of pronouncing upon the tenacity of the propagation of the defence that the penal culpability of the accused stands exculpated by the factum of his suffering from paranoid schizophrenia as emanable from the testimony of DW.1, hence, concomitantly while his being gripped with the mental disorder aforesaid, he was as such also unaware of the nature of the offence which he committed or besides was also unaware that it was wrong or contrary to law so as to render the aforesaid proven factum of his being unaware of both the nature of the act or that what he was doing is wrong or contrary to law to stand encapsulated besides encompassed within the domain of legal insanity, in marked distinctivity with medical insanity, as propounded in Section 84 of the Indian Penal Code, for the accused to while relying upon it seek his exculpation from penal culpability. Before this Court proceeds to garner from the apposite evidence as exists on record the factum whether the defence has succeeded in espousing legal insanity enshrined in Section 84 of the Indian Penal Code gripping the accused at the relevant time it is incumbent upon this Court to before proceeding to dwell upon the tenacity of the said plea espoused by the defence allude to the apt besides the pre-eminent factum as to upon whom the burden to discharge the said onus is cast besides enjoined or mandated by law. Uncontrovertedly not the prosecution rather the defence is commanded or enjoined by law to prove by adduction of efficacious evidence carrying probative vigor, the factum of the accused while labouring under a severe mental disorder or his being gripped with besides beset with a mental malady at the time contemporaneous to the occurrence, hence was

constrained to be unaware of both the nature of the act or that what he was doing is wrong or contrary to law. The defence to discharge the burden as cast upon it, by law for succeeding in its espousal that the plea of mental insanity is available to the accused, has relied upon the deposition of DW.1 besides upon the deposition of DW.2. Dr. Virendera Mohan, who stepped into the witness box as DW.1. DW.1 had subjected the accused to medical examination on 18.8.1984, whereupon he concluded that the accused was suffering from paranoid schizophrenia. Though he has proceeded to depose that with the accused being beset with the aforesaid mental malady he is deprived of his cognitive faculties. Nonetheless, when his observations qua the factum of the accused being beset with paranoid schizophrenia stand recorded in Ext.D.1 on 18.8.1984, as also when he subjected the accused to examination on 4.12.1987, yet the examination if any by him of the mental condition of the accused in the years aforesaid may not be relevant to, on such assessment by him qua the mental condition of the accused in the years aforesaid, constrains this Court to conclude that the ill-fated occurrence of 24.3.1988 was carried into effect by the accused with his then too being beset with paranoid schizophrenia. More so when DW.1 in his cross examination has conceded to the factum of his having not subjected the accused to medical examination in March 1988, besides even if there is a revelation in his deposition of theirs being a possibility of reoccurrence of the aforesaid mental malady in the accused on the score of his having been beset with the mental disorder aforesaid since 1984 would not facilitate an inference from this Court that he had yet not recovered from the mental malady aforesaid especially when there is no evidence forthcoming portraying the factum that since 4.12.1987 till March 1988, the accused had been receiving treatment for enabling him to recuperate from the mental malady aforesaid. For want of evidence unveiling the factum of the accused having received medical treatment subsequent to December, 1987 when DW.1 subjected the accused to medical examination and thereupon his having detected the accused to be beset with paranoid schizophrenia, the invincible conclusion ensuable therefrom is that, hence the accused had recovered from the aforesaid mental malady or that the incident on the ill-fated day was not a sequel to its reoccurrence or resprouting in the accused. Moreso, when there is no apposite evidence comprised in the factum of the accused having been subjected to medical examination at the time contemporaneous to the ill fated occurrence and such examination portraying factum of the accused being yet beset with paranoid schizophrenia.

18. Even the testimony of DW.2 is of no avail to the defence to espouse with any iota of success before this Court that at the apposite stage or on the ill-fated day the accused while being beset with paranoid schizophrenia deadened his cognitive faculties concomitantly sequelling the effect of, hence his being unaware of the nature of the act or that what he was doing was wrong or contrary to law so as to bring his penal misdemeanors within the ambit or domain of the exception to penal liability constituted under Section 84 of the Indian Penal Code, especially when he did not, immediately prior to the ill-fated day or even at a time in close proximity to or in contemporanity to the ill-fated occurrence, subject the accused to medical examination for empowering him to unearth the factum of the accused being beset with paranoid schizophrenia. Rather as emanable from a reading his testimony, of his having subjected the accused to medical examination in the year 1991 which is a period three years subsequent to the ill-fated occurrence cannot bring the detection, if any by him of the accused then being beset with paranoid schizophrenia, to be either relatable to or being referable to the stage contemporaneous to the ill-fated occurrence, for then giving succor to the propagation by the defence that its detection then has a close nexus with the occurrence which rather took place as distantly as three years prior to its detection.

19. The medical evidence comprised in the testimonies of DW.1 and DW.2 for the reasons aforesaid when ridden with evidentiary emasculation to prove the factum of the accused at the relevant or the germane stage being gripped with paranoid schizophrenia, the evidence comprised in the deposition of PW.13, the officer under whom the accused was serving as an Accountant in the office of the Senior Accountant General, Shimla from 1986 to the earlier part of the year 1988 and its close reading with incisive circumspection unveiling the factum of PW.13 having not during the tenure of the accused serving under him as an Accountant observed in him any noticeable mental abnormality rather his deposition on oath unveiling the factum that both the official behaviour as well as the work performed by the accused was normal, discounts the propagation by the defence that at the time contemporaneous to the ill-fated occurrence the accused was gripped with paranoid schizophrenia. More so, when PW.13 has been categorical in deposing that the accused had worked as an Accountant under him in the office of the Senior Deputy Accountant General, Shimla from the end of the year 1986 to the earlier part of the year 1988, hence, when the aforesaid tenure of rendition of work by the accused under PW.13, is in close proximity to the ill-fated occurrence and when PW.13 has been categorical in his deposition qua the factum of their being no noticable symptoms of the accused while performing duties under him in portrayal of his being beset with any abnormality rather when he has bespoken with clarity the factum that the accused during the period of his rendering duties under him as an Accountant, was performing his official work satisfactorily besides his behaviour was normal and which deposition gains momentum especially when it has remained unshred during the course of his having been subjected to cross-examination by the learned counsel for defence, necessarily then it with aplomb foments an apt conclusion that the accused at the time contemporaneous to the ill-fated occurrence was not beset with paranoid schizophrenia.

20. Apart therefrom with theirs being an emanation in the testimony of PW.6 the injured eye witness of the accused having 2-3 days prior to the incident solicited his services for settling his matrimony with deceased Poonam, which requisition remained unacceded to at his instance, necessarily when the said occurrence in the deposition of PW-6 while having remained unimpeached during his cross-examination hence empowering it to acquire probative tenacity, constrains a conclusion from this Court that the accused was nursing a desire to marry deceased Poonam having developed intimacy with her with his as deposed by PW-9 his being a regular visitor to the house of deceased Poonam while being the class fellow of her younger brother Rakesh, hence may be it appears that when the said offer stood spurned or thwarted by the deceased, he in retribution to avenge his ignominy proceeded in the wee hours of the ill-fated day to the house of the deceased Poonam to murder her in the manner he did. The factum that he had apart from the fact constituted in the hereinabove assigned reasons of his being driven, by his bruised psyche arising from his offer to marry deceased Poonam having been spurned by the latter to murder her, outpoured vituperative invectives comprised in the phraseology “Kuti Haramjadi Main Tujhe Chhodunga Nahin Khatam Kar Dunga”, as deposed by PW.9 at the deceased when he ingressed the premises, which factum of the user by him of the aforesaid invectives when remains unshattered during the cross examination of PW.9, fosters a conclusion that the accused had proceeded from his house to wreak vendetta upon the deceased Poonam by murdering her as he did by wielding a Khukhari Ext.P.1. The emanation of the aforesaid inference tells upon the fact that the accused was scheming besides planning while hence, carrying a mens rea in his mind to commit the murder of deceased Poonam, necessarily when this Court has drawn a conclusion of the accused scheming the murder of deceased Poonam, which inference stands firmly embedded in the evidentiary material adverted to hereinabove, firmly ousts the propagation by the defence that the accused was not aware of the nature of the offence which he committed or besides was unaware that it was wrong or

contrary to law so as to bring his act of committing the murder of deceased Poonam besides attempting to commit the murder of injured eye witnesses PW.6 and PW.9 to fall within the ambit of Section 84 of the Indian Penal Code. In sequel, it is held that with the prosecution having proved the factum of the accused nursing a mens rea in his mind to commit the offences for which he stood charged and convicted, hence when the burden of proving the exception to penal liability constituted under Section 84 of the Indian Penal Code relied upon by the defence was enjoined to be discharged by the defence, which burden for the reasons aforesaid has remained undischarged, the natural conclusion which ensues is that findings and conclusions recorded by the learned trial Court do not necessitate interference.

21. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Chaman Lal .....Appellant

Versus

Rukmi Devi and others ..... Respondents

FAO No.327 of 2008

Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Tribunal had taken the notional income of the deceased as Rs. 15,000/- per annum- multiplier of '15' is applicable, thus, claimants are entitled to Rs. 15000 x 15 = Rs. 2,25,000/-, along with interest- claimants are also held entitled to Rs. 10,000/- as litigation expenses. (Para-9)

For the appellant: Mr.Mehar Chand, Proxy Counsel.

For the respondents: Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms.Amrita Messie, Advocate, for respondents No.1 and 2.
Nemo for respondent No.3.
Mr.Virender Singh Rathore, Advocate, for respondent No.4.
Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Nishant Kumar, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 1st May, 2008, passed by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, (for short, the Tribunal) in M.A.C. Petition No.26/N/2 of 2004, titled Rukmi Devi and another vs. Mahi Pal and others, whereby compensation to the tune of Rs.1,60,000/-, with interest at the rate of 7.5% per annum from the date of the claim petition till deposit, came to be awarded in favour of the claimants, (respondents No.1 and 2 herein), and the insurer was saddled with the liability, with right of recovery, (for short, the impugned award).

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

3. Feeling aggrieved, the owner of the vehicle, namely, Chaman Lal, (original respondent No.2), has filed the instant appeal, laying challenge to the impugned award.

4. During the hearing of the appeal, vide order, dated 14th August, 2015, passed by this Court, Vinod Kumar alias Vicky, son of Shri Satwant Singh, resident of Village Kotla, Post Office Dhundla, Tehsil Bangana, District Una, H.P., who was the actual driver of the offending vehicle, was arrayed as respondent No.6. It is apt to reproduce the order dated 14th August, 2015, as under:

> *"Learned counsel for the appellant argued that the accident was caused by one Shri Vinod Kumar alias Vicky, s/o Shri Satwant Singh, r/o Village Kotla, P.O. Dhundla, Tehsil Bhangana, District Una, H.P., against whom FIR No. 52 of 2004, dated 15.10.2004, was registered at Police Station Shillai, and final report under Sections 279, 337 and 304-A of the Indian Penal Code (for short "IPC") was presented before the Court of competent jurisdiction, i.e. Judicial Magistrate 1st Class, Court No. 2, Paonta Sahib, but he was not arrayed as party-respondent in the array of respondent and the claimants have wrongly shown Shri Sunil Kumar to be the driver of the offending vehicle before the Tribunal.*
>
> *2. Further argued that thereafter the claimants moved an application under Order 1 Rule 10 of the Code of Civil Procedure (for short "CPC") and Order 6 Rule 17 CPC before the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan (for short "the Tribunal") for arraying said Shri Vinod Kumar as party-respondent in the array of respondents, which was dismissed by the Tribunal on 18.12.2006. The appellant has set the same as a ground in the memo of appeal in para 2 (iii).*
>
> *3. Learned counsel for the appellant also argued that the said FIR has been taken to its logical end and perhaps said Shri Vinod Kumar has been convicted. He sought time to place on record the copy of the judgment and also to seek instructions.*
>
> *4 .The moot question is - whether the application filed by the claimants for impleadment of said Shri Vinod Kumar was rightly rejected by the Tribunal or otherwise?*
>
> *5. It was the duty of the Tribunal to array said Shri Vinod Kumar as a party-respondent in the array of respondents in the claim petition in view of the mandate of Section 158 (6) and 166 (4) of the Motor Vehicles Act, 1988 (for short "the MV Act") read with the fact that the First Information Report is the first information of the accident, in which the name of said Shri Vinod Kumar has been recorded as driver of the offending vehicle and final report has been presented before the Court of competent jurisdiction, which it has failed to do so.*
>
> *6. Thus, I deem it proper to invoke the powers in terms of Section 105 CPC read with Order 41 Rule 20 CPC. Accordingly, Shri Vinod Kumar alias Vicky, s/o Shri Satwant Singh, r/o Village Kotla, P.O. Dhundla, Tehsil Bhangana, District Una, H.P., is arrayed as party-respondent, shall figure as respondent No. 6 in the array of respondents in the memo of appeal. Registry to carry out necessary correction in the cause title. Amended memo of parties be filed within one week.*
>
> *7. Issue notice to newly added respondent No. 6 returnable within four weeks on taking steps within one week. Dasti notice also permissible.*
>
> *8. The Judicial Magistrate 1st Class, Court No. 2, Paonta Sahib, is directed to send the status of the case FIR No. 52 of 2004 of Police Station Shillai, titled as State versus Vinod Kumar."*

5. In pursuance to the aforesaid order passed by this Court, the Judicial Magistrate Ist Class, Court No.2, Paonta Sahib, has sent the status of the criminal case arising out of FIR No.52/2004, dated 15th October, 2004, registered at Police Station Shillai, vide letter dated 26th August, 2015, whereby it has been stated that the criminal case, arising out of the FIR supra, has culminated into conviction of the said Vinod Kumar. It may be placed on record that the FIR No.52/2004 was registered in regard to the accident, subject matter of the present lis.

6. Thus, from the above, it is clear that the Tribunal has fallen in error in dismissing the application under Order 1 Rule 10 CPC and granting the right of recovery in favour of the insurer without determining the fact whether the said Vinod Kumar was having a valid and effective driving licence.

7. As far as the amount of compensation awarded by the Tribunal is concerned, the Tribunal has taken the notional income of the deceased as Rs.15,000/- per annum and has deducted 1/3rd from the said income towards the personal income of the deceased. The learned counsel for the claimants submitted that the Tribunal has fallen in error in deducting 1/3rd amount for the personal expenses of the deceased.

8. The income assessed by the Tribunal, on the face of it, is meager. Notwithstanding that, since the claimants have not questioned the impugned award, therefore, the same is reluctantly upheld. However, the Tribunal has fallen in error in deducting 1/3rd amount towards the personal income of the deceased, which is not consonance with the mandate of Schedule 2 of the Motor Vehicles Act, 1988.

9. Having said so, the income of the deceased is assessed as Rs.15,000/- per annum. The Tribunal has applied the multiplier of 15, which is just and proper. Accordingly, the claimants are held entitled to a sum of Rs.15000 x 15 = Rs.2,25,000/-, alongwith interest as awarded by the Tribunal. In addition to it, the claimants are also held entitled to Rs.10,000/- as litigation costs throughout, payable by the insured.

10. The only question requires adjudication in the present lis is as to who is liable to indemnify the amount of compensation.

11. Accordingly, I deem it proper to remand the Claim Petition to the Tribunal only to determine the following issues:

1. Whether Vinod Kumar (actual driver) was having a valid and effective driving licence at the time of accident?

2. Whether the insured/owner had committed willful breach, on the basis of which the insurer can be absolved from its liability?

12. The Tribunal is directed to decide the above issues within a period of **three months from 2nd November, 2015**, after issuing notice to the parties including the driver Vinod Kumar aforesaid. Needless to observe, parties be also given time to adduce evidence in order to prove these issues. The parties, through their counsel, are directed to cause appearance before the Tribunal on 2nd November, 2015.

13. Since granting of compensation in vehicular accident cases is a social legislation, I deem it proper to direct the insurer to pay the entire amount of compensation at this stage, of course, subject to the outcome of the findings to be recorded by the Tribunal on the two issues, supra. Ordered accordingly. The amount be deposited within a period of six weeks from today and on deposit, the Registry is directed to release the entire amount, alongwith interest, in favour of the claimants, strictly in terms of the impugned award. The appeal stands disposed of accordingly.

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

D.S. Mankotia & another .....Appellants
Versus
Subhash Chand & others ..... Respondents

FAO No.515 of 2008
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Learned Counsel for the respondent No. 3 stated that he was under the instruction to settle the claim by paying Rs. 3,50,000/- in lump sum- while claimants sought an amount of Rs. 5,00,000/- as compensation - keeping in view the age of the deceased and the time spent by the claimants, amount of Rs. 4,00,000/- awarded in lump sum. (Para- 2)

For the appellants: Mr. Surinder Saklani, Advocate.
For the respondents: Ms.Chetna Thakur, Advocate vice Mr.D. Dadwal, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Mr. J.S Bagga, Advocate, stated at the Bar that he is under instructions to settle the claim by paying Rs.3,50,000/- in lump sum. On the other hand, Mr. Surinder Saklani, learned counsel for the appellants, stated that the claimants would be more than content in case a sum of Rs.5,00,000/- in lump sum, is granted in their favour, which amount they have claimed in the claim petition. Their statements are taken on record.

2. I have gone through the claim petition and the impugned award. Keeping in view the age of the deceased and the time spent by the claimants in contesting the claim petition as also the appeal before this Court, I deem it proper to award Rs.4,00,000/- in lump sum to the claimants. Ordered accordingly. The insurer is directed to deposit the compensation amount within six weeks from today in the Registry and on deposit, the same be released to the claimants, strictly as per the conditions contained in the impugned award.

3. The impugned award is accordingly modified as indicated hereinabove and the appeal, alongwith pending applications, if any, stands disposed of.

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

Deep Chand ...Appellant
Versus
Shri Udey Singh & others ...Respondents

FAO No. 384 of 2009
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that he was travelling in the vehicle as labourer and was having goods in his possession- this fact was not denied- hence, plea of the insurer that claimant was a gratuitous passenger cannot be accepted.

(Para-8 to 12)

For the appellant : Mr. Arun Kumar, Advocate vice Mr. Vinay Thakur, Advocate.
For the respondents: Nemo for respondents No. 1 & 2.
Mr. G.D. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The owner-insured has questioned the award dated 4th June, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 127-MAC/2 of 2006, whereby compensation to the tune of Rs.75,000/- with interest at the rate of 7.5% per annum, from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1, herein and against owner-appellant herein and driver-respondent No. 2 herein (for short, the "impugned award").

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

3. Thus, the only question to be determined in this appeal is-whether the insurer or the owner has to satisfy the impugned award?

4. Issue No. 1 is not in dispute. However, I have gone through the impugned award. There is ample evidence on the record to the effect that driver, namely, Bankey Lal has driven vehicle-Mahindra Bolero bearing registration No. HP-17B-0311, rashly and negligently, on 09.06.2005, at about 9.00 a.m., near Jawalapur, Tehsil Paonta Sahib and caused the accident. Thus, the findings recorded by the Tribunal on Issue No. 1 are upheld.

5. The adequacy of compensation is also not in dispute. Accordingly, the findings recorded by the Tribunal on Issue No. 2 are also upheld.

6. Issues No. 3 to 6 are inter-linked. It was for the insurer to prove these issues.

7. Respondent-insurer have examined Suresh Kumar (RW-1) and Sub Inspector Liaq Ram (RW-3). Driver Bankey Lal also appeared in the witness box as RW-2.

8. It is pleaded in the claim petition that claimant was traveling in the offending vehicle as labourer and was also having goods in his possession, which he was carrying in the said vehicle. There is no denial to this fact.

9. The seating capacity of the vehicle was '5+1'. Thus, the risk is covered in terms of the insurance policy.

10. Learned Counsel for the insurer has argued that the injured was traveling in the offending vehicle as a gratuitous passenger. It was pleaded before the Tribunal that the injured was traveling in the vehicle as a labourer and had also loaded goods in the said vehicle.

11. In the given circumstance, there are sufficient grounds to hold that the injured was not traveling in the offending vehicle as a gratuitous passenger, but was traveling as a labourer alongwith the loaded goods.

12. It was also for the insurer to plead and prove that the owner has committed willful breach, has led no evidence.

13. Having said so, I am of the considered view that the Tribunal has fallen in error in holding that the owner has committed willful breach. Accordingly, the findings returned on issues No. 3 to 6 are set aside.

14. Viewed thus, the insurer-Insurance Company is saddled with liability and is directed to satisfy the award amount. The insurer is directed to deposit the award amount before the Registry within six weeks from today. On deposit, the Registry to release the same in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payees account cheque.

15. The owner-insured has deposited the statutory amount to the tune of Rs.25,000/-, is awarded as costs in favour of the claimant. The Registry also to release the same in favour of the claimant.

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

17. Send down the records after placing copy of the judgment on record.

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

FAO No.346 of 2009 and
FAO No.364 of 2009
Date of decision: 09.10.2015

1.	**FAO No.346 of 2009**	
	Jagdish Chand and another	.....Appellants
	Versus	
	Meena Devi and another	..... Respondents
2.	**FAO No.364 of 2009**	
	Himachal Road Transport Corporation	.....Appellant
	Versus	
	Meena Devi & others	..... Respondents

Motor Vehicles Act, 1988 - Section 169- It was contended that driver of the bus was acquitted in the criminal case and the Tribunal had wrongly held that driver of the bus was driving the vehicle rashly and negligently – held, that a criminal case has to be proved beyond reasonable doubt, while a claim petition has to be proved summarily - respondent cannot be absolved of the liability on the ground that driver had been acquitted by the Criminal Court- claimants had led sufficient evidence to prove the rashness and negligence of the driver of the bus- while driver was unable to dislodge the evidence led by the petitioner- hence, driver of the bus was rightly held negligent. (Para-7 to 10)

Cases referred:
N.K.V. Bros. (P.) Ltd. vs. M. Karumai Ammal and others etc., AIR 1980, SC 1354

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

In FAO No.346 of 2009

For the appellants: Mr.Yudhvir Singh, Proxy Counsel.
For the respondents: Mr.Vinod Kumar, Proxy Counsel, for respondent No.1.
Nemo for respondent No.2.

In FAO No.364 of 2009

For the appellant: Nemo.
For the respondents: Mr.Vinod Kumar, Proxy Counsel, for respondent No.1.
Mr.Yudhvir Singh, Proxy Counsel, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of these appeals, the appellants have questioned the award, dated 6th March, 2009, passed by the Motor Accident Claims Tribunal-II, Solan, (for short, the Tribunal), in MAC Petition No.10-S/2 of 2008, titled Meena Devi vs. Himachal Road Transport Corporation and others, whereby compensation to the tune of Rs.13,78,680/-, alongwith interest at the rate of 12% per annum, was awarded in favour of the claimant and the Himachal Road Transport Corporation (HRTC, for short), being the employer, was saddled with the liability.

2. Feeling aggrieved, the HRTC has questioned the impugned award by way of FAO No.364 of 2009, while the driver and the conductor (original respondents No.2 and 3, respectively), have filed the appeal being FAO No.346 of 2009. Thus, both the appeals are taken up together for final disposal.

3. Facts of the case, in brief, are that on 15th September, 2007, Meena Devi, the claimant-injured, boarded the bus belonging to HRTC. When she was alighting from the bus on reaching her destination, the driver of the bus suddenly put the bus into motion, as a result of which the claimant fell down and sustained multiple injuries. She was immediately taken to IGMC, Shimla, fromwhere was referred to PGI, Chandigarh, again from PGI she was taken to IGMC, Shimla, thereafter to Hospital at Arki. From Arki, the claimant-injured was taken to PGI, Chandigarh, and was operated upon there twice. It has been pleaded that the claimant-injured was still in coma. Thus, the injured filed the Claim Petition through her husband claiming compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition.

4. The Claim Petition was resisted by the respondents. The Tribunal, on the pleadings of the parties, framed the following issues:

> "1. Whether the injuries were suffered by the petitioner on account of rash and negligent driving by the respondent No.2, as alleged? OPP
>
> 2. If issue No.1 is proved in affirmative, whether the petitioner is entitled for compensation, if so the amount thereof and by whom? OPP
>
> 3. Relief."

5. The claimant-injured, in order to prove her case, has examined as many as six witnesses, while the driver and the conductor (original respondents No.2 and 3) appeared

in the witness box as RW-1 and RW-2, respectively. No other evidence was led by the respondents.

6. I have gone through the pleadings and the evidence led by the parties. The claimant-injured has proved by leading evidence that the driver of the offending bus had driven the bus rashly and negligently and had caused the accident in which the claimant-injured sustained injuries and became permanent disabled. The Tribunal has rightly made discussion in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the impugned award.

7. Learned counsel for the appellants in FAO No.346 of 2009 argued that the driver of the offending Bus was acquitted of the criminal case registered against him, by the Trial Magistrate. Thus, it was submitted that the Tribunal has wrongly held that the driver had driven the offending Bus rashly and negligently.

8. The argument, though attractive, is devoid of any force for the reason that in order to prove guilt against an accused in a criminal case, the prosecution has to prove its case beyond reasonable doubt. In a claim petition, the claimants have to prove their case summarily and it cannot be dismissed on the ground that the driver of the offending vehicle has earned acquittal order. My this view is fortified by the judgment of the Apex Court in case titled as ***N.K.V. Bros. (P.) Ltd. vs. M. Karumai Ammal and others etc***., reported in ***AIR 1980, SC 1354.***

9. It is also beaten law of the land that, in claim petition, the negligence on the part of the driver of the offending vehicle has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Further also, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

10. On the other hand, from the pleadings and the evidence adduced, one comes to inescapable conclusion that the accident was the outcome of rash and negligent driving of the driver of the offending bus. No doubt, the driver of the offending bus appeared in the witness box as RW-1, however, he was not in a position to dislodge the evidence of the claimant-injured that the accident was the outcome of rash and negligent driving of the driver. On the contrary, the driver of the bus, in his statement as RW-1, has admitted that he had driven the offending bus at the relevant point of time. Therefore, the findings returned by the Tribunal on issue No.1 are liable to be upheld and the same are upheld accordingly.

11. Now coming to issue No.2, the Tribunal, while assessing the compensation, has made detailed discussion in paragraphs 13 to 17 of the impugned award. It is the positive case of the claimant-injured that she was in coma, has become permanent disabled, which has shattered her physical frame, is dependent upon others. Because of the accident, life of the children and the husband of the injured has become miserable. It has also affected her matrimonial family and other spheres of life.

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

"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

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

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

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

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

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

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

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

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

13. Following the law expounded by the Apex Court, this Court, in catena of judgments, has held that in an injury case, the courts are expected to pass an award which appears to be fair, just and proper, and keeping in mind the hardships, discomfort, loss of amenities of life, pain and sufferings undergone and has to undergo by the claimant-injured throughout his/her life.

14. The Tribunal, in the instant case, has taken the monthly income of the injured as Rs.3,000/-. Keeping in view the age of the injured i.e. 45 years at the time of accident, the Tribunal has applied the multiplier of 15 and, thus, awarded Rs.5,40,000/- under the head 'loss of income', in favour of the claimant-injured. Keeping in view the facts of the case, the amount awarded under this head appears to be on the lower side, however, since the claimant-injured has not questioned the impugned award, the same is reluctantly upheld.

15. The Tribunal, in paragraph 14 of the impugned award, has discussed in detail that the claimant-injured has become 100% disabled, is physically wreck, therefore, needed an attendant to look after her. Accordingly, the Tribunal assessed, and rightly so, the attendant charges as Rs.3,000/- per month and after applying the multiplier of 15, awarded Rs.5,40,000/- under the head 'attendant charges'.

16. In addition to it, the Tribunal has also awarded Rs.1.00 lac and Rs.50,000/- under the heads 'pain and suffering' and 'loss of amenities of life', respectively, which, keeping in view the condition of the claimant-injured, appear to be on the lower side. However, as has been observed above, since the claimants have not assailed the impugned award, therefore, I have been left with no option but to reluctantly uphold the same.

17. In paragraph 16 of the impugned award, the Tribunal, keeping in view the material placed on record, has awarded Rs.48,680/- towards expenses on medicines. The Tribunal, in paragraph 17 of the impugned award, has awarded Rs.1.00 lac towards future medical treatment, which again appears to be on the lower side. However, since the claimant-injured has not questioned the impugned award, the same is liable to be upheld reluctantly.

18. Having said so, the impugned award merits to be upheld and the same is upheld. As a consequence, both the appeals are dismissed. The Registry is directed to release the entire amount of compensation, alongwith interest, in favour of the claimant-injured forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

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

Criminal Appeal No. 421 of 2015
Judgment reserved on : 7.10.2015
Date of Decision : October 9, 2015

N.D.P.S. Act, 1985- Section 20- Police team saw the accused carrying a red coloured bag- accused tried to hide the same and flee away from the spot but he was apprehended on suspicion- two persons riding the scooter came per chance on the spot and the bag was searched in their presence – 215 grams of charas was found in the bag- two police officials were not examined and two police witnesses contradicted each other materially on the colour of the bag and shape of the charas - charas produced in court neither in shape of charas nor marbles as spoken by witnesses- witnesses failed to identify case property in court-witnesses contradicted each other as to where the statements of witnesses were recorded-no explanation on the record as to why the police party was moving in the dark night without the provision of light-no explanation about the means of transport used by the official who brought the rukka to the police station- guilt of the accused not established beyond doubts- conviction and sentence set aside. (Para 12 to 17)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603

For the appellant : Mr. Dushyant Dadwal, Advocate, for the appellant-accused.
For the respondent : Mr. M. L. Chauhan, Addl. Advocate General and Mr. R. S. Verma, Addl. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 24.1.2015, passed by learned Special Judge (I), Una, H.P. in Sessions Trial No. 28 of 2014, titled as State of Himachal Pradesh vs. Kartik Singh, whereby appellant-accused stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of three years and pay fine of Rs.20,000/- and in default thereof, to further undergo simple imprisonment for a period of six months, he has filed the present appeal under the provisions of Section 374(2) of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 5.4.2014, police party headed by ASI Gaurav Bhardwaj (PW-10), comprising of HC Satish Kumar (PW-9), HC Vijay Kumar, HHC Khushvinder Pal (both not examined) and Constable Rajesh Kumar (PW-7) were on patrol and excise checking duty near Nagran. At about 10.40 p.m. when they reached at a place which was 200 mts. from Rampur Bazaar, they saw a man carrying a red coloured bag. Seeing the police party, hiding the bag, he tried to flee away. On suspicion he was nabbed. In the meanwhile two persons who were coming on scooter bearing No. HP-20-1440 from

Nagran side, were associated as witnesses. In the presence of Sohan Lal (PW-5) and Yashpal (not examined), accused was interrogated. On suspicion, red coloured bag carried by him was checked and 17 round shaped rolls, which appeared to be charas, were recovered. Scale for weighing the contraband substance was brought from the shop of one Shiv Lal (PW-6) and upon weighment was found to be 215 grams. The recovered stuff was kept in the very same bag, sealed with seal impression-A and seized vide memo (Ext. PW-5/A). Ruka (Ext. PW-4/A) sent through Const. Rajesh Kumar (PW-7), led to registration of F.I.R. No. 87 of 2014, dated 6.4.2014 (Ext. PW-4/B) at Police Station Sadar, Una, Distt. Una, H.P., against the accused under the provisions of Section 20 of the Act. With the completion of proceedings on the spot, including filling up of NCB form (Ext. PW-4/C), in triplicate, and arrest of the accused, case property was produced before SHO Krishan Lal Beri (PW-4), who after resealing the same with seal impression-R deposited it with MHC Puran Bhagat (PW-8) incharge of the Maalkhana. LHC Rajiv Kumar (PW-3) took the case property for chemical analysis to the State Forensic Science Laboratory at Junga vide Road Certificate No. 65/14 and report (Ext. PX) taken on record by the police which revealed the contraband substance to be charas. Special report (Ext. PW-2/A) himself taken by the Investigating Officer (PW-10) was handed over to the Superintendent of Police, Una. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as eleven witnesses and the statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded false implication. No evidence in defence was led by him.

5. Appreciating the material placed on record by the prosecution, trial Court convicted the accused for the charged offence and sentenced him as aforesaid. Hence the present appeal.

6. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

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 the accused.

9. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

10. Trial Court convicted the accused on the grounds that (i) testimonies of the police officials duly corroborated by the independent witness revealed the prosecution case to have been established beyond reasonable doubt and (ii) statutory presumption remains unrebutted by the accused.

11. Through the testimonies of independent witness Sohan Lal (PW-5) and police officials Constable Rajesh Kumar (PW-7), HC Satish Kumar (PW-9) and ASI Gaurav Bhardwaj (PW-10), prosecution has tried to establish, beyond reasonable doubt, recovery of the contraband substance from the conscious possession of the accused. However, minute examination of testimonies of these witnesses only reveals the contradictions, which are material, rendering the genesis of the prosecution case to be extremely doubtful. Witnesses cannot be said to be worthy of credence or wholly reliable. There are contradictions and improvements.

12. SI Gaurav Bhardwaj states that on 5.4.2014 he alongwith Constable Rajesh Kumar (PW-7), HC Satish Kumar (PW-9), HC Vijay Kumar and HHC Khushvinder Pal (both not examined) was on patrol duty. At about 10.40 p.m. when the police party was a little ahead of Rampur Bazar, towards Nagran, they saw the accused on the road. The witness does not state that the police party had torch light(s) or were travelling in any vehicle. He states that the accused was spotted in the lights of a vehicle which was passing by. Seeing the police party, accused who was carrying a red coloured bag, while concealing the same behind his back, tried to flee away. On suspicion, he was apprehended. In the meanwhile Sohan Lal and Yashpal came on a two wheeler and after associating them as independent witnesses, bag so carried by the accused was searched. Inside the bag there was another "purple" coloured bag with the word "Bliss" inscribed thereon and inside this, there was another transparent polythene bag from which 17 round shaped 'rolls' of charas were recovered. On his asking, Rajesh Kumar brought the scales and upon weighment, the rolls were found to be of 215 grams. Thereafter the contraband substance so recovered was put in the very same bags and sealed in a cloth parcel with six seals of impression-A, sample of which was also taken on a separate piece of cloth (Ext. PW-7/A). NCB form (Ext. PW-4/C) was filled up on the spot and seal impression affixed thereupon. The recovered contraband substance was taken into possession vide memo (Ext. PW-5/A). Ruka (Ext.PW-4/A) prepared by him was sent through Rajesh Kumar on the basis of which F.I.R stood registered. Prior to his return with the case file, statements of the witnesses were recorded. Thereafter accused was arrested vide memo (Ext. PW-10/B). Witness identifies the contraband substance (Ext. P-5) to be charas which in the Court was found to be in the form of powder.

13. On first brush, such version appears to be true and duly corroborated by Sohan Lal (PW-5), Constable Rajesh Kumar (PW-7) and HC Satish Kumar (PW-9). However, close scrutiny of their testimonies reveal it not to be so. Significantly Yashpal, HC Vijay Kumar, HHC Khushvinder Pal were not examined in court. In fact some of them were given up. Presence of Sohan Lal (PW-5) and Constable Rajesh Kumar (PW-7) on the spot appears to be doubtful. The contradictions which are relevant are as under:-

1. Sohan Lal refers to the colour of the bag containing the contraband substance to be sky blue but police officials state it to be red in colour.
2. Sohan Lal states that inside the red bag, two polythene bags, one violet in colour and another transparent were found. But Rajesh Kumar refers

to only one violet coloured polythene bag. But then what is relevant is the fact that Satish Kumar refers the colour of the bag to be purple and Gaurav Bhardwaj talks about two bags, one transparent and the other one purple in colour.

3. Gaurav Bhardwaj specifically does not state whether he conducted personal search of the accused or not. But admits not to have prepared any memo of personal search or consent. However, Rajesh Kumar states that accused was searched by Gaurav Bhardwaj which version also stands materially contradicted by Sohan Lal

4. According to Sohan Lal and Rajesh Kumar the contraband substance recovered was in the shape of marbles. Whereas Satish Kumar and Gaurav Bhardwaj state it to be in the shape of "rolls". Undisputedly, the stuff produced before the court is neither in the shape of marble nor in the shape of rolls. It is powdery.

14. The contradictions do not end here. Even with regard to recording of statements of the witnesses, there are material contradictions. Satish Kumar states that his statement was recorded after registration of the F.I.R., when the case file was brought to the spot. But Gaurav Bhardwaj states it was done much prior thereto. Not only that, Gaurav Bhardwaj states that all such statements stood recorded on the spot which version stands belied by Rajesh Kumar according to whom it was so done at the police station. Further Gaurav Bhardwaj is categorical that he did not scribe such statements. Also he does not remember who did it. But according to Rajesh Kumar it was so done by Gaurav Bhardwaj.

15. Now all this renders the prosecution case with regard to recovery having been effected from the conscious possession of the accused to be extremely doubtful.

16. Improbabilities in the prosecution case further render it to be doubtful. None of the police officials state that they were having any torch light with them. The alleged recovery was made in the middle of night. Sohan Lal states that his statement was recorded under the solar light, which is not the case of other witnesses. Police party was on patrol duty in connection with detection of crime relating to offences under the Excise Act. They were on foot. Gaurav Bhardwaj wants the Court to believe that the accused was spotted in the head light of the vehicle which was passing by. What was its make and number or where did the said vehicle go to? remains unexplained on record. The alleged recovery was made at a place which was 200 mts. ahead of Rampur Bazar. Now why would police party move in absolute darkness remains unexplained by them.

17. In fact, Sohan Lal and Const. Rajesh Kumar are not even sure as to whether the case property produced in the Court was the one which was recovered or not.

18. There is yet another improbability which has emerged on record. According to Const. Rajesh Kumar, he went to the shop of Shiv Lal (PW-6) and brought the weighing scale. Such version appears to be doubtful. He does not disclose his mode of transportation. Further his version of having carried ruka to the police station does not inspire confidence for it is common case of the prosecution that Rajesh Kumar left the spot with the ruka to the police station at 11.50 p.m. which he handed over to SHO Krishan Lal (PW-4) at 12.20 a.m. SHO gave the file to him at 1.10 a.m. and he in turn, handed it over to Gaurav Bhardwaj, on the spot at 1.20 a.m. Now Rajesh Kumar does not disclose the mode of his transportation up to the police station. It is also not his case that from the spot he went somewhere else. The difference in time, of more than 20 minutes, which this witness took in reaching the

police station and coming back to the spot, further renders the prosecution story to be doubtful.

19. Prosecution version, that seeing the police party accused tried to conceal the bag behind his back is not so recorded in the statements of the witnesses, more specifically that of Sohan Lal who was confronted with the same.

20. There is no evidence on record to establish as to how the case property was taken out of the maalkhana.

21. All these contradictions, improbabilities, embellishments stood ignored by the trial Court and as such, findings returned on all the points being perverse and contrary to law are unsustainable in law.

22. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

23. Since prosecution has not been able to establish its case of having recovered the contraband substance from the conscious possession of the accused, no statutory presumption as envisaged under Section 35 of the Act, can be drawn against the accused.

24. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated, 24.1.2015, passed by the learned Special Judge (I), Una, H.P. in Sessions Trial No. 28 of 2014, titled as State of Himachal Pradesh vs. Kartik Singh, is set aside and the accused is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him. Release warrants be prepared accordingly.

Appeal stands disposed of, so also pending application(s), if any.

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

Kaushlya Devi and others ...Appellants.

Versus

Sh. Dev Raj and others ...Respondents.

FAO No. 157 of 2009
Decided on: 09.10.2015

Motor Vehicles Act, 1988- Section 169- Claimants filed a claim petition pleading that they became victims of a motor vehicle accident caused by driver of the bus- Tribunal held that claimants had failed to prove the rashness and negligence on the part of the driver of the bus - held that claim petitions are to be determined on the touchstone of preponderance of probabilities and not beyond the reasonable doubts- PW-3 had specifically stated that driver of the bus hit the same with motorcycle- however, his testimony was disbelieved on the basis of FIR- however, final report was filed before the Court by the police in the FIR against the driver of the bus, which clearly shows that police had also found on the basis of

investigation that the bus was being driven in a rash and negligent manner- deceased was earning not less than Rs. 6,000/- per month – 1/4th amount to be deducted towards his personal expense - claimants have lost source of dependency to the extent of Rs. 4,500/- per month- multiplier of '15' is to be applied and the claimants will be entitled to Rs. 8,10,000/-. (Para-8 to 20)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Umesh Kanwar & Mr. Deven Khanna, Advocates.

For the respondents: Mr. Vikram Thakur, Advocate, for respondents No. 1, 2 and 4.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.
Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, 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 judgment and award, dated 22.12.2008, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short "the Tribunal") in M.A.C. No. -: 2 :-32 of 2006, titled as Kaushlya Devi and others versus Sh. Dev Raj and others, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. The claimants had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") seeking compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition on the ground that they became the victims of the motor vehicular accident which was caused by the driver, namely Shri Dev Raj, while driving bus, bearing registration No. HP-23-8137, on 14.03.2006, at about 2.30 P.M., at place Vijaypur, Tehsil Ghumarwin, District Bilaspur, rashly and negligently.

3. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 22.11.2007:

> "1. Whether late Shri Deepak Dhiman (deceased) had died on account of injuries sustained by him on 14.03.2006, at about 2.30 P.M. at place Vijaypur-Mor, Tehsil Ghumarwin, District Bilaspur, H.P. due to the rash and negligent driving of bus No. HP-23-8137 being driven by respondent No. 1, as alleged? OPP
>
> 2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP
>
> 3. Whether this petition is bad for non-joinder of necessary parties? OPR-3
>
> 4. Whether the offending bus and motorcycle No. HP-23 A-0674 involved in the accident were being driven by respondent No. 1 and the deceased respectively without valid driving licence at the relevant time? OPR-3 & 5

5. Whether the accident had taken place on account of the contributory negligence of the deceased (Shri Depak Dhiman)? OPR-3

6. Whether the offending bus was being plied at the relevant time without valid documents in contravention of provisions of Motor Vehicles Act? OPR-3

7. Relief."

5. It appears that the claimants have amended the claim petition thrice and have arrayed the insurers of both the vehicles involved in the accident.

6. Parties have led evidence. After scanning the evidence, the Tribunal, decided issue No. 1 and held that the claimants have failed to prove that the driver, namely Shri Dev Raj, had driven the offending bus rashly and negligently and accordingly, dismissed the claim petition without returning findings on issues No. 2 to 6.

7. It is unfortunate that the Tribunal has determined the claim petition as if it was hearing a civil suit.

8. It is beaten law of land that the claim petitions are to be determined, as early as possible, that too, on the touchstone of preponderance of probabilities and not beyond the reasonable doubts, as in criminal cases.

9. Chapters X, XI and XII of the MV Act are really social legislation and its aim and object is to reach to the victim of a traffic accident. The legislature thought it proper to remove all technicalities and even to delete the limitation provision from the statute enabling the claimants to receive compensation. Sections 168 and 169 contained in Chapter XII of the MV Act specifically provide that the claim petition should be tried summarily and provisions of CPC are not applicable. Only some of the provisions are applicable, which are made applicable in terms of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "the Rules").

10. The MV Act has gone through a sea change in the year 1994 by amendment in terms of Act 54 of 1994. Amendment was made in Sections 158 and 166 of the MV Act, which mandates that even the report of the police officer can be treated as a claim petition.

11. I have gone through the evidence recorded and am of the considered view that the claimants have proved that the driver of the offending bus had driven the bus rashly and negligently at the time of the accident. Moreover, PW-3, namely Shri Rajesh Kumar, has stated that the driver of the bus hit the same with the motorcycle. He was the eye-witness of the accident. The way the Tribunal has believed the testimony of the driver-Dev Raj, who appeared as RW-1, disbelieving the statement of PW-3, is suggestive of the fact that the learned Judge has decided the claim petition as a civil suit.

12. The Tribunal has disbelieved the statement of PW-3 and has relied upon the statement of the driver taking a clue from the FIR, Ext. PW-2/A, which is not tenable.

13. It is worthwhile to record herein that the final report in terms of Section 173 of the Code of Civil Procedure (for short "CrPC") has been filed by the investigating agency, i.e. P.S. Sadar, Bilaspur, under Sections 279 and 304-A of the Indian Penal Code (for short "IPC") before the Court of competent jurisdiction against Dev Raj, i.e. the driver of the bus, is suggestive of the fact that the investigating agency has come to the conclusion that the driver of the bus had driven the bus rashly and negligently. The copy of the said final report has been produced in the open Court by the learned counsel for respondent No. 5, made

part of the file. Thus, the question of the motor cycle being driven in a rash and negligent manner does not arise.

14. Having said so, I am of the considered view that the claimants have, prima facie, proved that Des Raj had driven the bus rashly and negligently at the time of the accident. Accordingly, the findings returned by the Tribunal on issue No. 1 are set aside and the same is decided in favour of the claimants and against the respondents.

15. The claim petition is not suffering from mis-joinder and non-joinder of necessary parties. Accordingly, issue No. 3 is decided in favour of the claimants and against the respondents.

16. Mr. B.M. Chauhan, learned counsel appearing on behalf of respondent No. 3, stated at the Bar that the case be remanded for determination of other issues. It will be travesty of justice in case the compensation is not determined. May be the issues as to whether who is liable and whether the insurer of the bus has a right of recovery can be determined by the Tribunal on remand, but keeping in view the aim and object of granting compensation, I deem it proper to determine the compensation herein:

17. It has been averred that the age of the deceased was 32 years of age at the time of the accident. In terms of the matriculation certificate, Ext. R-1, also, the age of the deceased was 32 years. It has been pleaded in the claim petition that the deceased was a businessman & LIC agent and was earning Rs.30,000/- per month at the relevant point of time.

18. The claimants are the dependents of the deceased. Keeping in view the fact that the deceased was young and in budding age, by guess work, it can safely be said and held that the deceased was earning not less than Rs.6,000/- per month. One fourth is to be deducted towards his personal expenses in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, the claimants have lost source of dependency to the tune of Rs.4,500/- per month.

19. The multiplier of '15' is to be applied in view of the Second Schedule appended with the MV Act read with the ratio laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra).**

20. Accordingly, the claimants are held entitled to compensation to the tune of Rs.4,500/- x 12 x 15 = Rs.8,10,000/-. The factum of insurance of the bus is admitted. Thus, the insurer of the bus is directed to satisfy the awarded amount with a right to take all the defence available to it before the Tribunal.

21. The Tribunal is directed to assess as to whether the owner-insured of the bus has committed any willful breach, which entitles the insurer of the bus to right of recovery, within two months with effect from 02.11.2015.

22. Parties are directed to cause appearance before the Tribunal on **02.11.2015.** It is made clear that the parties shall not lead any further evidence.

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, C.J.

M/S Suriba Industries and others ...Appellants.

Versus

Shri Labh Singh ...Respondent.

FAO No. 208 of 2009
Decided on: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Appellant challenged the award claiming that it was wrongly saddled with liability – held that claimant/injured has proved that offending driver was driving the offending vehicle rashly and negligently– in this situation appellant was rightly saddled with liability– appeal dismissed. (Para 7 & 8)

For the appellants: Mr. J.L. Bhardwaj, Advocate.
For the respondent: Mr. Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award, dated 15.01.2009, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, Camp at Nalagarh (for short "the Tribunal") in Petition No. 22-NL/2 of 2007, titled as Labh Singh versus Anjani Tripathi and others, whereby compensation to the tune of Rs.1,46,845/- with interest @ 7% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and against the appellants herein (for short "the impugned award").

2. The claimant-injured has not questioned the impugned award on any count, thus, has attained finality so far it relates to him.

3. The appellants have questioned the impugned award on the grounds taken in the memo of appeal.

Brief facts:

4. The claimant-injured invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") and sought compensation to the tune of Rs.ten lacs on the ground that he sustained injuries in the vehicular accident, which was caused by Shri Anjani Tripathi, while driving the scooter, bearing registration No. HP-12B-3247, on 12.04.2007, near Forging Factory, Jharmajri, rashly and negligently.

5. The claim petition was resisted by the respondents on the grounds taken in the memo of objections.

6. Following issues came to be framed by the Tribunal on 17.05.2008:

> "1. Whether the petitioner has suffered injuries on account of rash/negligent driving of the vehicle by the respondent No. 1? 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. Relief."

7. The claimant-injured has proved by leading evidence that he has sustained injuries due to the rash and negligent driving of the offending vehicle by its driver, which is not in dispute.

8. However, I have gone through the record and am of the considered view that the claimant-injured has proved that the driver, namely Shri Anjani Tripathi, had driven the offending vehicle, i.e. the scooter, bearing registration No. HP-12B-3247, rashly and negligently, on 12.04.2007, near Forging Factory, Jharmajri and caused the accident, in which the claimant-injured sustained injuries. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. The Tribunal, after making assessment in paras 12 to 14 of the impugned award, has granted compensation to the tune of Rs.1,46,845/- in favour of the claimant-injured and the appellants herein came to be saddled with liability

10. Learned counsel for the appellants argued that the amount of compensation awarded is excessive and the appellants are not liable to satisfy the award. When he was confronted with the claim petition, the reply, evidence, oral as well as documentary and the discussions made by the Tribunal in paras 12 to 14, was not able to satisfy the Court that the awarded amount is excessive in any way. Rather, the amount awarded is too meager, but, as the claimant-injured has not questioned the same, the same is upheld. Accordingly, the findings returned on issue No. 2 are also upheld.

11. Having said so, 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.

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

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

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

Mukesh Bhardwaj & Ors. .....Appellants.

Versus

Smt. Anju Bhardwaj and others ...Respondents

FAO (MVA) No. 244 of 2009
Judgment reserved on 18.9.2015
Date of decision: 9th October, 2015

Motor Vehicles Act, 1988- Section 149- Tribunal awarded compensation of Rs. 10,40,000/- saddling the owner and driver with the liability- the insurer was exonerated – owner and driver challenged the award- held, that driver was possessing a valid and effective driving licence- deceased is admitted by owner and driver to be carrying his domestic articles in the vehicle- insurance policy discloses that risk of third party including driver was covered- Tribunal fell in error while exonerating Insurance Company- further held, that Tribunal had wrongly applied multiplier of '17' in place of '16' and also fell in error in

assessing annual income of the deceased to be Rs.91,000/-, when salary of deceased was taken as Rs.7,000/- his annual income should have been Rs.7,000 x 12= Rs.84,000/-- 1/3rd amount was to be deducted and, thus, dependency comes to Rs.56,000/-- appeal allowed and the compensation amount determined to be Rs.9,29,999/- - Insurer directed to deposit the entire amount in the Registry. (Para- 15 to 18 and 22 to 26)

Motor Vehicles Act, 1988- Section 166- Deceased was 29 years of age- Tribunal wrongly applied multiplier of '17' in place of '16' and also fell in error in assessing annual income of the deceased to be Rs. 91,000/-, when salary of deceased was taken as Rs. 7,000/- his annual income should have been Rs. 7,000 x 12= Rs. 84,000/-- 1/3rd amount was to be deducted and, thus, dependency comes to Rs. 56,000/-- appeal allowed and the compensation amount determined to be Rs. 9,29,999/- - Insurer directed to deposit the entire amount in the Registry. (Para 22 to 26)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

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

For the appellants:	Mr.Amit Jamwal, proxy Advocate.
For the respondents:	Nemo for respondents No. 1 and 2. Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Nishant Kumar, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Appellants have questioned the judgment and award dated 19.2.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Una in MAC Petition No. 39/03 RBT 59/05/03, titled Anju Bhardwaj and another versus Mukesh Bhardwaj and others, for short "the Tribunal", whereby compensation to the tune of Rs.10,40,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and appellants herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants and insurer have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insured/owner and driver have questioned the impugned award on the grounds that the Tribunal has fallen in an error in discharging the insurer from the liability despite the fact that the insurance was subsisting and no breach was committed by the owner and the driver. The appellants have not questioned the impugned award on any other ground. Thus, the only question to be determined in this appeal is whether the Tribunal has rightly discharged the insurer from the liability or otherwise?

4. In order to return the findings on the issue, it is necessary to give a flash-back of the facts which have given birth to the instant appeal.

5. Anju Bhardwaj and Master Manas claimants invoked the jurisdiction of the Tribunal for the grant of compensation to the tune of Rs.30 lacs, as per the break-ups given in the claim petition. It is averred in the claim petition that on 1.12.2002 Dinesh Bhardwaj husband of claimant No. 1 Anju Bhardwaj and father of claimant No. 2 became victim of a vehicular accident which was caused by Ram Paul respondent No. 2 in the claim petition, while driving vehicle, i.e. Jeep/ Pick-up bearing registration No. HP-55-3565 rashly and negligently in which the deceased was occupant, sustained injuries and succumbed to the injuries.

6. The claim petition was resisted by the respondents in the claim petition and following issues came to be framed.

(i) Whether on 1.12.2002 Dinesh Bhardwaj was traveling in Jeep/pick-up van No. HP-44-3565 being driven by respondent No. 2 in a rash and negligent manner and at place village Kinnu under P.S. Amb the said vehicle fell in a nalla and Dinesh Kumar sustained fatal injuries to his person and succumbed to the same later on as alleged? OPP.

(ii) If issue No. 1 is proved in affirmative whether the petitioners are entitled for compensation, if so to what amount and from which of the respondents? OPP.

(iii) Whether the petition is filed in collusion with respondents No. 1 and 2 as alleged? OPP.

(iv) Whether respondent No. 2 was not holding a valid and effective driving licence at the relevant time as alleged? OPR-3.

(v) Whether the vehicle was being used in violation of terms and conditions of insurance policy and the deceased was traveling as gratuitous passengers as alleged? OPR-3.

(vi) Relief.

7. Claimants have examined four witnesses including claimant No. 1 Anju Bhardwaj, who stepped into the witness-box as PW3.

8. Driver Ram Paul also stepped into the witness box as RW-1 and insurer examined one Nasib Chand as RW-2.

9. The owner has not led any evidence.

10. The Tribunal, after hearing the learned counsel for the parties and scanning the evidence, oral as well as documentary, held that the claimants have proved that Dinesh Bhardwaj was an occupant of the offending vehicle, which was being driven by driver Ram Paul-respondent No. 2 in the claim petition rashly and negligently and caused the accident in which deceased sustained injuries and succumbed to the same.

Issue No. 1.

11. I have examined the record. The findings recorded by the Tribunal on this issue are not in dispute, accordingly, the same are upheld.

12. Before I deal with issue No. 2, I deem it proper to determine issues No. 3, 4 and 5 for the reasons that the learned counsel for the insurer has also argued in alternative that in case the insurer is saddled with the liability, the amount awarded is excessive and not in accordance with the mandate of Chapter-XI of the Motor Vehicles Act, for short "the

Act, read with **Sarla Verma and others versus Delhi Transport Corporation and another** reported in **AIR 2009 SC 3104** and upheld in **Reshma Kumari and others versus Madan Mohan and another**, reported in **2013 AIR SCW 3120**.

13. **Issue No. 3.** It was for the insurer to lead evidence. However, no evidence has been led. The Tribunal has rightly decided this issue in favour of the claimants and against the insurer and the insurer has not questioned the findings returned on this issue. Accordingly, the findings returned on this issue are upheld.

14. **Issue No. 4.** It was for the insurer to prove that the driver was not having a valid and effective driving licence. The Tribunal has given findings in para 16 of the impugned award and held that the driver was having a valid and effective driving licence. I have gone through the record. The Driver was having a valid and effective licence to drive the vehicle, cannot be said to be ineffective on any count. However, the insurer has not questioned the findings on this issue, Thus, the findings so returned by the Tribunal are upheld.

15. **Issue No. 5.** It was for the insurer to prove that the deceased was a gratuitous passenger, has not led any evidence to prove that the deceased was a gratuitous passenger or the vehicle was used for carrying passengers. There is nothing on the file, which can be made basis for holding that the deceased was traveling in the offending vehicle as gratuitous passenger. The insurer has produced the copy of insurance policy in the open Court, which was made part of the file, which do disclose that risk of third party, including driver was covered.

16. The Registration Certificate is at page 169 of the record, which also do disclose that the gross weight of the vehicle is 2750Kg. and is a light motor vehicle. The sitting capacity is three, including driver.

17. The owner and driver have specifically pleaded in para 6 of the reply that deceased was an occupant of the vehicle along with his domestic articles. This averment has not been denied by the insurer and it is admission on the part of the driver and owner. The deceased was occupant of the vehicle, his risk is covered.

18. The insurer has to plead and prove that the insured has committed willful breach as per the mandate of Section 147 and 149 of the Act read with terms and conditions contained in the insurance policy, has not led any evidence to prove the terms and conditions of the insurance policy or that the owner has committed willful breach in terms of Section 147 and 149 of the Act. Thus, the insurer cannot seek exoneration. My this view is fortified by the judgment delivered by the apex court in **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> "105. .....
>
> (i) .....
>
> (ii) .....
>
> (iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its

> liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.
>
> (iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.
>
> (v).....
>
> (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

19. The Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** has also laid down the same principles.

20. Having said so, the findings returned on issues No. 3 and 5 are set aside and it is held that the insurer has failed to prove these issues.

21. In the given circumstance, the Tribunal has wrongly discharged the insurer from the liability and is to be saddled with the entire liability.

22. **Issue No. 2.** The deceased was 29 years of age at the time of accident which is recorded in para 12 of the impugned award. He was a government employee and his gross salary is recorded as Rs.7190/- as per the salary certificate Ext. PW2/A. The Tribunal has fallen in an error in applying the multiplier of "17" while keeping in view the 2nd Schedule appended to the Act read with **Sarla Verma and Reshma Kumari's** cases, referred to supra. The multiplier of "16" was applicable.

23. The Tribunal has also fallen in an error while making the assessment and coming to the conclusion that the annual income of the deceased was Rs.91,000/-. Admittedly, his salary was Rs.7190/- per month and Tribunal has taken his salary as Ra.7000/-. If his monthly income was Rs.7000/- his annual income was Rs.84000/- and not Rs.91,000/-. 1/3rd was to be deducted out of Rs.84,000/-. Thus, the claimants have lost source of dependency to the tune of Rs.56,000/- per year and are held entitled to compensation under the head "Loss of dependency" to the tune of Rs.56000/-x16= Rs.8,96,000/-. The Tribunal has also awarded Rs.8000/- as conventional charges, which is upheld. Having said so, the claimants are entitled to compensation to the tune of Rs.8,96,000+Rs.8000/-= Rs.9,04000/- in addition to the statutory amount of Rs.25,000/- deposited by the appellants herein, which is awarded as cost in favour of the claimants.

24. Viewed thus, the impugned award is modified, as indicated hereinabove and the appeal is allowed.

25. The compensation to the tune of Rs.9,04,000/- plus Rs.25,000/- =Rs.9,29,999/- is awarded in favour of the claimants alongwith interest @7.5% from the date of claim petition till its realization and insurer is saddled with the liability.

26. The insurer is directed to deposit the entire amount of compensation, i.e., Rs.9,04,000/- alongwith interest within eight weeks from today. On deposit, the Registry is directed to release the amount, including statutory amount of Rs.25,000/- in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

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

28. Send down the record, forthwith, after placing a copy of this judgment.

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

Narayan Singh .....Appellant.
Versus
State of H.P. ...Respondent.

Cr. Appeal No.:124 of 2015
Reserved on: 01.10.2015
Date of Decision: 09.10.2015

N.D.P.S. Act, 1985- Section 20- Accused intercepted by police with a bag carrying 2.900 k.g. charas during day time- convicted and sentenced by the Trial Court- alleged recovery of charas was made from the accused during broad day light - independent witnesses were available in the immediate locality but were not associated –held that omission to associate independent witnesses by the Investigating Officer creates doubt about the genuineness of prosecution story - two buses were also stopped nearby the dhaba and passengers were having lunch there- plea that the passengers had refused to be associated as witnesses is unsustainable on the face of it as Investigation Officer had not recorded the names of those witnesses and he had not taken any action against them - thus the prosecution case is not established beyond doubts for aforesaid reasons – appeal allowed and accused acquitted. (Para 9 to 12)

N.D.P.S. Act, 1985- Section 20- Accused was found with a carry bag which on search was found to be containing 2.9 kgs. of charas in it - it was admitted by prosecution witnesses that many shops were located in the vicinity- accused was apprehended on the highway, however, no incumbent of the vehicle plying on the highway was associated, which shows that independent witnesses were not joined deliberately – held, that prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-9 to 15)

For the Appellant: Mr.Sanjeev Bhushan, Sr. Advocate with Ms.Abhilasha Kumari, Advocate.
For the respondent: Mr.M.A.Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

This appeal is directed against the judgment rendered on 11.09.2014 by the learned Special Judge, Mandi, in Sessions trial No. 39/2010 whereby the latter convicted and sentenced the accused for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2. The accused/convict is aggrieved by the renditions of the learned Special Judge, Mandi. Being aggrieved he has by instituting the instant appeal before this Court assailed the findings recorded therein. A prayer has been made therein that his appeal be accepted and the findings of conviction recorded against him by the learned trial Court qua his having committed offences punishable under Section 20 of the NDPS Act be reversed and set-aside in the exercise of appellate jurisdiction by this Court.

3. The prosecution story, in brief, is that on 12.04.2010 ASI Ram Lal alongwith LHC Narpat Ram, ASI Mohan Lal, constable Dhameshwar, constable Suresh Kumar and constable Kashmir Singh proceeded from Police Station, Sadar Mandi towards Bindrbani for nakabandi at about 12.10 p.m and naka was laid by the police party at Saat Meel where the accused came from Pandoh side having a carry bag in his right hand and on seeing the police party he turned back and started running but was apprehended on suspicion. The members of the police party gave their search to the accused and nothing incriminating was recovered from their possession and thereafter the search of the carry bag in possession of the accused was conducted from which another polythene bag containing charas was recovered. The contraband so recovered was weighed and found to be 2.900 Kgs. which was packed in a parcel in the same sequence alongwith polythene bag and carry bag which parcel was sealed with 12 seals of impression 'R' and taken into possession. NCB form was prepared in triplicate and seal impression was affixed over NCB form and sample seal was drawn separately and handed over to ASI Mohan Lal. Rukka was prepared and sent to the police station through constable Dhameshwar Singh, on receipt of which F.I.R. came to be recorded at the police station, Sadar Mandi.

4. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the NDPS Act to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused person was given an opportunity to adduce evidence, in, defence, and he chose to adduce evidence in defence.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. Shri Sanjeev Bhushan, learned Senior Advocate, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the State, has, with considerable force and vigour, contended that the findings of conviction,

recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. 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. Recovery of charas weighing 2 kilograms & 900 grams was effected from a carry bag held by the accused in his right hand. The carry bag wherefrom charas weighing 2.900 kilograms was recovered was taken into possession under memo Ext.PW-2/B. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence it is argued that when the prosecution case stand established, it would be legally unwise for this Court to acquit the accused.

10. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, consequently they too enjoy credibility for sustaining thereupon the findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavoured to be sustained on the strength of unblemished testimonies of police witnesses. A close and studied perusal of the deposition of the police witnesses underscores the factum that they have neither given a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof as recited in the F.I.R. Ext.PW-8/A for begetting a conclusion that hence comprised their testimonies in their respective examinations in chief are ridden with the vice of inter se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations nor when their depositions are afflicted with any vice of intra se contradictions rather when they have deposed qua the manner of recovery of charas from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency gives leverage to the inference that hence the prosecution has been able to sustain the charge against the accused of charas weighing 2.900 Kgs. having been recovered from his conscious and exclusive possession while his carrying it, in a carry bag held by him in his right hand and which was seized under memo Ext.PW-2/B.

11. Be that as it may, given the manner of recovery of charas from the conscious and exclusive possession of the accused inasmuch as it having come to be recovered from a bag held by him in his right hand necessarily hence, when it was not recovered from either his pocket or its being strapped inextricably with any part of his body in event whereof compliance by the Investigating Officer in tandem with the mandatory provisions of Section 50 of the NDPS Act was imperative inasmuch as his being enjoined to under an apposite consent memo elicit from the accused his consent of his person being carried out either by the Executive Magistrate or a Gazetted Officer or by the police official eliciting his consent. Contrarily when it was recovered from a bag held in his right hand necessarily then the said manner of the accused carrying it, did not constitute its being strapped inextricably with any portion of his body necessarily then compliance by the Investigating Officer with the provisions of Section 50 of the NDPS Act were not enjoined to be meted out by him. Nor also when it was not a case of prior information rather was a chance recovery concomitantly also then compliance with the mandate of Section 42 of the NDPS Act was not enjoined to be meted out by the Investigating Officer.

12. However, even though the testimonies of the official witnesses who have proven the factum of recovery of charas under memo from the alleged conscious and exclusive possession of the accused while his carrying it in a bag held by him in his right hand besides when their testimonies comprised in their respective examinations in chief are bereft of any taint of either inter se contradictions vis-à-vis their deposition comprised in their respective cross-examinations nor also when their testimonies are not ingrained with the vice of intra se contradictions necessarily then when their testimonies inspire confidence and are credible, reliance is to be imputed to them while concluding qua the guilt of the accused. Nonetheless before proceeding to place implicit reliance upon their testimonies, it is also imperative for this Court to gauge or discern from the available evidence on record whether independent witnesses were available in the immediate vicinity of the locality where the proceedings relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused in the manner as deposed by the official witnesses were launched and concluded. The Investigating Officer, is not obliged to associate independent witnesses while his proceeding to carry out proceedings qua search and recovery of contraband from the alleged conscious and exclusive possession of the accused nor also the non association of independent witnesses by the investigating officer in the proceedings relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused would oust or discount the probative worth of the testimonies of the official witnesses. However, when independent witnesses despite proven evidence of theirs being available in close proximity to the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused were launched or carried out, are not associated such non association of independent witnesses by the Investigating Officer despite their availability would nurse an inference that their non association was deliberate or intentional. Concomitantly also it would give succor to an inference that the Investigating Officer omitted to join independent witnesses despite their availability in the vicinity of the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused were launched or concluded, as he intended to smother the truth qua the genesis of the prosecution version. The genesis of the prosecution version would gain credence with this Court only when it is free from taint of it having been reared by partisan or a slanted investigation having been carried out by the investigating officer. The investigation carried out by the Investigating Officer would garner an element of slantedness or distortion when the investigating officer despite availability of independent witnesses deliberately omits to join them in the proceedings relating to the search and recovery of contraband from the purported exclusive and conscious possession of the accused. Consequently, a slanted or distorted investigation by the Investigating Officer would erode the genesis of the prosecution story. Now the apt evidence for discerning therefrom whether independent witnesses were available in the immediate vicinity or in close proximity to the location or the site of search and recovery of contraband from the conscious and exclusive possession of the accused besides concomitantly of such omission to join them being deliberate as well as intentional for sprouting a further inference that hence the investigation carried out by him was both slanted and tainted besides distorted on which no reliance can be placed by this Court is comprised in the testimony constituted in the cross-examination of PW-2. In his cross-examination PW-2 has underscored the factum that the location of the site of occurrence was National Highway No.21 at 7 Miles. He in his cross-examination has admitted the factum that at Badano many shops and dhabas are located. The factum of the proceedings relating to search and recovery of contraband in the manner as deposed by the official witnesses having come to be launched and concluded at 12.25 p.m when it was broad day light and with PW-2 in his cross-examination having conceded to the factum of many Dhabas and shops being located in proximity to the site of occurrence

renders the omission on the part of the investigating officer to associate any of the owners of the shops and dhabas located in close proximity to the site of occurrence to constrain an inference that despite availability of independent witnesses in close proximity to the site of occurrence, the Investigating Officer deliberately abstain from joining them, as he intended to smother the truth qua the genesis of the prosecution version. Furthermore, the inference of the Investigating Officer having intentionally or deliberately omitted to join independent witnesses though available in proximity to the site of occurrence stands galvanized from the factum that PW-2 in his cross-examination has admitted the factum of the Investigating Officer having requested the drivers, conductors and occupants of two buses, to join as independent witnesses, yet when he feigns ignorance whether the Investigating Officer had recorded their names and addresses and taken any lawful action for refusal on their part to join as independent witnesses, prods this Court to conclude that despite the arrival of two buses at the site of occurrence the Investigating Officer did not proceed to join either their drivers or conductors or their occupants as witnesses in the apposite proceedings. If he had made a concert to join them as witnesses in the purported proceedings relating to the recovery of contraband from the alleged conscious and exclusive possession of the accused then he would have proceeded to record their names and addresses besides even if they had refused to join as independent witnesses in the apposite proceedings, he would have maintained a record qua the lawful action initiated by him against such persons arising from their refusal to join as independent witnesses. However, with there being an admission in the cross-examination of the Investigating Officer that he did not record the registration numbers of the vehicles, which he stopped nor he recorded the names of the persons who were requested by him to join as independent witnesses in the apposite proceedings also when he has deposed that he did not take any action against the persons who had refused to join as independent witnesses, constrains an inference that the Investigating Officer had not solicited the drivers, conductors or occupants of the two buses which were stopped by him, to join as witnesses in the proceedings relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused. If he had concerted to make an endeavour of soliciting them to join as witnesses in the apposite proceedings, he would have proceeded to record their names and addresses besides on their refusal to accede to his solicitation or entreaty he would have proceeded to take lawful action against them. Necessarily when there are omissions on the part of the Investigating Officer to either record their names or when he concedes to his having not initiated any lawful action against them for theirs refusing to join as independent witnesses in the proceedings relating to search and seizure of recovery of contraband from the purported conscious and exclusive possession of the accused, rejuvenates an inference that such omission was prodded by the fact that he did not make any concert or endeavour to solicit the drivers, conductors or occupants of the two buses stopped by him, to join as independent witnesses relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused. As a corollary, the ensuing inference which flows therefrom is that such omission was intentional as well as deliberate as the Investigating Officer intended to smother the truth qua the prosecution version. Furthermore, the inference which is available to be drawn by this Court is that the Investigating Officer carried out a slanted besides a contorted as well as a contrived investigation on which no reliance can be placed by this Court. In sequel, the genesis of the prosecution version founded upon a skewed, faulty and partisan investigation cannot be lent credence by this Court.

13. The accused had espoused in his defence a propagation of his innocence founded upon the factum of his having been nabbed from his house by the police officials and then taken to the police station concerned. In case the aforesaid defence propounded by the accused galvanizes an aura of truth, the proceedings relating to the search and recovery of contraband in the manner as alleged by the prosecution from the purported

exclusive and conscious possession of the accused at National Highway No. 21 would stand belied. Concomitantly also then the factum of the deliberate or intentional omission for the reasons aforesaid on the part of the Investigating Officer to join independent witnesses in the apposite proceedings would also garner tremendous legal vigour, in discounting besides ousting the depositions of the official witnesses. The apt and germane evidence which was relied upon by the accused in propagation of his defence stood comprised in Ext.DW-3/A, which constituted an inquiry conducted by the police authority concerned qua the allegations reared by the complainant qua his having come to be nabbed from his house by the police officials concerned on the night intervening 11.4.2010 and 12.4.2010. Even when the factum as propounded by the accused in his defence stood corroborated by the recitals in Ext.DW-3/A nonetheless the learned Court below discarded their probative worth, merely on the ground that it did not come to be proved by the authority who had proceeded to draw the conclusions recorded in Ext.DW-3/A. The reasons as meted out by the learned trial Court for discounting the probative vigour of Ext.DW-3/A adduced into evidence at the instance of the accused in propagation of his defence of his having been nabbed from his house by the police officials concerned and then his having been taken to the police station concerned, is comprised in the fact that it stood not proved by its author rather came to be adduced in Court merely by an official in the office of S.P. Kullu. The aforesaid reason is unworthy of acceptance. The unworthiness of the reason as meted out aforesaid by the learned trial Court in discounting Ext.DW-3/A is constituted in the fact DW-3 during the course of recording of his deposition proved Ext.DW-3/A from the original brought by him in Court. With DW-3 having proved Ext.DW-3/A from its original brought by him in Court, obviously when the factum of its being a photocopy of the original stood not concerted to be repulsed by the learned Public Prosecutor by subjecting him to cross-examination, then it was neither appropriate nor apt for the learned trial Court to discard its probative worth merely on the ground of its authorship having remained not proved. In face thereof with the recitals in Ext.DW-3/A imputing succor to the propagation of the accused of the proceedings relating to search and recovery of contraband having not been either launched or concluded at the site of occurrence as espoused by the prosecution, all the more rendered imperative besides entailed upon the investigating officer, to associate independent witnesses in the apposite proceedings especially for dispelling the efficacy of Ext.DW-3/A. In sequel with the Investigating officer having not concerted to associate independent witnesses in the apt and apposite proceedings, for dispelling the efficacy of Ext.DW-3/A, the effect of his deliberately omitting to join independent witnesses in the apposite proceedings cannot but constrain an inference that it was actuated by his oblique motive, to smother the truth qua the genesis of the prosecution version. Moreover, the concomitant inference which is marshalable therefrom is that purported apposite proceedings were neither launched or concluded at the site of occurrence and also the concomitant inference which is derivable therefrom is that the deposition of the official witnesses cannot gather any aura of truth or veracity. Consequently, no truth can be acquired by a tainted or slanted investigation.

14. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

15. In view of above discussion, the instant appeal is allowed and the impugned judgment of 11.09.2014 rendered by the learned Special Judge, Mandi, is set-aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

16. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent back forthwith.

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

Naresh Kumar Mahant .....Appellant

Versus

Oriental Insurance Company Limited & others ..... Respondents

FAO No.302 of 2009
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that deceased was travelling in the truck along with goods- owner and driver did not deny this fact- insurer did not lead any evidence to prove that deceased was travelling as a gratuitous passenger- held, that Tribunal had wrongly held that the deceased was a gratuitous passenger - appeal allowed and insurer held liable to pay compensation. (Para-5 to 10)

Cases referred:
United India Insurance Company Ltd. vs. Savita Devi and others, I L R 2015 (IV) HP 1285
Oriental Insurance Co. Ltd. vs. Mahender Singh and others, I L R 2015 (IV) HP 1264

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Ashwani Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate, for respondent No.1.
Mr. G.R. Palsra, Advocate, for respondents No.2 to 5.
Nemo for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 31st March, 2009, passed by the Motor Accident Claims Tribunal-cum Presiding Officer, Fast Track Court, Mandi, H.P., (for short, "the Tribunal") in Claim petition No.112/2005(78/2002), titled Naina Katoch & others vs. Naresh Kumar Mahant & others, whereby a sum of Rs.11,03,200/-, alongwith interest at the rate of 7.5% per annum, came to be awarded as compensation in favour of the claimants and the owner-insured was saddled with the liability, (for short, the "impugned award").

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

3. Feeling aggrieved, the owner/insured has questioned the impugned award on the ground that the Tribunal has fallen in error in holding that the deceased was traveling in the offending vehicle as gratuitous passenger and, therefore, has wrongly saddled the owner with the liability.

4. Thus, the only question to be determined in this appeal is - Whether the Tribunal has rightly exonerated the insurer from its liability?

5. To settle the above controversy, a reference may be made to the pleadings of the parties. The claimants filed the claim petition, which was amended later on, wherein, in paragraph 24, they have pleaded that the deceased, namely, Kartar Singh was traveling in the truck bearing registration No.HP-34-3069 alongwith goods, which was being driven by its driver, namely Sarwan Kumar rashly and negligently, as a result of which, the deceased fell down and got crushed under the rear tyre of the offending vehicle.

6. The owner and the driver filed the reply in which they have not denied the fact that the deceased was not traveling in the offending vehicle alongwith his goods, rather have admitted the said fact. Thus, it cannot be disputed that the deceased was not traveling in the offending vehicle alongwith his goods.

7. The Tribunal, after examining the pleadings of the parties, framed the following issues:-

> *"1. Whether Kartar Singh died as a result of rash or negligent driving of respondent No.2. OPP*
>
> *2. In case issue No.1 is proved, to what amount the petitioners are entitled and from which of the respondent? OPP*
>
> *3. Whether respondent No.2 was not having a valid and effective driving licence? If so, its effect? OPR-3*
>
> *4. Whether the deceased was a gratuitous passenger and as such, respondent No.3 is not liable? OPR-3*
>
> *5. Relief."*

8. From the above, it is clear that the controversy needs to be settled in the instant appeal pertains to issue No.4. The insurer has not led any evidence despite the fact that it had to discharge the onus viz. a viz. issues No.3 & 4 and had also to lead evidence in defence to claim exoneration. Since the insurer has failed to lead any evidence, therefore, in the absence of any evidence having been led by the insurer, the Tribunal has fallen in error in holding that the deceased was a gratuitous passenger, which is against the mandate of Order 14 of the Code of Civil Procedure. It was for the insurer to plead and prove that the owner/insured had committed willful breach of the terms and conditions of the insurance policy, in which it has failed. As has been noted above, the claimants have specifically pleaded in the Claim Petition, which fact has been admitted by the owner and the driver, by filing reply to the Claim Petition, that the deceased was traveling in the offending vehicle as owner of the goods.

9. This Court in FAO No.615 of 2008, titled United India Insurance Company Ltd. vs. Savita Devi and others, decided on 7th August, 2015, FAO No.682 of 2008, titled Oriental Insurance Co. Ltd. vs. Mahender Singh and others, decided on 7th August, 2015, and catena of other judgments, has already held that once a person is traveling in a vehicle alongwith his goods, he cannot be termed as a gratuitous passenger.

10. Having said so, the findings returned by the Tribunal on issue No.4 are set aside and it is held that the deceased was not traveling in the offending vehicle as gratuitous passenger, rather was traveling alongwith his goods. Accordingly, the insurer is saddled with the liability.

11. The insurer is directed to deposit the amount of compensation, alongwith interest as awarded by the Tribunal, within a period of six weeks from today in the Registry of this Court and the Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award. The statutory amount deposited by the appellant/owner is ordered to be paid to the claimants as costs of this appeal.

12. The appeal is allowed and the impugned award is modified as indicated above.

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

National Insurance Company Ltd. .....Appellant
Versus
Smriti Verma & others ..... Respondents

FAO No.349 of 2009
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded the interest @ 12% per annum- held, that rate of interest should be awarded as per the prevailing rate- hence, rate of interest reduced from 12% per annum to 7.5% per annum from the date of the claim petition. (Para-4 to 6)

Cases referred:
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, I L R 2015 (III) HP 1149

For the appellant: Mr. Suneet Goel, Advocate.
For the respondents: Mr. Surender Thakur, Advocate vice Mr. P.P. Chauhan, Advocate, for respondents No.1 and 2.
Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 28th February, 2009, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, "the Tribunal") in Petition No.2-S/2 of 2007, titled Smriti Verma & another vs. Mohinder Singh Verma & another,

whereby a sum of Rs.9,26,000/- alongwith interest at the rate of 12% per annum, came to be awarded as compensation in favour of the claimants, (for short the "impugned award").

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

3. I have gone through the impugned award, is well reasoned, needs no interference.

4. The learned counsel for the appellant, during the course of hearing, was not able to show how the impugned award was excessive or bad in law. However, he argued that the Tribunal has awarded interest at the rate of 12% per annum, which is on the higher side and is not in accordance with Section 171 of the Motor Vehicles Act, 1988, (for short, the Act).

5. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,* reported in *(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,* reported in *2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,* reported in *(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,* reported in *2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,* reported in *2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,* reported in *(2015) 4 Supreme Court Cases 433,* and *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,* reported in *(2015) 4 Supreme Court Cases 434,* and discussed by this Court in a batch of FAOs, *FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,* being the lead case, decided on 19.06.2015 and FAO No.63 of 2009, titled United India Insurance Company Ltd. vs. Gian Chand and others, decided on 7th August, 2015.

6. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of the claim petition till deposit.

7. The appeal is allowed and the impugned award is modified, as indicated above.

8. The Registry is directed to release the award amount, alongwith interest, in favour of the claimants, strictly in terms of the conditions contained in the impugned award, after proper identification, and the excess amount, if any, deposited by the insurer-appellant, be refunded in its favour through payees' account cheque.

9. The appeal stands disposed of accordingly.

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

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

The New India Assurance Co. Ltd. ...Appellant.

Versus

Smt. Bori Devi and others ...Respondents.

FAO No. 269 of 2009
Decided on: 09.10.2015

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that driver was not driving the offending vehicle and the Tribunal has fallen in error in saddling it with liability – held, that appellant/insurer has not led any evidence to discharge the onus- Tribunal has rightly appreciated the evidence to hold that driver of the offending vehicle was driving the vehicle rashly and negligently- beaten law of the land is that in welfare legislation, procedural wrangles and tangles have no role to play and strict proof of rashness and negligence is not required- appeal dismissed. (Para-3 to 9)

For the appellant: Mr. Ratish Sharma, Advocate.

For the respondents: Mr. S.D. Sharma, Advocate, for respondents No. 1 and 2.
Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for respondent No. 3.
Mr. Ajeet Saklani, Advocate, for respondent No. 4.

The following judgment of the Court was deliverd:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 16.12.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. (for short "the Tribunal") in R.B.T. No. 12-S/2 of 2005/2001, titled as Smt. Bori Devi and another versus Sh. Gangesh Kumar and others, whereby compensation to the tune of Rs.2,58,000/- with interest @ 9% per annum from the date of the filing of the claim petition till its realization alongwith costs assessed at Rs.1,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

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

3. The appellant-insurer has questioned the impugned award on the ground that the driver, namely Shri Misar Dass, was not driving the offending vehicle, i.e. canter, bearing registration No. HP-33-2951, rashly and negligently on 27.07.1998, thus, the Tribunal has fallen in an error in saddling the appellant-insurer with liability.

4. The arguments of the learned counsel for the appellant-insurer revolve around the findings returned by the Tribunal on issue No. 1.

5. Before I deal with issue No. 1, I deem it proper to record herein that the appellant-insurer had to discharge the onus relating to issues No. 3 to 7, has not led any evidence to prove the said issues, rather, has not pressed the same. There is also not even a whisper in the memo of appeal that the findings recorded in para 24 of the impugned award are wrong. Even otherwise, the appellant-insurer has not led any evidence, thus, has failed

to discharge the onus. Accordingly, issues No. 3 to 7 are decided in favour of the claimants and against the appellant-insurer.

6. Now coming to issue No. 1, as discussed hereinabove, the appellant-insurer has not led any evidence, thus, the evidence led by the claimants has remained unrebutted. The Tribunal has discussed the evidence led by the claimants and the owner of the offending vehicle.

7. I have perused the evidence and the discussions made by the Tribunal in paras 10 to 16 and am of the considered view that the Tribunal has rightly held that the driver of the offending vehicle was rash and negligent.

8. It is beaten law of land that granting of compensation is a welfare legislation and hypertechnicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

9. In the claim petitions, as is held by the Apex Court and this Court in a series of cases, strict proof is not required and the claimants have to prove the rashness and negligence of the driver, by leading evidence, that too, prima facie.

10. Having said so, the Tribunal has rightly recorded the findings on issue No. 1 and the same are accordingly upheld.

11. The amount awarded is too meager, which, unfortunately, has not been questioned and is reluctantly upheld.

12. Having glance of the above discussions, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

13. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

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

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

Oriental Insurance co. Ltd. .....Appellant.

Versus

Sh. Om Prakash Sahni and others ...Respondents

FAO (MVA) No. 344 of 2008
Judgment reserved on 18.9.2015
Date of decision: 9th October, 2015

Motor Vehicles Act, 1988- Section 166- Claimant has questioned the award on the ground of adequacy of compensation- held, that claimant was 39 years of age and had suffered permanent disability to the extent of 45% rendering him physically handicapped- Tribunal had fallen in error in not awarding the compensation under the head 'loss of amenities'- claimant held entitled to Rs. 50,000/- under the head 'loss of amenities of life' - Rs.50,000/-

awarded under the head 'pain and suffering for future' and Rs.50,000/- further awarded under the head 'loss of future income'- appeal allowed and insurer directed to deposit the entire amount. (Para-6 to 13)

For the appellant:	Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents:	Mr.Neeraj Gupta, Advocate, for respondent No.1. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to the judgment and award dated 1.4.2008, made by the Motor Accident Claims Tribunal Solan in MAC Petition No. 3-S/2 of 2007, titled Om Parkash Sahni Versus Mr. Mohammad Anis and others, for short "the Tribunal", whereby compensation to the tune of Rs.6,00,000/- alongwith interest @ 9% per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

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

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned Senior Advocate for the appellant argued that the Tribunal, without any basis and foundation, has awarded Rs.6 lacs in lump sum in favour of the claimant and prayed that the impugned award be set aside. He has not questioned the other findings returned by the Tribunal. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate and the Tribunal was having basis for such an assessment.

5. Brief facts are given as under:

6. Claimant Om Parkash Sahni filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.15 lacs, as per the break-ups given in the claim petition. It is averred in the claim petition that the claimant was traveling in his own Honda City Car bearing registration No. HP-14-A-0250 alongwith his family on 23.11.2003 and was on his way to Barellie. The Truck bearing registration No. HR-38-H-8148 suddenly came on the wrong side, which was on a very fast speed and hit the Honda City Car near Chaudharpur Moradabad and totally damaged the said Car. The claimant and other occupants sustained injuries.

7. The owner and driver did not appear before the Tribunal and were set ex parte. The insurer filed objections and following issues came to be framed.

(i) Whether the vehicle of the petitioner has suffered damages on account of rash/negligent driving of the truck by respondent No.1? OPP

(ii) If issue No. 1 is proved in affirmative, what amount of damages petitioner is entitled to and from whom? OPP

(iii) Whether the liability of the respondent No.3 is confined to only Rs.6000/-? OPR.

(iv) Relief.

8. The claimant examined two witnesses, namely, Bal Kishan and Prabhujot Singh and appeared himself in the witness-box as PW3.

9. The insurer has not led any evidence, thus, the evidence led by the claimant has remained un-rebutted.

10. The driver and owner have not resisted the claim petition thus, the averments contained in the claim petition stand admitted.

11. The Tribunal, after examining the evidence, oral as well as documentary, and also the photographs, held that the driver had driven the offending vehicle rashly and negligently and totally damaged the Honda City Car of the claimant. These findings are also not in dispute. Accordingly, the findings are upheld.

12. Issues No. 2 and 3 are interlinked. Thus, I deem it proper to determine both these issues together.

13. The Tribunal has discussed in paras 10 and 12 of the impugned award that the vehicle was completely damaged which is factually and legally correct for the reasons that the evidence and the documents on the file proved the said fact and accordingly it can be safely held that the vehicle was completely damaged.

14. The claimant has led evidence and also proved the estimate Ext. PW2/A, which was prepared by the Supervisor of M/s Lally Motors Industrial Area Chandigarh. The claimant has examined Prabhujot Singh PW2 who has proved the said estimate. The estimate do disclose that the estimated amount was more then the cost of the vehicle.

15. The vehicle was purchased in the year 2002 and the accident took place in the year 2003. So the value of the vehicle is to be assessed while keeping in view the depreciation. The Tribunal, after taking into the account the fact that the vehicle was totally damaged which was purchased in 2002, has rightly awarded Rs.6 lacs with interest and by no stretch of imagination, it can be said to be excessive rather inadequate while keeping in view the evidence on the file and findings recorded by the Tribunal.

16. It was for the insurer to prove that the liability was only for Rs.6,000/-, has not led any evidence. The Tribunal has made discussion in paras 10 and 12 of the impugned award that excess amount was paid and the risk of damage to the 3rd party was covered up to Rs.7,50,000/-. Thus, the insurer is liable to pay the amount to the tune of Rs.6,00,000/- with interest as awarded by the Tribunal.

17. Having said so, no interference is required, the appeal is dismissed.

18. The Registry is directed to release the amount in favour of the claimant, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

19. Send down the record, forthwith, after placing a copy of this judgment.

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

Oriental Insurance Company ...Appellant.

Versus

Rajender Kumar and another ...Respondents.

FAO No. 257 of 2009
Decided on: 09.10.2015

Motor Vehicles Act, 1988- Section 149- Appellant/insurer challenged the award on the ground of collusion between the claimant and the insured – held, that insurer has not led any evidence to discharge the onus; and evidence led by claimant/injured has remained unrebutted- plea that there was collusion between the claimant/injured and owner/insured-cum- driver, was not taken in the reply, hence, the same cannot be entertained for the first time in appeal – appeal dismissed. (Para 7 to 9)

For the appellant: Mr. J.S. Bagga, Advocate.

For the respondents: Ms. Chetna Thakur, Advocate, vice Mr. Dushyant Dadwal, Advocate, for respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

By the medium of this appeal, the appellant-insurer has called in question the judgment and award, dated 13.01.2009, made by the Motor Accident Claims Tribunal, Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 96 of 2005, titled as Sh. Rajender Kumar versus Bhopal Singh and another, whereby compensation to the tune of Rs.1,31,223/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The claimant-injured and the owner-insured-cum-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 taken in the memo of appeal.

4. The claimant-injured invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") and sought compensation on the ground that he sustained injuries in the vehicular accident, which was caused by Shri Bhopal Singh, while driving the scooter, bearing registration No. HP-33A-1620, on 06.05.2005, at about 9.00 a.m. at Village Lunapani, rashly and negligently.

5. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

6. Following issues came to be framed by the Tribunal on 19.07.2007:

> "1. Whether the respondent No. 1 was driving the scooter No. HP-33A-1620 on 6-5-2005 at about 9 am at village Lunapani in a rash

and negligent manner resulting in injuries to the petitioner, as alleged? OPP

2. If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so, as to what amount and from whom? OPP

3. Whether respondent No. 1 was not holding a valid and effective driving licence at the time of the accident and the vehicle was driven in violation of the terms and conditions of the insurance policy as alleged? OPR-2.

4. Relief."

7. The claimant-injured examined Shri Rajender Kumar as PW-2, Dr. Sanjeev Raj Kapoor as PW-3 and himself stepped into the witness box as PW-1. The owner/insured-cum-driver of the offending vehicle appeared in the witness box as RW-1. The appellant-insurer has not led any evidence, thus, the evidence led by the claimant-injured has remained unrebutted.

8. Learned counsel for the appellant-insurer argued that there was collusion between the claimant-injured and the owner/insured-cum-driver of the offending vehicle.

9. It is worthwhile to record herein that the appellant-insurer has not taken the said defence in the reply. However, application under Section 170 of the MV Act was filed before the Tribunal, which was granted, but it has not led any evidence to this effect.

Issue No. 1:

10. I have gone through the evidence recorded and am of the considered view that the claimant-injured has proved that he has received the injuries due to the rash and negligent driving of the scooter by the owner/insured-cum-driver. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

12. It was for the appellant-insurer to lead evidence to prove issue No. 3, has not led any evidence, thus, has failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issue No. 3 are also upheld.

Issue No. 2:

13. The amount awarded is too meager, but the claimant-injured has not questioned the same. Accordingly, the same is reluctantly upheld.

14. Having said so, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

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

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

FAOs No. 4042 & 4043 of 2013
a/w CO No. 4019 & 4020 of 2013
Decided on: 09.10.2015

FAO No. 4042 of 2013

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Sushila and others ...Respondents.

FAO No. 4043 of 2013

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Kaniza and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the truck as labourer who was doing the job of loading or unloading lime stones, sand, bricks and bajri etc. - this fact was not denied by the owner and the driver- sitting capacity of the vehicle was '5+1' meaning that risk of 5 person was covered, thus, risk of the deceased is also covered- held, that plea of the insurer that deceased was a gratuitous passenger cannot be accepted. (Para-7 to 9)

For the appellant(s): Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Inder Sharma, Advocate, for respondents No. 1 to 4.
Mr. B.B. Vaid, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These appeals and the cross-objections are the outcome of a motor vehicular accident, which was caused by the driver, namely Shri Khatri Ram, while driving truck, bearing registration No. HP-17-4454, rashly and negligently on 21.02.2011, at about 11.30 A.M. near Tillourdhar, Tehsil Paonta Sahib, District Sirmaur, H.P., in which Shri Sanjay and Shri Mehmood sustained injuries and succumbed to the injuries, constraining the claimants to file two claim petitions before the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan (for short "the Tribunal"), which came to be determined and compensation was awarded in favour of the claimants vide separate awards, dated 12.04.2013 (for short "the impugned awards").

2. The owner-insured and the driver of the offending vehicle have not questioned the impugned awards on any count, have attained finality so far these awards relate to them.

3. The insurer has questioned the impugned awards on the grounds that the deceased were travelling in the offending vehicle as gratuitous passengers, thus, the owner-insured has committed a willful breach and that the insurance policy was not subsisting at the time of the accident.

4. The claimants have questioned the impugned awards by the medium of cross-objections on the ground of adequacy of compensation.

5. Learned counsel for the parties frankly conceded that the amount of compensation awarded by the Tribunal is adequate and is neither meager nor excessive.

6. Thus, the only question to be determined in these appeals is - whether the Tribunal has rightly saddled the insurer with liability? The answer is in affirmative for the following reasons:

7. Admittedly, the offending vehicle was a truck and the claimants have pleaded in paras 5 and 23 of the claim petitions that the deceased were travelling in the offending vehicle as labourers and were doing the job of loading and unloading lime stones, sand, bricks and bajri etc. The owner-insured and the driver of the offending vehicle have filed the replies and have not denied the said factum, but have admitted the same. Thus, there is admission on the part of the owner-insured and the driver of the offending vehicle that the deceased were labourers with the offending vehicle.

8. The insurance policy, Ext. R-1 is on record, which does disclose that the seating capacity of the offending vehicle was '5 + 1', and risk of five persons and driver was covered. Thus, the risk of the deceased was covered. The insurance policy was effective w.e.f. 28.10.2010 to the midnight of 27.10.2011. The accident has taken place on 21.02.2011. Thus, the insurance policy was subsisting.

9. Having said so, the Tribunal has rightly saddled the insurer with liability.

10. It is apt to record herein that the insurer has not led any evidence to prove its defence and has failed to discharge the onus. On that count also, the findings on issues No. 3 to 6 are to be upheld and are upheld accordingly.

11. Having glance of the above discussions, the impugned awards are to be upheld, the appeals and the cross-objections merit to be dismissed. Accordingly, the impugned awards are upheld and the appeals and the cross-objections are dismissed.

12. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

13. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Oriental Insurance Company Ltd. .....Appellant.

Versus

Smt. Tara Devi and others ...Respondents

FAO (MVA) No. 381 of 2009.
Date of decision: 9th October, 2015.

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that driver was not having valid licence- held, that driver was possessing driving licence to drive light motor vehicle and it did not require endorsement to drive passenger vehicle and secondly, driver possessing learner's licence to drive the vehicle was competent to drive the offending vehicle- Tribunal has rightly held that driver was having valid and effective driving licence- appeal dismissed. (Para-4 to 9)

Cases referred:
Kulwant Singh and others versus Oriental Insurance Company Ltd. (2015) 2 SCC 186
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Oriental Insurance Company Ltd versus Smt. Amra Devi and others I L R 2015 (II) HP, 874
Dinesh Kumar versus Trishla Devi and another, : I L R 2015 (V) HP 210

For the appellant:	Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.
For the respondents:	Mr. Ashok Sharma, Sr. Advocate with Mr. Ajay Chandel, Advocate, for respondents No. 1 and 2. Mr. Surender Verma, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award dated 31.3.2009, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, H.P., in Claim Petition No. 248/2005 (114/2004), titled Smt. Tara Devi and another versus Mast Ram and others, for short "the Tribunal", whereby compensation to the tune of Rs.2,69,000/- alongwith interest @7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The insurer has questioned the impugned award on the ground that the driver was not having a valid driving licence. The offending vehicle was Tata Sumo. Admittedly, the driver was having the licence to drive the light motor. This Court in **FAO No. 125 of 2008** titled **Oriental Insurance Co. Ltd. Versus Smt. Amara Devi and others** decided on 17.4.2015 and **FAO No. 219 of 2008** titled **United India Insurance Co. Ltd. Versus Smt. Juma Devi and others** decided on 14th August, 2015, has already held that the driver, who is having driving licence to driver light motor needs no endorsement to drive passenger vehicle. So it was valid driving licence.

4. The learned counsel for the claimants has also relied upon a recent judgment of the Supreme Court in case titled **Kulwant Singh and others versus Oriental Insurance Company Ltd**. reported in **(2015) 2 SCC 186,** wherein same principles of law have been laid down. It is apt to reproduce para 9 of the said judgment herein.

> "9.In S. Iyyapan , the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed:
>
> "18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the

> driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."

5. The second argument advanced by the learned Senior Counsel for the appellant is that the driver was having learner's licence to drive the vehicle and was not competent to drive the offending vehicle.

6. Whether a person, who is holding a learner's license, is competent to drive light motor vehicle came up for consideration in case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's license is deemed to have been holding a valid and effective driving license. It is apt to reproduce paras 88, 89 and 90 of the said judgment herein:

> "88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149(2) of the said Act.
>
> 89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation

of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance, has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein.

7. This Court in **FAO NO. 125 of 2008 titled Oriental Insurance Company Ltd versus Smt. Amra Devi and others** decided on 17th April, 2015, **FAO No. 703 of 2008** titled as **Dinesh Kumar versus Trishla Devi and another,** decided on 4.9.2015 and **FAO No.322 of 2011** titled **IFFCO-TOKIO Gen. Insurance Company Limited Versus Smt. Joginder Kaur & others**, has laid down the same principles of law.

8. Thus, the Tribunal has rightly held that the driver was having a valid and effective driving license.

9. Having said so, no interference is called for. The appeal is dismissed and the impugned award is upheld.

10. The insurer is directed to deposit the entire amount within six weeks from today, if not deposited, and on deposit, the Registry is directed to release the same in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

11. Send down the record, forthwith, after placing a copy of this judgment.

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

Sh. Prakash ....Appellant.

Versus

Sh. Vinay Nanda and others ...Respondents

FAO (MVA) No. 344 of 2009.
Date of decision: 9th October, 2015.

Motor Vehicles Act, 1988- Section 166- The insurer challenged the award on the ground that the compensation granted is excessive – held that insurer has not led any evidence and the claimant has led enough evidence to establish the fact that his vehicle was totally

damaged in the accident- vehicle was purchased in the year 2000 and accident took place in the year 2003- Rs. 6,00,000/- with interest was rightly awarded as compensation- appeal dismissed. (Para 9 to 16)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Oriental Insurance Company versus Padama Devi and others, : I L R 2015 (V) HP 526
Managing Director HPMC Nigam Vihar vs. Naresh Kumar and others, I L R 2015 (IV) HP, 1435
Anil Kumar versus Sh. Nittin Kumar and others , I L R 2015 (IV) HP 445 (D.B.)

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate for respondent No.1.
Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this appeal, the claimant has questioned the judgment and award dated 10.4.2009, made by the Motor Accident Claims Tribunal Shimla, in MAC Petition No. 11-S/2 of 2008, titled *Sh. Parkash versus Vinay Nanda and others,* for short "the Tribunal", whereby compensation to the tune of Rs.4,30,600/- came to be awarded in favour of the claimant and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The claimant has questioned the impugned award on the ground of adequacy of compensation. Thus, the only question to be determined in this appeal is whether the amount awarded is meager or otherwise.

4. I am of the considered view that the compensation awarded is meager and merits to be enhanced for the following reasons.

5. The claimant was 39 years of age at the time of accident and has suffered permanent disability to the extent of 45% which has rendered him physically handicapped and shattered his physical frame and all hops of future. Dr. Pawan Thakur, (PW1) Dr. Ravinder Mokta (PW4), Dr. Sanjay Mahanan and Dr. V.K. Arya have given details what is the effect of the injuries which have been discussed by the Tribunal in paras 17 and 18 of the impugned judgment which is not in dispute.

6. The claimant has pleaded that he has spent Rs.70,000/- on account of his treatment which has been discussed by the Tribunal in para 20 of the impugned award and the Tribunal, after discussing all the issues held the claimant entitled to Rs.14,600/- under the head "medical expenditure", Rs.24000/- under the head "conveyance charges" and Rs.18000/- under the head "attendant charges" and also awarded Rs.50,000/- under the head "pain and suffering" but has fallen in an error in not awarding the compensation

under the head "loss of amenities", pain and suffering for future" and also has not assessed the loss of income rightly.

7. In the injury cases, the compensation has to be awarded under two heads "pecuniary damages" and "non-pecuniary damages."

8. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be awarded under various heads.

9. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in ***2010 AIR SCW 6085***.

10. This Court in ***FAO No. 317 of 2011*** titled ***Oriental Insurance Company versus Padama Devi and others,*** decided on 18.9.2015, ***FAO No. 18 of 2009*** titled ***Managing Director HPMC Nigam Vihar vs. Naresh Kumar and others*** decided on ***14.8.2015*** and ***FAO No. 72 of 2008*** titled ***Anil Kumar versus Sh. Nittin Kumar and others decided on 10.7.2015*** has also laid down the same principles.

11. Having said so, I am of the considered view that by a guess work, the claimant is entitled to Rs.50,000/- under the head "loss of amenities of life" Rs.50,000/- under the head "pain and suffering for future".

12. The Tribunal has discussed in para 23 of the impugned award that the claimant was earning Rs.4000/- per month and it has affected his earning capacity to the extent of Rs.1800/-. It has to be Rs.2000/- per month.

13. In the given circumstances I deem it proper to award Rs.50,000/- under the head "loss of future income", in addition to the compensation already awarded.

14. Accordingly, the claimant is held entitled to Rs.4,30,600/-+Rs.1,50,000/-, i.e., total to the tune of Rs.5,80,600/- with interest, as awarded, from the date of the claim petition on the amount of Rs.4,30,600/- and on Rs.1,50,000/-, from the date of impugned award.

15. Having said so, the appeal is allowed and the amount of compensation is enhanced, as indicated hereinabove.

16. The insurer is directed to deposit the entire amount minus the amount already deposited, in the Registry within six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

17. Send down the record, forthwith, after placing a copy of this judgment.

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

Prem Lal .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.10531 of 2011.
Judgment reserved on : 01.10.2015.
Date of decision: October 09, 2015.

Constitution of India, 1950- Article 226- Petitioner sought a writ of mandamus seeking a direction to the respondents to acquire the land and to pay the compensation from the date of taking of possession- petitioner claimed that notification was issued for acquiring 0-01-89 hectares of the petitioner's land- however, the petitioner was dispossessed from his entire land- he filed a civil suit in which it was held that respondent No. 2 had encroached upon the entire area of the petitioner but no direction could be issued for acquiring the remaining land- held, that the right to hold the property is not only constitutional right but also a human right which cannot be taken away without following due course of law- it was found on the basis of demarcation that Khasra No.1464/383 was not acquired but 50% of the area is submerged and remaining 50% is in the danger zone- similarly, points were put towards the end of Khasra No. 1464/383 but it was not acquired – some portion of khasra No.384/1 had submerged and remaining was in the danger zone, although, it was not acquired - Khasra No. 391 was six meters above the water level- report clearly shows that un-acquired land was being used by the respondents- therefore, direction issued to acquire the land of the petitioner bearing Khasra No. 1464/383 and Khasra No. 384/1. (Para-6 to 19)

Cases referred:

Chairman, Indore Vikas Pradhikaran versus Pure Industrial Coke & Chemicals Ltd. and others (2007) 8 SCC 705

Lachhman Dass versus Jagat Ram and others (2007) 10 SCC 448

K.T. Plantation Private Limited and another versus State of Karnataka (2011) 9 SCC 1

Tuka Ram Kana Joshi and others versus Maharastra Industrial Development Corporation and others (2013) 1 SCC 353

For the Petitioner : Mr.Hamender Chandel, Advocate.

For the Respondents : Mr.Virender Kumar Verma and Ms.Meenakshi Sharma, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No.1 and 3.

Mr.Ramesh Chand Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition has been filed claiming therein the following substantive reliefs:-

"i) That the respondents may be directed to acquire the total land comprised in Khata-Khatauni No.126/178, Khasra No.383, 384 and 391 as per the provisions of Land Acquisition Act.

ii) That the petitioner may be held entitled for the compensation from the date the respondent No.2 has taken possession of the above three Khasra No's in the year 2007 by affixing iron pillars."

The facts, in brief, may be noticed.

2. The petitioner is owner of Khewat-Khatauni No.126/178, Khasra Nos. 383, 384 and 391, situated in Mohal Shakri, Tehsil Sunni, District Shimla. A notification under Section 4 of the Land Acquisition Act was issued on 24.03.2005 whereby 0-01-89 hectare of the petitioner's land as comprised in Khasra No.383 was also sought to be acquired. However, while taking over the possession of the acquired land, the respondents are alleged to have taken over the possession of the entire land of the petitioner including the land that had not even been legally acquired.

3. According to the petitioner, the acquired land after its acquisition was re-numbered as Khasra No.383/1 and measured about 5 biswas, whereas, his remaining land comprised in Khasra Nos. 383, 384 and 391 had been forcibly taken possession of without there being any lawful acquisition. His repeated representations did not yield any result constraining him to file a civil suit which was partly decreed on 07.06.2010 by holding that though respondent No.2 had encroached upon the entire area of the petitioner as mentioned in the aforesaid khasra numbers, but it had no jurisdiction to issue directions in the nature as prayed for by the petitioner.

4. Respondents No.1 and 3 contested the petition by filing reply wherein a number of preliminary objections regarding maintainability, estoppel etc. have been raised. However, on merits, nothing worth-mentioning can be noticed. It is the respondent No.2, which is the main contesting party and in its reply has claimed that the required land has been acquired and due and admissible compensation stands paid to the petitioner.

5. Learned counsel for respondent No.2 has further raised preliminary submission regarding the very maintainability of this petition as being barred by the principles of resjudicata. It is contended that Civil Suit seeking same and similar reliefs already stands decided against the petitioner by the judgment and decree passed by the learned Civil Judge (Junior Division), Court No.4, Shimla, on 07.06.2010 in Civil Suit No.55/1 of 2008 and, therefore, the instant petition is not maintainable.

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

6. Insofar as the preliminary objection is concerned, it would be evident from a perusal of the judgment and decree that the contention raised by respondent No.2 is absolutely false and frivolous because the learned Civil Court not only found substance in the contentions raised by the plaintiff/petitioner, but also found that the respondent No.2 despite being a public authority had forcibly encroached upon the land of the plaintiff. The only hindrance coming in the way of the Court in decreeing the suit in its entirety was that it felt that it had no jurisdiction to direct the respondents to acquire the land of the petitioner. Nonetheless, it partly decreed the suit of the plaintiff by directing the respondents to remove all iron pillars erected on the land comprised in Khewat Khatauni No.126/178, Khasra Nos. 383, 384 and 391 and further permanently restrained them from interfering in this land in any manner.

7. To hold property is not a constitutional right in terms of Article 300-A of the Constitution of India, but is also human right and, therefore, cannot be taken away except in accordance with law. This was so held by the Hon'ble Supreme Court in ***Chairman,***

Indore Vikas Pradhikaran *versus* ***Pure Industrial Coke & Chemicals Ltd. and others (2007) 8 SCC 705,*** in the following terms:-

> "53. The right to property is now considered to be not only a constitutional right but also a human right.
>
> 54. The Declaration of Human and Civic Rights of 26-8-1789 enunciates under Article 17:
>
> > "17. Since the right to property is inviolable and sacred, no-one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it and just and prior indemnity has been paid".
> >
> > Further under Article 17 of the Universal Declaration of Human Rights, 1948 dated 10-12-1948, adopted in the United Nations General Assembly Resolution it is stated that : (i) Everyone has the right to own property alone as well as in association with others. (ii) No-one shall be arbitrarily deprived of his property.
>
> 55. Earlier human rights were existed to the claim of individuals right to health, right to livelihood, right to shelter and employment etc. but now human rights have started gaining a multifacet approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights. As President John Adams (1797-1801) put it :
>
> "Property is surely a right of mankind as real as liberty."
>
> Adding,
>
> "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence".
>
> 56. Property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law."

8. The legal position was reiterated by the Hon'ble Supreme Court in ***Lachhman Dass*** *versus* ***Jagat Ram and others (2007) 10 SCC 448*** and it was held as under:-

> "16. Despite such notice, the appellant was not impleaded as a party. His right, therefore, to own and possess the suit land could not have been taken away without giving him an opportunity of hearing in a matter of this nature. To hold property is a constitutional right in terms of Article 300-A of the Constitution of India. It is also a human right. Right to hold property, therefore, cannot be taken away except in accordance with the provisions of a statute. If a superior right to hold a property is claimed, the procedures therefor must be complied with. The conditions precedent therefor must be satisfied. Even otherwise, the right of pre-emption is a very weak right, although it is a statutory right. The Court, while granting a relief in favour of a preemptor, must bear it in mind about the character of the right, vis-a- vis, the constitutional and human right of the owner thereof."

9. In ***K.T. Plantation Private Limited and another*** versus ***State of Karnataka (2011) 9 SCC 1***, it was held by the Hon'ble Supreme Court that Article 300-A would be violated if the provisions of law authorizing deprivation of property have not been

complied with. It was further observed that while enacting Article 300-A, Parliament had only borrowed Article 31(1) (the "Rule of law" doctrine) and not Article 31(2) (which had embodied the doctrine of eminent domain). Though Article 300-A enables the State to put restrictions on the right to property by law, however, the same must be reasonable and must be complied with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive. It is apt to reproduce paras 187 to 192 of the judgment which reads thus:-

> "187. The legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in Schedule VII List I, called the Union List and subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the Concurrent List. Subject to the above, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the State List. Under Article 248, the exclusive power of the Parliament to make laws extends to any matter not enumerated either in the Concurrent List or State List.
>
> 188. We find no apparent conflict with the words used in Entry 42 List III so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under Entry 42 List III. Right to claim compensation is, therefore, cannot be read into the legislative Entry 42 List III.
>
> 189. Requirement of public purpose, for deprivation of a person of his property under Article 300-A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards. Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300-A, it can be inferred in that Article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors.
>
> 190. Article 300-A would be equally violated if the provisions of law authorizing deprivation of property have not been complied with. While enacting Article 300-A Parliament has only borrowed Article 31(1) (the "Rule of law" doctrine) and not Article 31(2) (which had embodied the doctrine of Eminent Domain). Article 300-A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive.
>
> 191. The legislation providing for deprivation of property under Article 300-A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. Thus in each case, courts will have to examine the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make

the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above.

192. At this stage, we may clarify that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the government to establish validity of such law. In the latter case, the court in exercise of judicial review will test such a law keeping in mind the above parameters."

10. In ***Tuka Ram Kana Joshi and others*** *versus* ***Maharastra Industrial Development Corporation and others (2013) 1 SCC 353***, the Hon'ble Supreme Court reiterated that right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though it is not a basic feature of the Constitution or a fundamental right. The right to property is considered very much to be part of new dimensions where human rights are considered to be in realm of individual's rights such as the right to health, the right to livelihood, the right to shelter and employment etc. and such rights are gaining an even greater multifaceted dimension. It is apt to reproduce paras 8 and 9 of the judgment which reads thus:-

"8. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the Right to Property ceased to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. In Jilubhai Nanbhai Khachar v. State of Gujarat, AIR 1995 SC 142, it has been held as follows: (SCC p.627, para 48)

> "48. In other words, Article 300-A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without due sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."

9. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension. (Vide: Lachhman Dass v. Jagat Ram (2007) 10 SCC 448, Amarjit Singh v. State of Punjab (2010) 10 SCC 43, State of M.P. v. Narmada Bachao Andolan AIR 2011 SC 1989, State of Haryana v. Mukesh Kumar AIR 2012 SC 559 and Delhi Airtech Services Pvt. Ltd. v. State of U.P AIR 2012 SC 573)."

11. From the aforesaid exposition of law, it is absolutely clear that a citizen has a legal and constitutional right to hold property in terms of Article 300-A of the Constitution of India. He, therefore, cannot be deprived of his right, save and except, by authority of law. The right of an individual to hold a property apart from legal right has also been held to be a human right. Therefore, its deprivation can only be by due process of law.

12. Now adverting to the merits of the case, it would be noticed that during the pendency of the petition, the petitioner filed applications bearing CMP No.7275 of 2015 for issuance of interim directions and early hearing of the case and CMP No.10018 of 2015 for placing on record additional information to the effect that the land of the petitioner was likely to be submerged and was, therefore, required to be demarcated. Both these applications came up for consideration on 10.07.2015 when this Court directed the respondents to demarcate the land and the following order came to be passed:-

> "**CMP No. 7275 of 2015 & CMP No.10018 of 2015**.
>
> The petitioner in support of CMP No. 7275 of 2015 has filed in the Court an application for placing on record additional information. The petitioner has clarified that it was due to inadvertence that specific khasra numbers could not be mentioned in this application for demarcation.
>
> Taking into consideration the averments contained in both these applications and also taking into consideration the fact that the land belonging to the petitioner is now being submerged in the water, the applications are allowed and the respondents are directed to immediately demarcate the land of the petitioner. Demarcation be carried out within a period of ten days and report thereof be submitted to this Court within fortnight.
>
> List this case on 6.8.2015. Copy ***dasti.***"

13. In compliance to the aforesaid directions, respondent No.3 i.e. Land Acquisition Officer, Bilaspur, has filed his report wherein it has been specifically stated that on demarcation it was found on the spot that Khasra No.1464/383 was not acquired by NTPC but 50% of this khasra number has already got submerged while remaining 50% is also in the danger zone. It is also pointed out that though NTPC had put their points upto the end point of Khasra No. 1464/383, but it was not acquired by it. It is further mentioned that some portion of Khasra No.384 i.e. Khasra No.384/1 measuring 0-01-20 hectare has though not been acquired, but some portion thereof has submerged in the water due to land sliding and the remaining portion of this khasra number is also in the danger zone and can be submerged in water due to land slides. Insofar as Khasra No.391 is concerned, it is stated that the same is six metres above the water level.

14. It is apt to reproduce para-2 of the report which reads thus:-

> "2. That the demarcation was done according to demarcation procedure and demarcation report of Naib Tehsildar is attached herewith as Annexure-"R3/A", statement of Prem Lal petitioner is attached herewith as annexure-"R3/B" and statement of villagers namely Sheesh Ram S/o Tulsu, Madan Lal S/o Balak Ram & Sewa Nand S/o Madan Lal is attached herewith as annexure-"R3/C". On demarcation it was found on the spot that Khasra No.1463/383 was acquired by NTPC and stands submerged in water. Khasra No.1464/383 was not acquired by NTPC but 50% portion of this Khasra No. has already got submerged, remaining 50% is also in danger zone. Here it is also submitted that though NTPC had put their points up to the end point of this Khasra No.1464/383, but it was not acquired by NTPC.

Some portion of Khasra No.384 i.e. new Khasra No.384/1 measuring area 0-01-20 Hect. has not been acquired and some part of Khasra No.384/1 is merged in water due to land sliding and remaining portion of this Khasra No. is also in danger zone and can get submerged in water due to land sliding. As far as Khasra No.391 is concerned it is 6 metres above the water level."

15. As per the spot inspection and demarcation report, the respondent No.3 has suggested for acquiring Khasra No.1464/383 measuring 0-11-23 hectare and Khasra No.384/1 measuring 0-01-20 hectare.

16. Needless to say that the report submitted by respondent No.3 has attained finality inasmuch as none of the parties has filed objections thereto.

17. In view of the aforesaid discussion, more particularly, in light of the report submitted by the Local Commissioner, who is none other than the respondent No.3 in this petition, it is evidently clear that only Khasra No.1463/383 was acquired by the NTPC and stands submerged in water, but Khasra No.1464/383 has not been acquired and 50% of this Khasra Number is already submerged in water, whereas, remaining 50% is in danger zone. Even new Khasra No.384/1 measuring 0-01-20 hectare has though not been acquired, but some part thereof is already submerged in water due to land slides, whereas, even remaining portion of this Khasra Number is also in the danger zone. Insofar as Khasra No.391 is concerned, the same as of date is six metres above the water level.

18. This being the factual position, the respondents cannot shirk and escape from their responsibility of making good the loss suffered by the petitioner as a result of depriving him of his right to enjoy the property for all times to come. This action on the face of it is violative of Articles 14, 19, 21 and 300-A of the Constitution of India.

19. In view of the aforesaid discussion, this petition succeeds partly and accordingly the respondents are directed to acquire the land of the petitioner comprised in Khasra No.1464/383, measuring 0-11-23 hectare and Khasra No.384/1, measuring 0-01-20 hectare. Insofar as Khasra No.391 is concerned, the same as on date is stated to be six metres above the water level. However, in case even this land gets submerged in water because of the increase in water level or because of land slides or for any other reason or has been rendered useless, uncultivable etc., then the respondents shall be bound to acquire even this land.

20. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Rajinder Kumar ...Appellant

Versus

Anup Verma & another ..Respondents

FAO No. 77 of 2009
Decided on : 09.10.2015

Motor Vehicles Act, 1988 - Section 169- Claimant specifically pleaded that driver had driven the vehicle in a rash and negligent manner and had hit the car with the motorcycle

being driven by the claimant causing injury to him- an FIR was also registered against the driver, however, he was acquitted after giving him a benefit of doubt - held, that findings recorded in the criminal case cannot be a ground to defeat the rights of the claimant – acquittal of driver in a criminal case is no ground to dismiss the claim petition- Tribunal has to record prima facie finding regarding the negligence- appeal allowed and the case remanded. (Para-9 to 14)

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. S.K. Banwal, Advocate, vice Mr. Navlesh Verma, Advocate, for respondent No. 1.
Ms. Shilpa Sood, Advocate, for respondent NO. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 29th October, 2008, passed by the Motor Accident Claims Tribunal-I, Sirmaur, District at Nahan, H.P. (for short, 'the Tribunal'), in M.A.C. Petition No. 129-MAC/2 of 2005, titled Rajinder Kumar versus Anup Verma and another, whereby the claim petition came to be dismissed (for short, the 'impugned award').

Brief facts:

2. Claimant Rajinder Kumar became victim of a motor vehicular accident, which was allegedly caused by Anup Verma, driver, while driving Alto Car bearing registration No. HP-18A-1034, rashly and negligently, on 11.09.2005, at about 5.45. p.m., near Nehli on Nahan-Renuka Ji road, which collided with the motor cycle being driven by the claimant and caused injuries to him. The claimant filed the claim petition, seeking compensation to the tune of Rs.3,00,000/-, as per the break-ups given in the claim petition.

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

4. Following issues came to be framed by the Tribunal on 17.06.2006:-

"1. *Whether the petitioner Rajinder Kumar sustained injuries in an accident on 11-9-2005 at about 5.45 PM near village Nelhi when his motor-cycle was hit by Alto Car bearing registration No. HP-18A-1034 being owned and driven by respondent No. 1 Anoop Verm in a rash and negligent manner, as alleged? …OPP*

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled to compensation, if so, to what extent and from whom?…OPP

3. Whether the respondent No. 1 was not possessed valid and effective driving licence, as alleged? …OPR-2

4. Whether the insurance company is not liable to pay the claim as alleged? …OPR-2

5. Whether the petition has been filed by the petitioner in collusion with respondent No. 1, as alleged? ….OPR-2

6. Relief."

5. The Tribunal has neither discussed issue No. 2 nor returned findings. It has also not returned findings on issues No. 1, 3 to 5.

6. Issues No. 1, 3 to 5 are dependant on the findings returned on issue No. 1.

7. The claimant has specifically pleaded in the claim petition that driver Anup Verma has driven Alto Car bearing registration No. HP-18A-1034, rashly and negligently, on 11.09.2005, at about 5.45. p.m., near Nehli on Nahan-Renuka Ji road and hit the said car with the motor-cycle which was being driven by the claimant and caused injuries to him.

8. I have gone through the evidence led by the parties. It appears that the Tribunal has dealt with the claim petition like a civil suit.

9. In terms of Section 169 of the Motor Vehicles Act, for short 'the Act', prima-facie, claim petitions are to be decided summarily, as early as possible and the provisions of the Code of Civil Procedure, for short 'CPC' are not applicable. Only some of the provisions are applicable, as per the rules applicable.

10. While going through the pleadings, the claimants have *prima-facie* proved that driver Anup Verma has driven the car, rashly and negligently, on the said date. FIR No. 219/2005, dated 19.10.2005 under Sections 279, 337 & 338 of the Indian Penal Code was registered against driver of the car, i.e Anup Verma, at Police Station Nahan. He was facing trial before the Court of Judicial Magistrate 1st Class, Nahan in Criminal Case No. 61/2 of 2006, right from 31st December, 2005 to 28th July, 2008, was acquitted by giving the benefit of doubt. It is apt to reproduce para 21 of the judgment passed in the aforesaid criminal case, herein:-

> "21. *In view of the contradictions and infirmities as referred to above, I have no hesitation to hold that the evidence led by the prosecution are not sufficient to warrant conviction of the accused in the present case. Therefore, the accused is entitled to be acquitted by giving him benefit of doubt. Accordingly, Point No. 1 is decided against the prosecution."*

11. The Tribunal has come to the conclusion that there was no evidence against the driver-accused in the criminal case and dismissed the claim petition. The findings recorded by the said Court in the criminal case, cannot be a ground to defeat the rights of the claimant. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

12. The Tribunal has to decide the claim petition summarily. The standard of proof required in criminal case is not required in claim petition. And even the proof by preponderance of probabilities is not required in the claim petition.

13. The Tribunal had to return *prima-facie* findings whether driver Anup Verma was driving the offending car, rashly and negligently, has failed to do so.

14. Having said so, the case merits to be remanded with the direction to decide the same afresh. Ordered accordingly.

15. Viewed thus, the appeal is allowed and the impugned award is set aside, as indicated above.

16. Parties are directed to appear before the Tribunal on **02.11.2015.**

17. Registry to send the record of the case alongwith a copy of this judgment forthwith so as to reach the Tribunal below well before the date fixed.

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

Ravinder Parshad Bhardwaj ...Petitioner.
Versus
H.P. Gramin Bank ...Respondent.

CWP No.2164 of 2015.
Reserved on: 30/09/2015.
Decided on: October 09, 2015.

Constitution of India, 1950- Article 226- Petitioner was diagnosed for 'Choroidal Neovacular Membrane' in his right eye- he underwent treatment at Dr. Rajinder Prasad Centre for Ophthalmic Sciences, New Delhi- he filed a claim for reimbursement of Rs. 65,000/- which was rejected on the ground that petitioner had not undergone hospitalization for treatment and reimbursement was not permissible for treatment taken as outdoor patient- record shows that petitioner was admitted in the Hospital in the morning for treatment and was discharged in the evening - it cannot be said that hospitalization under the Rule has to be overnight- Bank had decided to consider the similar claims when the treatment was taken for a few hours in the hospital – Bank was not justified in denying the claim of the petitioner- petition allowed and the respondent directed to reimburse the amount paid by the petitioner.

For the petitioner: Mr. Ashish Verma, Advocate.
For the respondent: Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner had served the respondent-bank as its Manager. The respondent-bank stands sponsored by the Punjab National Bank and came into existence with the amalgamation of RRB. Since the respondent bank is performing public function for the welfare of the people of the State of Himachal Pradesh, as such, it is amenable to the writ jurisdiction of this High Court.

2. In the year 2006 the petitioner was diagnosed for 'Choroidal Neovacular Membrane' in his right eye. The aforesaid ailment of the right eye which befell the petitioner is averred to be a critical eye ailment which can cause loss of eye sight. For curing the aforesaid ailment in his right eye the petitioner undertook treatment at Super Specialized Institution i.e. Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi. Annexure P-1 appended to the writ petition comprises the record of treatment undertaken by the petitioner herein at the aforesaid hospital. It also details the expenses incurred by the petitioner herein for receiving the apposite treatment from Dr. Rajinder Prashad Centre for ophthalmic sciences. The petitioner claimed from the respondent bank reimbursement of Rs.65,000/- constituting the expenses incurred by him for receiving medical treatment for curing the ailment of 'Choroidal Neovacular Membrance' which afflicted his right eye. However, under Annexure P-2, the respondent rejected his claim. Under Annexure P-3 the petitioner made a representation to the respondent bank enunciating therein that the rejection of his claim by the latter for reimbursement of a sum of Rs.65,000/- to him comprising the expenses incurred by him for curing his ailment aforesaid by his receiving treatment from Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi, was in the

face of the apt rules governing the reimbursement of medical expenses claimed by him from the respondent bank, untenable. However, under Annexure P-4 the respondent bank turned down the representation of the petitioner comprised in Annexure P-3 against the former rejecting his claim for reimbursement of medical expenses raised by him under Annexure P-1. The ground as meted out in Annexure P-4 for the respondent bank turning down the representation of the petitioner against the rejection of his claim for medical reimbursement preferred by him before the respondent bank arising from his having received treatment for curing disorder of Choroidal Neovacular Membrane of his right eye from Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi, is constituted in the fact that PDT Therapy was not performed as part of Hospitalization, hence the same is not payable. The respondent in its reply meted to the writ petition has supported the reasons meted out in Annexure P-4 for rejecting the representation made by the petitioner before it comprised in Annexure P-3 against the refusal on the part of the respondent-bank to reimburse to him the medical expenses incurred by him for curing disorder of Choroidal Neovacular Membrane of his right eye. Even though there is a mandate in the relevant portion of the rules (which stand extracted hereinafter) governing besides regulating the reimbursement of medical expenses incurred by the officers, staff and their family members and it having been enjoined therein that hospitalization expenses incurred by staff

> "SCHEDULE FOR REIMBURSEMENT OF HOSPITALISATION EXPENSES FOR OFFICERS STAFF.
>
> Hospitalisation expenses will be reimbursed to officers staff in the bank to the extent of 100 percent in case of self and 75 percent in case of members of family subject to the procedure for reimbursement of hospitalization expenses as enumerated hereunder:
>
> a) Hospitalisation charges to the extent stated above will be reimbursed in case of all ailments and major accidents which require hospitsalisation.
>
> b) An officer or his family members will be considered to have been hospitalized only if they are admitted as indoor patient(s) in the hospital in respect of diseases/accidents as mentioned above in sub-para (a) Medical expenses incurred for the hospitalization will be reimbursed on the strength of bills/vouchers to the extent of 100% in case of himself and 75% in case of family members subject to limits prescribed hereunder"

and officers of the bank will be fully reimbursable to them only if they have remained admitted as indoor patient in the hospital concerned. The petitioner herein having received photodynamic therapy from Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi for alleviating disorder of Choroidal Neovacular Membrance which afflicted his right eye while his not having remained admitted therein as an indoor patient constrained the respondent to, in consonance with the hereinabove extracted mandate of the apposite rules, reject his claim for reimbursement of medical expenses comprised in a sum of Rs.65,000/-. The construction as placed upon the aforesaid apposite rules of it necessitating the claimant/patient to portray his having remained admitted as an indoor patient in the hospital concerned for receiving the treatment/therapy, for alleviating his ailment is a rigid besides a grossly pedantic literal construction qua its amplitude, which hence defeats the purpose for which the said rule stood enacted. The therapy which the claimant/petitioner herein received from Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi for alleviating or correcting the disorder of Choroidal Neovacular Membrance which afflicted his right eye was purveyed to him as portrayed in Annexure P-3 while his having remained admitted in the hospital concerned in the morning and his having come to be discharged therefrom in the evening. The disclosure in annexure P-3 of his having obtained from Dr. Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi, photodynamic therapy

therefrom besides his having come to be admitted therein in the morning and his having come to be discharged in the evening has not been controverted by the respondent in its reply. Necessarily then the ailment which beset the right eye of the patient/petitioner herein necessitated the purveying to him the therapy/treatment for its alleviation or correction only in the hospital, even if only during the course of the day, sequels an apt inference that it was meted to him as an indoor patient in the hospital concerned and was not required to be on the instructions of the doctor concerned carried into effect by the petitioner at home. Consequently, the discarding of by the respondent the medical reimbursement bill raised by the petitioner for reimbursing to him the medical expenses incurred by him for correcting the disorder of Choroidal Neovacular Membrance of his right eye on the mere ground that in the opinion of the medical consultant of the respondent, the therapy was not received by the petitioner herein as part of hospitalization, infracts the innate spirit and import of the relevant apposite rule governing the reimbursement of medical expenses to the officers and staff of the respondent bank. The opinion of the medical consultant of the respondent concerned which led the respondent to reject the claim for reimbursement of the medical expenses incurred by the petitioner herein for correcting Choroidal Neovacular Membrance (CNVM) which afflicted his right eye erodes besides subverts the intrinsic spirit of the apt rules which on its closest and keenest reading with a discerning eye does not mandate therein that a patient who incurs medical expenses for correcting or alleviating any ailment which befalls upon him, is required to remain admitted as an indoor patient at the hospital concerned overnight nor it enjoins that when the therapy which he receives for correcting his ailment or disease at the hospital concerned and which stands meted to him at the hospital itself, while hence rendering him to be construable to be an indoor patient even if purveyed to him during the course of the day would oust his claim for reimbursement of medical expenses incurred by him for receiving the therapy at the hospital concerned.

Even otherwise, the respondent does not controvert the relevant factum as reflected in Paragraph-6 which stands extracted herein-after:

> "DAY CARE SURGERY TREATMENT:
>
> The bank has been considering reimbursement of hospitalization expenses only when the officer or his family members are admitted as indoor patient in a hospital in respect of disease/accidents. The matter pertaining to reimbursement of hospitalization expenses in respect of 'day care surgery treatment' and also reimbursement of cost of intra ocular lens implanted during cataract operation has been considered and it has been decided as under:-
>
> 1. In the case of laser operation of the diseases of eye, operation like cataract lithotripsy operation for removal of gallstones, which do not require patient to stay in the hospital for more than few hours, keeping in view present day technological developments and superior micro surgery available in several medical institutions, the officer may be reimbursed hospitalization expenses subject to the limits specified under schedule through they are not admitted as 'indoor' patients; and
> 2. The officer be reimbursed the cost of lens to the extent of 100% or 75% of the actual cost of lens or Rs.2500/- whichever is less, where the government hospitals do not have provision for supply of intra ocular lens to the patients undergoing cataract operations and lens are purchased from outside by the patient and supplied to the surgeon before the operation."

of theirs while being abreast of the rapid growth in technological developments for correcting eye disorders like Cataract, had thought it fit to permit reimbursement of hospitalization

expenses incurred by a patient for correcting Cataract. Even though the afore referred portion of the relevant rules governing the reimbursement of medical expenses for a patient receiving therapy for correcting a Cataract disorder or removal of gall stones by deployment of the latest state of art in vogue techniques, is not exhaustive so as to encompass the photodynamic treatment received by the petitioner herein during the course of the day from Dr.Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi for correcting the disorder of Choroidal Neovacular Membrane which afflicted his right eye. Nonetheless, the omission of its incorporation in the aforesaid referred apt rules permitting the reimbursement of medical expenses to the patients receiving day care therapy for alleviation of diseases/ailments referred therein even when they are not admitted overnight in the hospital concerned, would not oust the claim of the petitioner herein for his being entitled to the reimbursement of medical expenses incurred towards his receiving photodynamic therapy as day care surgery/therapy from Dr.Rajinder Prashad Centre for Ophthalmic Sciences, New Delhi for correcting the disorder of Choroidal Neovacular Membrane which afflicted his right eye especially when the reasons meted out hereinabove dehors the afore referred extracted relevant rules applicable for permitting reimbursement of medical expenses to patients receiving day care surgery/treatment qua diseases enumerated therein, constitute him to be an indoor patient moreso when the therapy was imparted besides receivable only on his having come to be admitted as a patient in the hospital concerned even for a day during the course whereof it was purveyed to him. Since no part of the therapy was imparted to him nor received by him while his having departed from the hospital nor was necessitated to be on the instructions of the doctor concerned volitionally undertaken at home by him, reinforcingly renders him to be an indoor patient in the hospital concerned, especially when the photodynamic therapy which he received from the doctor at the hospital concerned for correction of disorder of Choroidal Neovacular Membrane which afflicted his right eye, is an advanced state of art therapy/technique which does not necessitate for its being purveyed to him his being kept overnight in the hospital. Necessarily then given the advancement in the technology of the therapy meted to the petitioner, the relevant rules have to be kept abreast of the latest technological developments, also when the innate spirit of the apt rules encompasses “within” the domain of indoor patients, even a patient receiving therapy only within the precincts of the hospital and not outside it, conjunctively any contrary interpretation as afforded by the medical consultant of the respondent on which opinion the respondent ousted the medical expenses raised by the petitioner herein would not give life or spirit to the intrinsic worth of the apposite rules.

The respondent has contended that the delay of seven years at the instance of the petitioner herein to institute the writ petition before this Court renders his claim to be stale hence deprives him to raise the said unclaimed medical expenses through the instant writ petition. However, the said argument cannot be accepted by this Court as the petitioner herein had raised the claim not qua seniority or promotion rather has raised a claim for his tenable entitlement of reimbursement of medical expenses which claim having been unjustifiably denied to him by gross misreading by the respondent of the relevant rules, which claim in case not vindicated by this Court even if some delay has been occasioned, would disentitle him to receive from the respondent his legitimate dues. The argument of the learned counsel for the respondent that the writ petition is vitiated by the stench of staleness deserves to be rejected, hence stands discountenanced.

With the aforesaid observations, the writ petition is allowed. Pending application(s), if any, shall also stand disposed of. No costs.

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

Rupali Gupta ...Petitioner.

Versus

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

CWP No. 8461 of 2014
Judgment reserved on : 01.10.2015
Date of decision: October 9, 2015.

Constitution of India, 1950- Article 226- Petitioner took admission in 2nd semester M.Com. (distance learning) in which she failed- after re-appearing in 2nd semester examination, she found that she had obtained 52 marks out of 100 marks thereby making an aggregate of 198 marks out of 400 marks which was less than 50% - she made a representation for awarding 2 grace marks, so that her aggregate could become 50%- request was accepted and consolidated mark sheet was issued- subsequently, a letter was issued by the University for returning the mark-sheet on the ground that grace marks were inadvertently added- necessary correction had been made in the office record and the certificate be returned for making correction in the same- petitioner informed the University that she had already acquired the UGC-NET examination and had taken admission in Ph.D course on the basis of the result declared by the University- any modification in the mark-sheet will prejudice her entire career - respondent/University claimed that petitioner was claiming two marks to make her aggregate 55% which is not permissible as per Ordinance- Ordinance provides that 1% of total aggregate marks can be awarded as grace marks, if the candidate had failed to obtain first or second division and addition of such marks would increase the percentage- reading of the ordinance shows that the marks can be awarded to the candidate who has passed examination but has failed to obtain first or second division and if by the addition of such grace marks he is enabled to be placed in first or second division - grace marks can be awarded not only to pass examination but to improve the part of the examination - ordinance does not provide that marks shall only be awarded at the end of the examination and cannot be awarded after the end of the semester- therefore, University had rightly awarded the marks to the petitioner at the end of the semester but had wrongly withdrawn the same. (Para-2 to 13)

For the Petitioner : Mr. Sandeep Singh, Advocate.

For the Respondents : Mr. V.K. Verma, Ms. Meenakshi Sharma, Addl. A.Gs. with Ms. Parul Negi, Dy. A.G. for respondent No. 1.
Mr. J. L. Bhardwaj, Advocate, for respondent No.2.

The following judgment of the Court was delivered;

Tarlok Singh Chauhan, Judge

The only question involved in this writ petition is as to whether a candidate as per Ordinance 6.61(b) is entitled to grace marks upto 1% of the total aggregate only in a complete course or for even any part of the course i.e. semester etc.

2. The petitioner in 2008 took admission directly in 2nd semester M.Com. (distance learning) course in the respondent-University in which she failed. After re-appearing in the 2nd semester examination in November, 2011 the petitioner found that she had got 52 marks out of 100 marks, thereby making an aggregate of 198 marks out of 400 marks in all subjects of 2nd semester which was less than 50%. Accordingly, the petitioner

requested the respondent-University to grant her two grace marks so that her aggregate in 2nd semester could become 50%.

3. The respondent-University on 23.5.2012 acceded to the request of the petitioner and issued consolidated mark-sheet of all semesters to the petitioner wherein one grace marks had been duly awarded.

4. However, after more than one and half year from the declaration of the result, the petitioner was issued letter No. 6-2/HPU/M.Com.(Exam-II)-14 dated 20.1.2014 by the respondent-University asking her to return the marks-sheet for correction on the ground that the grace marks so awarded had inadvertently been added. She was further informed that necessary corrections had already been made in the office record and her score now stands at 879 marks out of 1600 marks.

5. The petitioner vide her letter dated 8.2.2014 informed the University that she had already cleared the UGC-NET examination and taken admission in Ph.D course on the basis of the result declared by it and, therefore, any correction in the marks-sheet at any stage would seriously prejudice not only her entire career but entire life. This was followed by several reminders, but to no avail. Hence, this petition.

6. The respondents in their reply have not controverted the factual position and have sought to justify their action by falling back on the provisions of Ordinance 6.61(b) to contend that grace marks cannot be awarded to a person for making 55% marks in the aggregate.

7. The stand of the respondents when perused by this Court at the time of hearing on 4.9.2015 appeared to be rather strange thereby constraining the Court to direct respondent No.2 to file supplementary affidavit explaining therein as to on what basis according to it was the petitioner in fact claiming two grace marks so that her percentage could be 55% because a perusal of her application only revealed that she had sought two grace marks in the semester so that she could get a 2nd division in M.Com. 2nd semester.

8. In compliance to the aforesaid directions, the University has filed a supplementary affidavit and it is relevant to quote paras 2 and 3 thereof, which read as under:

> *"2. That the case of the University in the reply is to the effect that the petitioner was issued consolidated marks card showing therein 1 grace mark as evident from perusal of Annexure 'P-4', whereas the petitioner could have been awarded grace mark upto 1% of the total aggregate marks, if she had failed to obtain either the second or the first division that too, after clearing all the semesters. In the present case, the petitioner has never written any letter as appended with the petition as Annexure P-3 and that fact has specifically been denied while filing reply to para-5 of the petition, where the reference of Annexure P-3 has been mentioned.*
>
> *3. That the replying-University has nowhere mentioned in the reply that the petitioner was in fact claiming 2 grace marks so that her percentage could be 55%. It is relevant to mention here that the grace marks are awarded to the extent of one percent of the total aggregate only in case, the candidate fails in a particular semester/course or to obtain second or first division that too, while preparing the consolidated marks card. The marks are not awarded in each course or semester to obtain second or first division. Hence, the petitioner was wrongly issued the consolidated marks card vide Annexure P-4 and after coming to its notice that the grace marks cannot be awarded for making 55%*

marks in the degree, the petitioner was asked to return the consolidated marks card, so that the new consolidated marks card is given to her."

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

9. Ordinance 6.61(b) reads thus:

"Grace marks upto 1% of the total aggregate marks may be awarded to a candidate, who has passed an examination but has failed to obtain either the second or the first division, if by the addition of such grace marks he is enabled to be placed in the second or the first division, as the case may be;

Provided that grace marks shall not be allowed to a candidate to improve his division, if he has already been allowed grace marks to pass the examination or any part thereof, or to a candidate who is permitted to re-appear in an examination to improve his division or score in a course under paragraph 6.23."

10. A plain reading of the ordinance suggests that grace marks upto 1% of the total aggregate marks may be awarded to a candidate, who has passed an examination but has failed to obtain either the second or the first division, if by the addition of such grace marks he is enabled to be placed in the second or the first division, as the case may be. But in no event would the grace marks be allowed to a candidate to improve his division, if he has already been allowed grace marks to pass the examination or any part thereof or to a candidate who is permitted to re-appear in an examination to improve his division or score in a course under paragraph 6.23.

11. The proviso clearly indicates that grace marks can also be awarded not only to pass the examination but even a part thereof. Meaning thereby, that in case an entire course is considered to be an examination, then nothing prevents the candidate from being allowed grace marks for "any part thereof" i.e. even one semester subject of course to the other conditions as contemplated and provided for in the aforesaid ordinance.

12. That apart, a perusal of para 3 of the supplementary affidavit (supra) would clearly indicate that even the respondents themselves do not dispute that the grace marks to the extent of 1% of the total aggregate can be awarded in case the candidate fails to obtain second division. The ordinance does not even remotely indicate much less make mention that these marks shall not be awarded in each course or semester and shall be awarded only at the time of preparation of the consolidated mark-sheet as is being portrayed by the respondents. These words have been imported by the respondents only in order to justify their illegal action while no such words find mention in the Ordinance 6.61 (b).

13. It is more than settled that one cannot read anything in a statutory provision or a stipulated condition which is plain and unambiguous and, therefore, the respondents cannot be permitted to read something into the aforesaid Ordinance, which is otherwise not provided for.

14. In view of the aforesaid discussion, this Court finds no fault with the action of respondent No.2 whereby it earlier awarded grace marks to the petitioner, but the withdrawal thereof coupled with the justification as now sought to be furnished for the same, cannot for the aforestated reasons, be countenanced.

15. Accordingly, this writ petition is allowed and the letter issued by respondent No.2 –University on 20.1.2014 is quashed and set-aside. The respondent-University is directed to issue a declaration to the petitioner to the effect that the consolidated mark-sheet

No. 6779 issued on 23.5.2012 as valid and is further directed to issue letter to the UGC so as to confirm the marks and eligibility of the petitioner as stated in the above mark-sheet is true and correct.

With the aforesaid observations, the writ petition is disposed of, so also the pending application(s) if any. The parties are left to bear their costs.

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

Sain Ram Jhingta ...Petitioner
Versus
Surinder Singh. ...Respondent

Civil Revision No. 54 of 2012
Reserved on 1.10.2015
Date of decision: 9th October,2015.

H.P. Urban Rent Control Act, 1987- Section 24 (5)- Rent petition on the change of user by the tenant and making additions and alterations by fixing wooden racks in the shop allowed by the Rent Controller- Appellate Authority reversed the decision- the order of Appellate Authority challenged in Revision- it was proved on record that the premises was rented to run a typing institute and was converted to run a dhaba by the tenant by changing its user- however, it does not automatically result in eviction- mere change of user from one commercial activity to another in the absence of any covenant to the contrary would ordinarily be not a ground for claiming eviction unless any injury or prejudice is caused to the land lord- mere fixing of wooden racks in the shop with the help of nails etc. would not amount to alterations which lead to the impairment in the value and utility of the building- Revision Petition dismissed. (Para 11 to 18)

Cases referred:

Hari Rao Vs. N.Govindachari & ors (2005) 7 SCC 643
Rajinder Kumar Sharma Vs. Smt.Kanta Kumari, Latest HLJ 2007(HP) 73,
Shiv Ram & anr Vs. Sheela Devi, 1993 (1) SLC 266 (P-12,13
Bishamber Dass Kohli (Dead) By L.Rs Vs. Satya Bhalla (Smt), (1993) 1 SCC 566 (P-7,14)
Mohan Lal Vs. Jai Bhagwan,(1988) 2 SCC 474 (P-7)
Sunder Lal @a Sunder Dass Vs. Sita Devi@a Sheela Devi, 1994 (2) RCR 633 (P13)
S.P. Sabapathi Pillai Vs. M.Durga, 1995 (1) RCR 252 (P9,10,11);
Ashok Kumar Vs. Uttam Chand, 1996(1) RCR 277 (P-20)
K. Panchavarnammal (Died) Vs. E.Saraswathiammal, 1997(2) RCR 43 (P-13,14)
Canara Bank, Bombay Vs.Yusuf Abdulhussein Arsiwala (deceased by LRs), AIR 2000 Bom 71 (P-11, 15)
M.Arul Jothi & anr Vs. Lajja Bal (deceased) and anr, (2000) 3 SCC 723 (P-14,15 and 16)
K.Natarajan Vs. C. Murugan, 2002(2) RCR 156 (P-10 to 12)
Bharat Lal Baranwal Vs. Virendra Kumar Agarwal, 2003(1) RCR 178 (P-14 to 16)
Mahadev Mahantappa Patil Vs.Ahmed Usman Sayyed, 2004 (1)RCR 399 (P-9)
Chhotey Lal & ors Vs. Rajinder Kumar @ Rajinder Parshad, 2004(2) RCR 450 (P-11)

Goa Urban Cooperative Bank Ltd Vs. Noor Mohd Sheikh Mussa & anr, AIR 2004 SC 3886 (P-23)
Shantilal Kesharmal Gandhi Vs. Prabhakar Balkrishna Mahanubhav, (2007) 2 SCC 619 (P 6-7
A. S. Parvathy Krishnan Vs. Joseph @ Jose, 2008 (2) RCR 59
Rajinder Kumar Sharma Vs. Smt. Kanta Kumari, Latest HLJ 73 (P-8 to 10)
Rakesh Kumar Vs. Darshan Singh, 2012 (1) RLR 67 (P-11)
Mohan Lal Vs. Jai Bhagwan (1988) 2 SCC 474
Gurdial Batra Vs. Raj Kumar Jain (1989) 3 SCC 441

For the Petitioner: Mr.Ramesh Sharma, Advocate.
For the Respondent: Mr.Deepak Bhasin, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This Revision Petition under Section 24(5) of the H.P. Urban Rent Control Act, 1987(for short the 'Act') is directed against the judgment dated 20.4.2012, passed by learned Appellate Authority, Shimla, Camp at Rohru whereby order passed by learned Rent Controller (I), Rohru has been reversed and consequently the eviction petition filed by the petitioner/landlord has been ordered to be dismissed.

Brief facts may be noticed.

2. The petitioner sought eviction of the respondent of the premises in dispute on the ground that he has changed the user of property thereby impairing the utility and value of the property in dispute and, as such, is liable to be ejected. It is averred that the petitioner had let out the shop i.e. premises in dispute to the respondent for running a typing institute, but respondent has converted the said premises into a Dhaba/tea stall and had also affixed the wooden shelves on the walls which amounts to material alteration thereby impairing the value and utility of the premises in question and same renders the respondent/tenant liable for ejectment.

3. The respondent resisted and contested the petition by filing reply, admitting that he has taken the premises on rent for running a typing institute and has not denied that he has started running a Dhaba but would maintain that even the typing institute is being run from the shop. It is further averred that the petition is frivolous and therefore, deserves to be dismissed.

4. On 14.9.2010, the learned Rent Controller framed the following issues:-

"1. Whether the respondent has changed he user of premises as alleged?. OPA.

2. Whether the petition is not maintainable against the respondent? OPR

3. Relief."

5. That learned Rent Controller, after recording the evidence and evaluating the same, ordered the eviction of the respondent on the ground of change of user. On appeal having been filed preferred before the appellate authority, the order passed by the learned Rent Controller was set aside resulting in dismissal of the eviction petition.

6. It is against the order passed by learned appellate authority that the present petition has been filed on the ground that the eviction petition ought to have been allowed as it was an admitted case of change of user, which in turn had caused injury or was detrimental to the building housing the tenanted premises.

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

7. The petitioner-landlord in his statement of oath has specifically stated that the demised premises were let out to the respondent in the year 2000 for three years for running a type institute which fact is admitted by the respondent during his cross-examination while appearing as RW-1. The petitioner had sent notice Ext PW-1/A to the respondent specifically alleging therein that the shop had been let out to him for running a tying institute, but the same was now being run as tea stall. In reply Ext PW-1/B, respondent did not deny the said fact but stated that the shop was being used by him for running typing institute also.

8. The evidence brought on record by the parties, does clearly suggest and indicate that indeed the respondent had admitted the business of selling tea in the shop in question, thus admitting about the change of user of the shop from a typing institute to tea stall. Therefore, I proceed on the basis that the tenant has changed the user of the premises, as alleged, but then does the same automatically result as an eviction?.

9. Section 14 (2) of the H.P. Urban Rent Control Act, 1987 reads thus:

"14. Eviction of tenants

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-

(i) that the tenant has not paid or tendered the rent due from him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day of the month next following that for which the rent is payable:

Provided that If the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at the rate of 9 per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within time aforesaid:

Provided further that if the arrears pertain to the period prior to the appointed day, the rate of interest shall be calculated at the rate of 6 per cent per annum:

Provided further that the tenant against whom the Controller has made an order for eviction on the ground of non-payment of rent due from him, shall not be evicted as a result of his order, if the tenant pays the amount due within a period of 30 days from the date of order ; or

(ii) that the tenant has after the commencement of this Act without the written consent of the landlord

(a) transferred his rights under the lease or sublet the entire building or rented land or any portion thereof; or

(b) used the building or rented land for a purpose other than that for which it was leased ; or

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land ; or

(iv) that the tenant has been guilty of such acts and conduct as are nuisance to the occupiers of buildings in the neighborhood; or

(v) that the tenant has ceased to occupy the building or rented land for a continuous period of twelve months without reasonable cause;

the Controller may make an order directing the tenant to put the landlord in possession of the building or rented land and if the Controller is not so satisfied he shall make an order rejecting the application;

Provided that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building or rented land and may extend such time so as not to exceed three months in the aggregate."

10. The user of the building for a purpose other than for which was leased, has to be considered in the context of Section 12 of the Act which prohibits conversion of a residential building into a non residential building except with the permission in writing of the controller, any covenant in that behalf entered into by the tenant and the nature of the tenancy. In other words, when the lease is granted for the purpose of a trade, in absence of any covenant in the contract between the parties prohibiting a user different from the particular one mentioned in the deed, the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of premises. In a case where the premises let out for a commercial purpose, is used by the tenant for a residential purpose, it would be a user for a purpose other than that for which it was leased attracting Section 14 (2) (ii) (b) of the Act. Similarly, if a building had been let out for the purpose of a trade, but a tenant uses the premises for the purpose of manufacture or production of materials after installing machinery, that would be a user other than the one for which the building was let. User of a building let out for a trade as a godown may attract the provision. Ultimately, the question would depend upon the facts of a particular case, in the context of the terms of the letting and the covenants governing the transaction and the general spirit of Section 108(o) of the Transfer of Property Act. This was so held by the by the Hon'ble Supreme Court in **Hari Rao** Vs. **N.Govindachari & ors (2005) 7 SCC 643** and it is apt to reproduce para 6 of the judgment, which read thus:

"6. On the plain terms of the statute, uninfluenced by authorities, it appears to us that user of the building for a purpose other than that for which it was leased, has to be considered in the context of Section 21 of the Act which prohibits conversion of a residential building into a non- residential building except with the permission in writing of the controller, any covenant in that behalf entered into by the tenant and the nature of the tenancy. In other words, when the lease is granted for the purpose of a trade, in the absence of any covenant in the contract between the parties prohibiting a user different from the particular one mentioned in the lease deed, the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. In a case where the premises let out for a commercial purpose, is used by the tenant for a residential purpose, it would

be a user for a purpose other than that for which it was leased attracting Section 10 (2) (ii) (b) of the Act. Similarly, if a building had been let out for the purpose of a trade, but a tenant uses the premises for the purpose of manufacture or production of materials after installing machinery, that would be a user other than the one for which the building was let. User of a building let out for a trade as a godown may attract the provision. Ultimately, the question would depend upon the facts of a particular case, in the context of the terms of the letting and the covenants governing the transaction and the general spirit of Section 108(o) of the Transfer of Property Act. Merely because a shop let out for trade in shoes and other leather goods, is used by the tenant also for the purpose of trading in readymade garments, it could not be held to be a user by the tenant of the premises for a purpose other than that for which it was leased. It has to be noted that even now, the tenant is carrying on the business of trading in shoes, which according to the landlord was the purpose for which the building was let. The trade in shoes has not been stopped by the tenant. All that has happened is, that he has also diversified into selling some readymade garments or T-shirts, the manufacture of which even some of the manufacturers of shoes have taken up."

11. Tested on the exposition of law, as enunciated by the Hon'ble Supreme Court in Hari Rao's case (supra), it would be noticed that though it was the specific stand of the petitioner that he had entered into a written agreement with the respondent at the time of handing over of the premises, wherein apart from other terms and conditions it had expressly been provided that respondent would only open a typing institute in the demises premises. But then the landlord has withheld the agreement wherein the alleged covenant was alleged to be contained. Needless to say that if the agreement had been proved on record, then the mere fact that the user was from one commercial activity to another the same would still entail eviction of the tenant as being in violation against the express covenant of the agreement. In absence of any such agreement having been proved on record, this Court is left with no other option, but to draw an adverse inference against the petitioner.

12. Broadly speaking, a building or a part thereof can be let out for three purposes;

(i) Residential;

(ii) Business;

(iii) Manufacturing.

Normally, if the dominant purpose for which a building is let out is maintained, then a tenant may not be liable to be evicted in the absence of any covenant in the contract between the parties prohibiting a user different from particular one mentioned in the lease deed and the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. But if the building is let out for residential or business purpose and the tenants starts manufacturing activity or vice a versa, the it would amount to change of user subject to the provisions of the Act.

13. Closure to the facts of this case, a learned Single Judge of this Court (Hon'ble Mr. Justice V.K.Gupta, C.J, as His Lordship then was), in **Rajinder Kumar Sharma** Vs**. Smt.Kanta Kumari, Latest HLJ 2007(HP) 73,** while adjudicating upon a case where the tenant had from a Kariyana (general merchandise) changed its user to a tea stall, held that mere change of user from one commercial activity to another in itself is no ground for

claiming eviction under Section 14 of the Act, until and unless injury to the property and interest of the landlord is proved. It was held:

> *"8.The evidence brought on record by the parties does clearly suggest that indeed the petitioner had admitted doing the business of making and selling tea in the shop in question, thus admitting about the change of user of the shop from "Kariyana" to tea. Since this fact of the petitioner having changed the user of the shop has been admitted by the petitioner both in the written statement filed by him as well as in the course of evidence adduced by him before the learned Rent Controller, the onus to prove and establish that this change of user was with the written consent of the landlady was upon the petitioner.*
>
> *9. A bare look at Clause (ii) of sub-section(2) of Section 14 of 1987 Act clearly suggests, without an iota of doubt and without any ambiguity that even though the onus initially is upon the landlord to aver, plead as well as prove and establish the fact that the tenant has used the building for a purpose other than for which it was leased but once this fact is either admitted by the tenant or it gets established and proved, the onus shifts upon the tenant to prove and establish that the change in user of the building was made by him with the written consent of the landlord. In the present case, at the risk of reiteration it is to be observed and seen that since the tenant did not dispute either in the pleadings or in the evidence about the change of user, it was up to him to establish and prove that it was done with the written consent of the landlady. He did not do so. Therefore, it clearly means that the change of user from Kariyana business to making and selling of tea without the written consent of the landlady is a fact which has to be treated as having been established in this case.*
>
> *10. In the case of Gurdial Batra vs.Raj Kumar Jain reported in1989 (3) SCC 441in which also the eviction of a tenant was sought on the ground of change of user and wherein the allegation against the tenant was that he had changed the user of the shop from the business of repairing of Cycles and rickshaws to the business of selling Televisions, their Lordships of the Supreme Court held as under:-*
>
> > *"Letting of a premises can broadly be for residential or commercial purpose. The restriction which is statutorily provided in Section 13(2)(ii)(b) of the Act is obviously one to protect the interests of the landlord and is intended to restrict the use of the landlord's premises taken by the tenant under lease. It is akin to the provision contained in Section 108 of the Transfer of Property Act dealing with the obligations of a lessee. That clause provides:*
> >
> > *The lessee may use the property and its products, if any, as a person of ordinary prudence would use then if they were of his own; but he must not use or permit another to use the property for a purpose other than that for which it was leased.....*
> >
> > > *A house let for residential purpose would not be available for being used as a shop even without structural alteration. The concept of injury to the premises which forms the foundation of clause (b) is the main basis for providing clause (b) in Section*

> *13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in U Po Naingv. Burma Oil Co. [AIR 1929 PC 108] adopted the same consideration. The Kerala High Court has held that*
>
> *premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property (Raghavan Pillaiv. Sainaba Beevi, 1977 Ker LT 417]. Similarly, the Bombay High Court has held that when the lease deed provided for user of the premises for business of fret work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(c) of the Transfer of Property Act [1978 Mah LJ 545].*
>
> *The landlord parts with possession of the premises by giving a lease of the property to the tenant for a consideration. Ordinarily, as long as the interest of the landlord is not prejudiced, a small change in the user would not be actionable."*

11. Similarly, in the case of Mohan Lal vs.Jai Bhagwan reported in 1988(2) SCC 474 in which also the eviction of the tenant was sought on the ground of change of user by alleging that the tenant had changed the business of selling liquor to general merchandise, it was held as under:-

> *"While respectfully agreeing with the said observations of Lord Diplock, that the Parliament legislates to remedy and the judiciary interpret them, it has to be borne in mind that the meaning of the expression must be found in the felt necessities of the time. In the background of the purpose of rent legislation and inasmuch as in the instant case the change of the user would not cause any mischief or detriment or impairment of the shop in question and in one sense could be called an allied business in the expanding concept of departmental stores, in our opinion, in this case there was no change of user which attract the mischief of Section 13(2)(ii)(b) of the Act. The High Court, therefore, was in error."*

12.The juridical philosophy propounded in the aforesaid proposition of law in Gurdial Batravs. Raj Kumar Jain(supra) is this:-

> *A property let out for residential purpose cannot be used as a shop even without any structural alteration. But if a property is let for commercial purpose, despite the fact that the commercial purpose is specified, unless there is an element of injury to the premises, using of the property for a purpose other than for which it was let out would not be a ground for eviction of the tenant. In Gurdial Batravs. Raj Kumar Jain(supra), their Lordships, therefore, introduced a conceptual theory of injury to the property. Citing the judgment of Privy Council in U Po Naing vs.Burma Oil Co.(AIR 1929 PC 108) and relying upon the judgment of Kerala High Court (in Raghavan Pillaivs. Sainaba*

Beevi, 1977 Ker LT 417) and a judgment of Bombay High Court, their Lordships very clearly held that the change of user from one commercial activity to another commercial activity cannot be a ground for eviction unless such a change of user would be destructive or permanently injurious to the leased property.

13.Similarly, in Mohan Lalvs. Jai Bhagwan(supra) citing the observations of Lord Diplock about the legislative intendment, their Lordships clearly held that unless any mischief or detriment or an impairment is caused to the shop in question, the change of user by itself from one commercial activity to another commercial activity cannot be a

ground for eviction of the tenant. Culling the aforesaid ratio in the aforesaid two judgments and applying the same to our case, I have no hesitation in holding that there is a clear nexus between the concept of change of user (provided the activity remains either commercial or business, as the case may be) and any injury or impairment caused to the property or any prejudice caused or likely to be caused to the landlord because such a nexus alone can be made the basis of the eviction of the tenant. Otherwise in ordinary prudence and in normal circumstances merely because a tenant changes his commercial activity from one business to another for any reason, this should not be by itself a ground for eviction. It is very commonly understood in the mercantile world that even though a tenant may have obtained a shop on lease for a particular and specified commercial activity, either because of the reason of his failure in that activity or changes in the economic scenario, he may have to put that commercial activity to an end and to earn his livelihood by starting another commercial activity in the same shop. After all, a businessman cannot be compelled to carry on with a particular commercial activity even if he feels it to be non-viable, non-manageable or non-profitable. Every businessman has a right to carry on a business of

his choice. Merely because for the reasons best suited to him he undertakes a change in commercial activity, this by itself should not be a ground of his eviction from the shop. As noticed above, the change of user has to be clearly linked, and inseparably coupled with, an element of injury or impairment of the shop or causing any prejudice or having the potential of prejudice, to the landlord.

14.In the light of the aforesaid ratio laid in the above mentioned two judgments of the Supreme Court, let us apply the facts of this case to find out whether the change of user of the shop by the petitioner from selling Kariyana items (general merchandise) to making and selling tea has the potential of causing any prejudice or detriment to the interests of the respondent or does it create any mischief in so far as the user of the shop as a tea stall is concerned or has any injury been caused to the respondent- landlady by the conduct of business of making and selling of tea in the shop?

15. PW 3 Yashwant Kumar Gupta is the husband of respondent- landlady and in his capacity as her general power attorney holder appeared as a witness in the case. He stated that the trade of making and selling tea can give rise to a fire incident in the shop and the floor as well as walls of the

shop also can be damaged. He also stated that since the petitioner opens the shop at 3.30 a.m. or 4.00 a.m. and opens it by operating a rolling shutter it causes nuisance. As against this statement of the respondent, the petitioner who appeared as his own witness clearly deposed that he makes the tea in the shop by using a gas burner. Actually the stand of the petitioner in the written statement filed by him before the Rent Controller also was that tea is made by him in the shop by using a gas burner. Not only this, another witness who appeared on behalf of the respondent, namely, PW 5 Sunder Lal Aggarwal deposed that the petitioner apart from making tea, sells some items of general merchandise (Kariyana) in the shop. He went on to depose that the petitioner sells toffees, biscuits and cigarettes etc. Whether or not, the business of making and selling tea is akin or ancillary to the business of selling Kariyana items, the fact remains that the making and selling of tea does not have the potential of causing any injury or prejudice or detriment to the respondent. Neither has the evidence adduced by the respondent conclusively brought on the record any fact of any damage suffered by the respondent on the floor or the walls of his shop nor can it be said that merely by making tea through the help of a gas burner is there any likelihood of the walls or the floor of the shop being damaged in any manner.

16.Even though therefore the petitioner has changed the user of the shop from selling Kariyana items to the making and selling tea, because of the aforesaid ratio in the above mentioned two judgments of the Supreme Court since this change of user neither causes nor has the potential of causing any injury or prejudice or detriment to the respondent or her interests, the petitioner cannot be evicted on this ground from the shop in question."

14. On the basis of the aforesaid exposition of law, it can safely be concluded that unless and unless any injury or prejudice is caused to the landlord, then mere change of user from one commercial activity to another in absence of any covenant to the contrary would ordinarily be not a ground for claiming eviction. It shall further have to be proved that the change of user has caused or has the potential of causing any injury or prejudice or is detrimental to the interest of the landlord.

15. Now, coming to the issue regarding injury, if any, caused to the premises, it would be noticed from the perusal of the petition that there is no allegation whatsoever contained therein. Save and except, making a mention of the respondent having fixed wooden racks in the shop for displaying different items and thereby causing alteration, no other allegation has been set out in the petition. No doubt, while appearing in the witness box, petitioner has stated that the respondent had installed and fixed racks in the shop, with the help of nails etc. without his consent, but then mere fixing of the racks in the shop per se would not amount to alterations which can be said to be leading to the impairment in the value and utility of the building.

16. Similar issue came up before the Hon'ble Supreme Court in **Hari Rao's** case (supra), wherein it was held that mere putting racks and signboard on the walls, does not amount to material alteration leading to the impairment of the value and utility of the premises. It is apt to reproduce para 9 of the judgment which reads thus:

"*9. n support of his claim for eviction under Section 10(2)(iii) of the Act, what the landlord pleaded was that his tenant had put up new sign-boards and fixed two additional racks by drilling holes in the wall and in the beam and*

had taken an independent electric connection for which holes have been drilled in the floor and the wall, and all this amounted to commission of acts of waste as are likely to impair materially the value and utility of the building. He also pleaded that the tenant had damaged the building while converting the shop for selling readymade dresses. He had installed additional show-cases on the walls of the building by making holes therein. He had increased the consumption of electricity by fixing up more lights and fans. He had increased the electric load, causing constant blowing out of the fuse in the building and causing damage to the electric service connection to the whole building and the entire building may catch fire at any moment. He also put up a big name board outside, damaging the building and had also drawn heavy electrical lines and taken service connection to the name board, with a heavy load of electricity. The tenant admitted the putting up of sign-boards and the fixing up of racks but he denied that he had caused any damage. Whatever he had done was with the consent of the landlord and the claim put forward by the landlord was only an attempt to gain the sympathy of the Court. The Engineer, P.W. 2 noted that new racks were fixed by making holes in floor walls and also in the beams. Two new massive sign boards were fixed in the front and side. Holes were made in the parapet wall of the first floor and angle irons supporting the sign boards were fixed. The parapet wall was only 2" thick and it could not take the weight of the huge sign boards and the parapet wall may collapse at any time. New electric connection has been given by making holes in the foundation and the wall in front and a new meter board had been fixed. This report of P.W.2 was not sought to be corroborated by any other material to show that there was any danger because of the taking of a new electric connection or by the increase in load. It is true that for the purpose of his trade, the tenant fixed new racks by making holes in the floor, the walls and in the beams. But, in the absence of any other material, it cannot be said to be the commission of acts of waste as are likely to impair materially the value and utility of the building. We must say that there is hardly any evidence on the side of the landlord to show that there was material impairment, either in the value or the utility of the building by the acts of the tenant. The mere fixing of sign-boards outside the shop by taking support from the parapet wall, cannot be considered to be an act of waste which is likely to impair materially the value or utility of the building. The report of the Engineer, P.W.2, merely asserts that the parapet wall will collapse at any time. There is no supporting evidence in respect of that assertion. Ex. B1-letter of the landlord giving permission to the tenant to fix boards, cannot also be ignored in this context. Moreover, when a trade is carried on in a premises, that too in an important locality in a city, it is obvious that the tenant would have to fix sign-boards outside, to attract customers. These are days of fierce competition and unless the premises is made attractive by lighting and other means, a trader would not be in a position to attract customers or survive in the trade. Therefore, the acts of the tenant established, are merely acts which are consistent with the needs of the tenant who has taken the premises on rent for the purpose of a trade in leather goods and shoes and in furtherance of the prospects of that trade. The fixing of racks inside the premises even by drilling holes in the walls or beams cannot be said to be acts which are themselves acts of waste as are likely to impair materially the value and utility of the building. Broadly, a structural alteration however slight, should be involved to attract Section 10 (2) (iii) of the Act. In fact, we see hardly any pleading or evidence in this case

which would justify a conclusion that the acts of the tenant amount to such acts of waste as are likely to impair materially the value and utility of the building. In G. Arunachalam (died) through L.Rs. and anr. Vs. Thondarperienambi and anr. [AIR 1992 SC 977] dealing with the same provision, this Court held that the fixing of rolling shutters by the tenant in place of the wooden plank of the front door by itself did not amount to a structural alteration that impaired the value of the building and no eviction could be ordered under Section 10 (2) (iii) of the Act. Of course, in that case, there was also a report by an Engineer that the structural alteration made for fixing the rolling shutter, did not impair the value of the building. In the context of the Kerala statute which spoke of impairment in the value or utility of the building materially and permanently, this Court has recently held in G. Raghunathan Vs. K.V. Varghese [2005 (6) SCALE 675] that the fixing up of rolling shutter and doing of the allied acts referred to in that decision, would not amount to user that materially and permanently impairs the value or utility of the building. The Act here, only speaks of acts of waste as are likely to impair materially the value and utility of the building. The impairment need not be permanent. But even then, it appears to us that it must really be a material impairment in the value or utility of the building. In British Motor Car Co. Vs. Madan Lal Saggi (Dead) and anr. [(2005) 1 SCC 8], this Court considered the aspect of material alteration or damage in the context of Section 13(2)(iii) of the East Punjab Urban Rent Restriction Act, 1949. In the lease deed in that case, there was a covenant that the lessee will not make any addition or alteration or change in the building during the period of the tenancy. This Court referred to Om Prakash Vs. Amar Singh [(1987) 1 SCC 458], Om Pal Vs. Anand Swarup [(1988) 4 SCC 545], Waryam Singh Vs. Baldev Singh [(2003) 1 SCC 59], Gurbachan Singh Vs. Shivalak Rubber Industries [(1996) 2 SCC 626], Vipin Kumar Vs. Roshan Lal Anand [(1993) 2 SCC 614] and held,

> *"When a construction is alleged to have materially impaired the value and utility of the premises, the construction should be of such a nature as to substantially diminish the value of the building either from the commercial and monetary point of view or from the utilitarian aspect of the building."*

There is hardly any material in the present case on the basis of which the Court could come to the conclusion that the act of the tenant here has amounted to commission of such acts of waste as are likely to impair materially the value and utility of the building. The Rent Controller and the High Court have not properly applied their minds to the relevant aspects in the context of the statute and have acted without jurisdiction in passing an order of eviction under Section 10 (2) (iii) of the Act. The Appellate Authority was justified in denying an order of eviction to the landlord on this ground."

17. In absence of any evidence led by the petitioner, it cannot be said that by putting racks with the help of nails, the respondent has committed acts of waste as are likely to impair materially the value and utility of the building. There is no evidence on the side of petitioner to show that there was material impairment either in the value or the utility of the building by the acts of the tenant.

18. Learned counsel for the petitioner would then argue that after the respondent has changed the user of the premises, a lot of drunken customers of the respondent frequent the demises premises and create nuisance and are a cause of

annoyanace to the petitioner and his family. These drunk customers urinate there which trickles down towards the petitioner's kitchen. Similar statements have been given by Shashi Bhushan PW-2 and Negi Ram PW-3. But then no such suggestion has been put to the respondent at the time of his cross examination. The only suggestion put to the respondent and his witness in this regard is that the respondent washes utensils etc. in the shop itself to which suggestion it has been stated that he throws the refuse water in the municipal drain. That apart, no such allegation is in fact contained in the petition itself. Even in the notice PW-1/A it is not alleged that in what manner nuisance was being caused by the respondent by running a dhaba in the demises premises. Further, there is no evidence that the respondent was challaned by the municipal authorities for causing nuisance or that the petitioner had filed any complaint with the police or the municipal authorities bringing to their notice all the aforesaid facts.

19. To be fair to the learned counsel for the petitioner, in support of his petition, has made a reference to the following judgments: **Shiv Ram & anr** Vs. **Sheela Devi, 1993 (1) SLC 266 (P-12,13); Bishamber Dass Kohli (Dead) By L.Rs** Vs. **Satya Bhalla (Smt), (1993) 1 SCC 566 (P-7,14); Mohan Lal** Vs. **Jai Bhagwan,(1988) 2 SCC 474 (P-7)**; **Sunder Lal @a Sunder Dass** Vs. **Sita Devi@a Sheela Devi, 1994 (2) RCR 633 (P13); S.P. Sabapathi Pillai** Vs. **M.Durga, 1995 (1) RCR 252 (P9,10,11); Ashok Kumar** Vs. **Uttam Chand, 1996(1) RCR 277 (P-20); K. Panchavarnammal (Died)** Vs. **E.Saraswathiammal, 1997(2) RCR 43 (P-13,14)**; **Canara Bank, Bombay** Vs.**Yusuf Abdulhussein Arsiwala (deceased by LRs), AIR 2000 Bom 71 (P-11, 15)**; **M.Arul Jothi & anr** Vs. **Lajja Bal (deceased) and anr, (2000) 3 SCC 723 (P-14,15 and 16); K.Natarajan** Vs. **C. Murugan, 2002(2) RCR 156 (P-10 to 12)**; **Bharat Lal Baranwal** Vs. **Virendra Kumar Agarwal, 2003(1) RCR 178 (P-14 to 16)** ; **Mahadev Mahantappa Patil** Vs.**Ahmed Usman Sayyed, 2004 (1)RCR 399 (P-9)**; **Chhotey Lal & ors** Vs. **Rajinder Kumar @ Rajinder Parshad, 2004(2) RCR 450 (P-11)**; **Goa Urban Cooperative Bank Ltd** Vs. **Noor Mohd Sheikh Mussa & anr, AIR 2004 SC 3886 (P-23)**; **Shantilal Kesharmal Gandhi** Vs. **Prabhakar Balkrishna Mahanubhav, (2007) 2 SCC 619 (P 6-7)**: **A. S. Parvathy Krishnan** Vs. **Joseph @ Jose, 2008 (2) RCR 59; Rajinder Kumar Sharma** Vs. **Smt. Kanta Kumari, Latest HLJ 73 (P-8 to 10); Rakesh Kumar** Vs. **Darshan Singh, 2012 (1) RLR 67 (P-11)**.

20. As observed earlier, facts of the instant case are quite identical to those of Rajinder Kumar's case (supra) and that apart, it is not even the case of the petitioner here in that the said judgment has either been dissented, distinguished or even overruled. Moreover, ratio of the judgment in Rajinder Kumar's case (supra) is itself based upon the judgments of the Hon'ble Supreme Court in **Mohan Lal** Vs. **Jai Bhagwan (1988) 2 SCC 474,** which in turn was followed **in Gurdial Batra** Vs**. Raj Kumar Jain (1989) 3 SCC 441** and these judgments in turn have subsequently been followed in Hari Rao's case (supra). In such circumstances, referring to the judgments in detail would only been burdening the judgment unnecessarily as these judgments do not lay down a ratio different from what has been laid down in judgments discussed above because after all it is ultimately the ratio of the judgment rendered by the Hon'ble Supreme Court that is binding upon all.

21. Having said so, I find no merit in the petition and the same is accordingly dismissed, leaving the parties to bear the cost.

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

Sanjogita Devi & another .....Appellants
Versus
Krishna Sood & others ..... Respondents

FAO No.609 of 2008
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that respondent No. 2 was driving the jeep in a rash and negligent manner and hit the motor cycle- driver of motor cycle died in the accident- Tribunal held that deceased, 16 years of the age, did not have driving licence, an FIR registered against the driver of the jeep was cancelled and the driver of the jeep was not driving the vehicle in a rash and negligent manner- there is no infirmity in the judgment- appeal dismissed. (Para-4 to 9)

For the appellants: Mr. Ajay Dhiman, Advocate.
For the respondents: Mr. Raman Sethi, Advocate, for respondents No.1 and 2.
Mr. Ratish Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

CMP No.10339 of 2015

The appellants have moved this application for recalling the order, dated 31st July, 2015, passed by this Court, whereby the appeal came to be dismissed in default and for non-prosecution. The learned counsel for the respondents have no objection in case the application is granted. Accordingly, the application is allowed and the order dated 31st July, 2015, is recalled. The appeal is ordered to be restored to its original number. The application is disposed of.

FAO No.609 of 2008

2. The appeal is taken on Board for final disposal with the consent of the parties.

3. Heard.

4. This appeal is directed against the award, dated 20th September, 2008, passed by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (H.P.), (for short, "the Tribunal") in MACT Petition No.96-P/2005, titled Sanjogita Devi & another vs. Krishna Sood & others, whereby the claim petition came to be dismissed (for short the "impugned award").

5. Heart and soul of the appeal is whether the claimants-appellants have been able to prove issue No.1, which is reproduced hereinbelow:-

> "1. Whether on 14.07.2005 Motor Cycle No.HP-37-A-3964 driven by Atul Kumar was hit by jeep No.HP-37A-2030 driven by respondent No.2 in a rash and negligent manner resulting in injuries to Atul Kumar who died, as alleged? OPP."

6. The claimants have specifically pleaded that respondent No.2, namely, Ramesh Kumar had driven the jeep bearing registration No.HP-37A-2030 rashly and negligently on 14.07.2005 and hit the motorcycle bearing registration No. HP-37-A-3964, which was being driven by deceased Atul Kumar rashly and negligently, who sustained injuries and succumbed to the same.

7. The parties have led evidence. The Tribunal, after making discussion in paragraphs 6 to 10 & 13 to 15 of the impugned award, held that deceased Atul Kumar was driving the Motorcycle without any valid and effective driving licence, who was 16 years of age at the time of accident. Further, the FIR bearing No.198/2005, registered at Police Station, Palampur, Ext.PW-2/A, was lodged against Ramesh Kumar, driver of the jeep, which was cancelled by the competent Court of law.

8. The Tribunal in paragraphs 7 to 9 of the impugned award has made discussion and has rightly come to the conclusion that the driver of the jeep was not driving the said vehicle rashly and negligently. It is apt to reproduce paragraphs 7 to 9 of the impugned award herein:

> *"7. This Tribunal has carefully appraised the entire evidence placed on record. The learned counsel for the petitioners had argued that the evidence of petitioner No.2 and his three witnesses, coupled with the FIR and post mortem report, had proved and established the charges of rash and negligent driving against respondent No.2. The respondent No.2 had been booked under Section 304-A I.P.C. by the local police immediately after the accident. Due weight was liable to be attached to the first version of the accident recorded in the First Information Report. There was no reason to reject the evidence of the petitioner No.2 and his three witnesses.*
>
> *8. This Tribunal finds no merit in the submissions of the learned counsel for the petitioners. Nothing much could be worked out in favour of the petitioners on the strength of evidence of petitioner No.2 and his three witnesses. PW3 had not seen respondent No.2 driving jeep No.HP-37-2030 rashly and negligently. PW3 had stated having carried out the spot inspection and local investigation immediately after the accident PW3 says having concluded the charges of rash and negligent driving against respondent No.2. The local investigation and spot inspection, if any, carried out by PW3 after the accident could not establish the charges of rash and negligent driving against respondent No.2. The evidence of PW4 could not be upheld for obvious reasons. PW4 had been the registered owner of motor cycle No.HP-37A-3964. The petitioner No.2, as also PW4, had stated that at the time of accident, Sh Atul Kumar had been below 18 years in age. The petitioners had produced copy Ex. PW3/A of matriculation certificate of Sh. Atul Kumar. The date of bright of Sh. Atul Kumar was 10.07.1989. As such, he was 16 years in age at the time of accident. PW4 could not have handed over his motor cycle to the deceased. PW4 had permitted a minor to drive the motor cycle. PW4 had rendered himself liable for punishment under Sections 5/177 of the Act.*
>
> *9. The motor cycle was owned by the husband of the sister of petitioner No.1. The petitioners as also Sh. Mehar Singh (PW4) had not produced the registration and insurance certificates of motor cycle. With a view to cause confusion to the defecne of the respondents, PW4 had stated having disposed of motor cycle No. HP-37A-3964 after the accident. Undoubtedly, the rider of motor cycle No. HP-37A-3964 required a valid and effective driving licence. In the petition, the petitioners had no where stated that their son Sh. Atul Kumar*

had been in possession of valid and effective driving licence. The respondent Nos. 1 and 2 in their reply had clearly stated that the deceased had not been in possession of a valid and effective driving licence. Since the deceased had been a minor, he could not have been granted a licence to drive the motor cycle with gear. The petitioners had field re-joinder to the reply of respondent Nos. 1 and 2. In the re-joinder, the petitioners had proceeded to state as follows:-

> *"It is pertinent to point out here that the deceased was driving the motor cycle on the command and dictates of pillion rider who was holding driving licence and deceased was fully trained and was driving under the supervision of the pillion rider who held a valid driving licence as stated above."*

9. Having said so, the findings returned by the Tribunal on issue No.1 are upheld.

10. In view of the above discussion, there is no merit in the appeal and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sham Lal (dead), through LRs ...Petitioner.
Versus
Smt. Rama Sharma ...Respondent.

Civil Revision Petition No.35 of 2010
Reserved on : 18.9.2015
Date of Decision: October 9, 2015

H.P. Urban Rent Control Act, 1987- Section 24 (5)- Landlord sought eviction of tenant on various grounds including bona fide requirement- petition allowed by Trial Court and appeal dismissed by Appellate Authority- Revision against the orders- held that, the power of revision cannot be equated with the appellate jurisdiction - further held that the landlord is best judge of his bona fide needs – the courts below had rightly appreciated the facts and had come to the right conclusion that the landlady had the bonafide requirement of the accommodation – revision without merits and dismissed. (Para 14-15)

Cases referred:

Meenal Eknath Kshirsagar v. Traders & Agencies and another, (1996) 5 SCC 344
Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, (1999) 6 SCC 222
Raghvendra Kumar v. Firm Prem Machinery & Co., (2000) 1 SCC 679
M.L. Prabhakar v. Rajiv Singal, (2001) 2 SCC 355
Siddalingamma and another v. Mamtha Shenoy, (2001) 8 SCC 561
Joginder Pal v. Naval Kishore Behal, (2002) 5 SCC 397
Savitri Sahay v. Sachidanand Prasad, (2002) 8 SCC 765
Akhileshwar Kumar v. Mustaqim and others, (2003) 1 SCC 462
Pratap Rai Tanwani and another v. Uttam Chand and another, (2004) 8 SCC 490
Kailash Chand and another v. Dharam Dass, (2005) 5 SCC 375

Dinesh Kumar v. Yusuf Ali, (2010) 12 SCC 740
Basayya I. Mathad v. Rudrayya S. Mathad and others, (2008) 3 SCC 120
Ajit Singh and another v. Jit Ram and another; (2008) 9 SCC 699
Union of India and others v. Flight Cadet Ashish Rai, (2006) 2 SCC 364
Hari Singh v. Kanhaiya Lal, AIR 1999 SC 3325
Gurbachan Singh and another v. Shivalak Rubber Industries and others, (1996) 2 SCC 626
Dev Kumar (Died) through LRs v. Smt. Swaran Lata and others, AIR 1996 SC 510
Vipin Kumar v. Roshan Lal Anand and others, (1993) 2 SCC 614
Prithi Chand v. Smt. Naura Devi and others, 2012(2) Him LJ 997
Jodha Ram v. Rahul Chauhan and others, Latest HLJ 2008(HP) 1425
Himachal Pradesh Congress Committee (I) v. M/s Salig Ram Nand Kishore, 2003(1) Shim 268
Mohan Lal Aggarwal v. Kali Ram, 1997(2) SLC 508
Ashok Kumar and others v. Uttam Chand, 1995(2) Sim.L.C. 373
Sohan Lal Khanna v. Amar Singh, 2000(2) RLR 664(HP)
Radha Krishan v. Amar Singh, 1999(2) RLR 439 (P&H
M/s Mohan Lal Ashok Raj v. Lajwanti Devi and others, 1997(2) RLR 197 (HP)
Subash v. Smt. Ganga Devi, 1996(2) RLR 519(HP)
Gazanafarali Fatehali Hakim v. Ratilal Manganlal Panchal, 1999(2) RLR 442 (Gujarat)

For the Petitioner : Mr. B.B. Vaid, Advocate.
For the Respondent : Mr. G.C. Gupta, Senior Advocate, with Ms Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Against the concurrent findings of fact, petitioner Sham Lal (dead and now represented through LRs), hereinafter referred to as the tenant, against whom order of eviction stands passed, has filed the present statutory petition, under the provisions of Section 24(5) of the H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the Act).

2. Power of revision, exercised by this Court, cannot be equated with appellate jurisdiction, unless there is perversity in the matter of appreciation of evidence or the authorities below have arrived at a conclusion, which no reasonable person will arrive at, this Court would not interfere and re-appreciate the evidence on the asking of tenant. In the instant case, no such perversity emerges from record.

3. The Courts/authorities below concurrently have ordered eviction of the tenant, on the statutory ground of (a) non-payment of rent, (b) bonafide requirement of the landlady (respondent herein) as also her family members, (c) impaired the value and utility of the premises, by unauthorizedly carrying out additions and alterations.

4. Regretfully, despite serious endeavour made by this Court, parties could not arrive at any settlement. Through their learned counsel, they were apprised of their statutory rights of resorting to ADR Mechanism, very much in place and operational in this Court.

5. Before this Court, tenant has moved an application, seeking appointment of a Local Commissioner, for getting whole of the building owned by the landlady, physically

inspected. According to the tenant, landlady has sufficient accommodation to meet her family requirement. At the threshold, the application is dismissed, for the reason that tenant had sufficient opportunities of leading evidence before the authorities below, which he failed to do so. Even otherwise, this Court would not come to the aid of a party for collecting evidence.

6. Despite limited scope of enquiry, which this court can dwell upon, for adjudging perversity, if any, in the orders passed by the authorities below, additional factors, which the tenant wants the Court to believe, stand considered, in adjudicating the present petition.

7. On 31.7.2001, when the petition for ejectment was filed, under Sections 14(2)(i), 14(2)(iii) and 14(3)(a)(i) of the Act, landlady was just having two rooms, one kitchen, one bathroom, one latrine and one store, as total accommodation under her occupation. At that time, her family consisted of herself, her husband, two daughters (one of whom was unmarried-aged 19 years) and one unmarried son (aged 16 years).

8. Being owner of the building, wherein the tenanted premises are situate, simultaneously, she initiated proceedings for ejectment against all the tenants. In effect, her bonafide requirement would have met only with the ejectment of all the tenants occupying the building.

9. Relying upon the testimonies of the landlady Smt. Rama Sharma (PW-1), Shri Dalip Singh (PW-2), Ms Seema Sharma (PW-3) and Shri Hem Raj (PW-6), the authorities below have come to the conclusion that the premises under occupation of the landlady is insufficient to meet her bonafide requirement.

10. Also, relying upon the testimonies of Smt Rama Sharma and expert Shri Vivek Karol (PW-4), who has proved report (Ex.PW-4/A) and spot map (Ex. PW-4/B), the authorities have also found the tenant to have impaired the value and utility of the building by unauthorizedly fixing almirahs and shelves in the walls, after breaking open the bathroom and making holes in the walls. Also, two water tanks of the capacity of 1000 litres and 1500 litres stand installed, putting an extra load over the building. Report of an expert, so produced by the tenant, remains unproven on record and testimony of tenant (RW-1), refuting such allegations of the landlady, was found to be not worthy of credence on all counts.

11. That the building in question is situate within the municipal limits of Shimla, is an old structure, stand proved through the testimony of Smt. Rama Sharma and Shri Vivek Karol. It is not disputed before this Court that though in the year 2001, landlady was in occupation of only two rooms, but however, with the passage of time, tenants Shri Onkar Singh and Shri Kuldeep Singh having vacated the premises under their occupation, giving the landlady three additional rooms (two rooms vacated by Shri Onkar Singh and one room vacated by Shri Kuldeep Singh). Also, during the pendency of the present petition, tenant Shri Sodhi Ram has vacated two rooms, under his occupation. Present tenant is the only other tenant left in the building.

12. Perusal of the floor plan of the entire building, which is part of the record, reveals that the landlady is in occupation of three rooms, gallery, one kitchen, one bathroom, one latrine on the first floor; six rooms, three kitchens, one bathroom and one latrine on the ground floor and two rooms, one bathroom and one latrine on the basement.

13. On the other hand, tenant is in occupation of two rooms, one latrine, one bathroom and one kitchen.

14. Even though the number of rooms under occupation of the landlady is more, but they are small in size. Out of ten rooms, there are only three rooms, which can be used as proper bedrooms and one out of them is totally damaged and unsuitable, on account of permanent seepage of water from the retaining wall. The other rooms are as small as 5'x9', 8'x9', 10'x7, 9'x8' and 8'x8'. The building in question is an old structure. Also, passage to some of these rooms is through the other rooms, in effect marginally reducing full utility and usage thereof. Noticeably, on the first floor, there are three rooms, but then the passage to the last room is through the first two rooms. So, in effect only one, out of three, can be used as a bed room. Thus, in effect, only leaving three, out of ten, to be used as bed rooms by the landlady and her family. One bed room is required by the landlady, one for her son and another one for the guests. Shimla is a Capital city, where inflow of guests all throughout the year is there. With the addition of two rooms under occupation of the tenant, bonafide requirement would be met.

15. It is a settled principle of law that bonafide requirement of the landlady of the demised premises, for own use and occupation, has to be seen and adjudged from her point of view and not that of the tenant, who cannot be allowed to dictate terms, with regard to suitability of the accommodation. However, sufficiency, adequacy and requirement of accommodation need to be proved by the landlady. (See: *Meenal Eknath Kshirsagar v. Traders & Agencies and another,* (1996) 5 SCC 344; *Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta,* (1999) 6 SCC 222; *Raghvendra Kumar v. Firm Prem Machinery & Co.,* (2000) 1 SCC 679; *M.L. Prabhakar v. Rajiv Singal,* (2001) 2 SCC 355; *Siddalingamma and another v. Mamtha Shenoy,* (2001) 8 SCC 561; *Joginder Pal v. Naval Kishore Behal,* (2002) 5 SCC 397; *Savitri Sahay v. Sachidanand Prasad,* (2002) 8 SCC 765; *Akhileshwar Kumar v. Mustaqim and others,* (2003) 1 SCC 462; *Pratap Rai Tanwani and another v. Uttam Chand and another,* (2004) 8 SCC 490; *Kailash Chand and another v. Dharam Dass,* (2005) 5 SCC 375; and *Dinesh Kumar v. Yusuf Ali,* (2010) 12 SCC 740).

16. It stands proven on record that out of two rooms, initially in her possession, one was totally unusable.

17. Primarily, family of the landlady consists of herself, her husband, one son of marriageable age, who cannot be married till and such time, additional accommodation, so occupied by the tenant, is vacated. During the subsistence of the petition, though the second daughter of the landlady has married, but however, like her elder sister, she is continuing to occupy the room in the house.

18. Submission made on behalf of the tenant that with the daughters having gone to their matrimonial house, they have no right, even to visit their mother or continue to occupy the rooms, which they were doing as maidens, only merits rejection. If the parents so desire, even with the marriage having been solemnized, a daughter would still have a right to visit and continue to use and occupy the premises. Attempt made by the tenant to establish that married daughters are happily residing in their matrimonial houses, stands repelled by the authorities below. Under these circumstances, can it be said that a daughter ceases to be member of the family for the purpose of bonafide requirement under the provisions of the Act? In my considered view, in the given fact situation, no, particularly when there is no evidence to establish that married daughters are residing in their own accommodation in the same town, which in any event is not the proven case on hand. It is the specific case of the landlady that her daughters have occupied part of the accommodation now available with her. In any event, regardless of such fact, assuming the daughters are not residing or occupying the accommodation, even then the tenanted premises are required by her. Even otherwise, entire usable accommodation available with

the landlady would be just three bedrooms, which, in any event, would be required by her, for she has a growing family.

19. In view of the aforesaid discussion, it cannot be said that even with the other tenants having vacated the premises, bonafide requirement of the landlady ceases to exist.

20. On behalf of the tenant, it is further contended that the landlady concealed vital information from the Court, as such, ejectment petition ought to have been rejected on that ground. According to the tenant, landlady suppressed vital information of being possessed with another room. Specific attention is drawn to the pleadings and the admissions made by the witnesses with regard thereto.

21. It is true that in the ejectment petition, there is no reference of this additional room, but then it stands clarified by Smt. Rama Sharma and Ms Seema Sharma, as also other witnesses that this accommodation, which is stated to be an additional room, is actually a shed (*Dhara*) and an outhouse. Mr. B.B. Vaid, learned counsel for the tenant, invites attention to that part of the statement of the witnesses, wherein it is admitted that the *Dhara* has concrete walls from inside. The question, which needs to be considered, is as to whether landlady can be asked to occupy the same, befitting her status and requirement, for (1) this *Dhara* is not authorized; (2) it is an outhouse and not part of the main building; (3) it has got no kitchen and latrine; (4) even with this *Dhara* requirement of the landlady cannot be met. It was not required to be pleaded by the landlady, for the same was not put to use for residential purposes by the family. Hence, contention only merits rejection.

22. On the question of impairment of the value and utility of the premises, it is contended on behalf of the tenant that in the testimony of the landlady and the expert, it has nowhere come that there is material impairment. The word "material" is missing, but then the witnesses have unambiguously and categorically explained as to how the value and utility stand impaired, which the Courts have found to be material. An old building burdened with weight only makes the roof sagging and seepage of water further damages the property, making part of it unsuable. Breaking of a bathroom and puncturing the walls of an old structure, cumulatively put, does impair the value and utility of the building and more particularly that of the tenanted premises. Before this Court, it is not the case of the tenant that such alterations were carried out with the authorization of the landlady.

23. Landlady is a Government servant. Her son-in-law is a doctor, her son is aged 36 years and is to be married. Status, style of living and habits are the factors which need to be considered while considering the bonafide requirement. The findings returned, cannot be said to be perverse or arbitrary, warranting interference, in any manner.

24. Learned counsel for the parties have referred to and relied upon the following judgments of the Hon'ble Supreme Court of India and various High Courts: *Basayya I. Mathad v. Rudrayya S. Mathad and others,* (2008) 3 SCC 120; *Ajit Singh and another v. Jit Ram and another;* (2008) 9 SCC 699; *Union of India and others v. Flight Cadet Ashish Rai,* (2006) 2 SCC 364; *Hari Singh v. Kanhaiya Lal,* AIR 1999 SC 3325; *Gurbachan Singh and another v. Shivalak Rubber Industries and others,* (1996) 2 SCC 626; *Dev Kumar (Died) through LRs v. Smt. Swaran Lata and others,* AIR 1996 SC 510; *Vipin Kumar v. Roshan Lal Anand and others,* (1993) 2 SCC 614; *Prithi Chand v. Smt. Naura Devi and others,* 2012(2) Him LJ 997; *Jodha Ram v. Rahul Chauhan and others,* Latest HLJ 2008(HP) 1425; *Himachal Pradesh Congress Committee (I) v. M/s Salig Ram Nand Kishore,* 2003(1) Shim 268; *Mohan Lal Aggarwal v. Kali Ram,* 1997(2) SLC 508; *Ashok Kumar and others v. Uttam Chand,* 1995(2) Sim.L.C. 373; *Sohan Lal Khanna v. Amar Singh,* 2000(2) RLR 664(HP); *Radha Krishan v. Amar Singh,* 1999(2) RLR 439 (P&H); *M/s Mohan Lal Ashok Raj v. Lajwanti Devi*

and others, 1997(2) RLR 197 (HP); *Subash v. Smt. Ganga Devi,* 1996(2) RLR 519(HP); and *Gazanafarali Fatehali Hakim v. Ratilal Manganlal Panchal,* 1999(2) RLR 442 (Gujarat). This is only reflective of their industry, but in no manner, advances the case of the tenant.

25. There is no challenge to the findings with regard to the arrears of rent. Petition stands dismissed. Pending application(s), if any, also stand disposed of.

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

State of H.P. .....Appellant.

Versus

Bidhi Chand son of Shri Shiv Ram and another .....Respondents.

Cr. Appeal Nos. 252 of 2013.
Reserved on: October 08, 2015.
Decided on: October 09, 2015.

Prevention of Corruption Act, 1988- Sections 7, 13 (1) (d) and 13(2)- Accused demanded bribe of Rs. 1,000/- for preparing Fard Mouka Kabja in a partition case - accused were apprehended with the currency notes- hand wash turned pink when it was mixed with sodium carbonate- complainant and prosecution witnesses had not supported the prosecution- PW-5 has also demolished the prosecution case - name of PW-8 was not mentioned in the daily diary – sanction order was approved by examining the reader and not by examining the Deputy Commissioner – held, that accused were rightly acquitted.

(Para-17 to 22)

Case referred:

K.L.Bakolia vrs. State through Director, Central Bureau of Investigation, (2015) 8 SCC 395

For the appellant(s): Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

For the respondents: Mr. Ashok Sharma, Sr. Advocate, with Mr. Angrez Kapoor, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has filed this appeal against the judgment dated 4.10.2012, rendered by the learned Special Judge, Hamirpur, H.P, in Corruption Case No. 03 of 2011, whereby the respondent-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 7 & 13 (1) (d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the Act), were acquitted.

2. The case of the prosecution, in a nut shell, is that on 26.10.2009, the police party headed by Insp. Khushi Ram (PW-11) was patrolling in the area of Badiana Jungle in Tehsil Bhoranj, Distt. Hamirpur. In the meantime, complainant Raj Kumar (PW-4) and Vikas (PW-6) met the police and the complainant Raj Kumar moved an application Ext. PW-1/A addressed to the Superintendent of Police, State Vigilance Anti-Corruption Bureau (hereinafter referred to as SV & ACB) to PW-11 Insp. Khushi Ram. It was alleged in the

application that the complainant is resident of VPO Jahu, Tehsil Bhoranj. In lieu of preparation of "Fard Mouka Kabja", in a partition case pertaining to his land bearing Kh. No. 1189, the accused persons were demanding bribe of Rs. 1000/- and the complainant had been called to the spot with the bribe money by the accused. As the complainant did not want to pay any gratification, he sought action against the accused. PW-11 Insp. Khushi Ram made an endorsement on the application and sent the same to the Police Station SV & ACB through HHC Gian Chand (PW-9), for registration of a case against the accused persons. FIR Ext. PW-1/B was registered. Thereafter, the I.O (PW-11) deputed HHC Sunil Kumar to bring independent witnesses from the SDM Office and I.O. gave demonstration by display of two chemicals i.e. Sodium Carbonate and Phenolphthalein in the presence of the complainant and other witnesses Vikas and Gurcharan. Solution of two powders was made separately in two glasses of water and when the separate powders were put in each glass, their colour remained natural and when these solutions were mixed together, then its colour turned into pink. The solution was put in a nip Ext. P-1 and sealed with seal impression "H". It was taken into possession vide memo Ext. PW-8/A. The I.O also took sample of seal on a piece of cloth vide Ext. PW-8/B and handed it over to witness Vikas. The I.O. asked the complainant to produce the currency notes which were to be given to the accused persons. He produced two currency notes of the denomination of Rs. 500/- each. The numbers of the notes were noted down by the Inspector in the memo Ext. PW-8/C. The currency notes were treated with the powder and given to the complainant to hand over the same to the accused on their demand. The I.O. further directed the complainant not to shake hands with the accused and witness Vikas was asked to accompany the complainant. In the meantime, official witness PW-5 P.R. Dhiman also came to the spot and then the raiding party proceeded to the spot. The complainant and witness Vikas went on their scooter to the house of one Rakesh Kumar at Jahu. The raiding party also proceeded to the spot and near the house of Rakesh Kumar, they remained hidden in the bushes. After about ten minutes, on receiving the signal from shadow witness Vikas, the I.O. alongwith HC Sunil Kumar and Gurcharan went inside the house of Rakesh Kumar. The accused persons were found sitting on a Sofa. The I.O. after giving his identity to the accused, asked them to hand over the bribe money which they had taken from the complainant. The hands of the accused were got washed in a plate and the colour of the water remained the same. Solution of Sodium Carbonate was prepared. When the hand wash of the accused was mixed in the solution of Sodium Carbonate, its colour turned into pink. The pink solution was put in a nip Ext. P-2 and P-3 and it was sealed with seal impression "H". Sh. P.R. Dhiman got the numbers of the notes tallied with the memo Ext. PW-8/C. The currency notes were put in an envelope Ext. P-4 and were taken into possession vide memo Ext. PW-5/B. The pocket wash of the shirts of the accused was also taken and the solution was put in nips Ext. P-11 and P-6. The I.O. also prepared the spot map. The accused were arrested. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, the complainant wanted favour from them being public servants i.e. Patwari and Kanungo in his partition petition of Abadi and they did not oblige him, hence a false case was made out against them. The learned trial Court acquitted the accused, as noticed hereinabove.

4. Mr. Parmod Thakur, learned Addl. AG, for the State, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Ashok Sharma, Sr. Advocate, appearing on behalf of the accused has supported the judgment of the learned trial Court dated 4.10.2012.

5. I have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

6. PW-1 DSP Ajay Rana deposed that on 26.10.2009, he received rukka Ext. PW-1/A, through HHC Gian Chand at 7:30 PM. On the basis of rukka, FIR Ext. PW-1/B was registered at Police Station SV & ACB, Hamirpur under his signatures.

7. PW-2 Surinder Pal, has produced Ext. PW-2/A and PW-2/B. In his cross-examination, he admitted that he has seen the "Fard Mauka Kabza" dated 29.5.2009, certified copy of which was Ext. DA. Similarly, Ext. DB was the copy of Tatima, Ext. DC was copy of field book, Ext. DD was copy of statement of Raj Kumar and Ext. DE was copy of report of Field Kanungo dated 29.5.2009, which are certified copies of the original record.

8. PW-3 Parkash Chand has brought the file from the Office of D.C. Hamirpur, whereby sanction to launch prosecution against accused persons was granted by the D.C. Hamirpur vide Ext. PW-3/A and PW-3/B.

9. PW-4 Raj Kumar deposed that he was running repair shop of sewing machines at Jahu. He is owner of land bearing Kh. No. 1189, situated at Jahu Khurd. Tehsildar Bhoranj passed an order of partition of this land and ordered to prepare Fard Moka Kabja. Patwari Gian Chand and Kanungo Bidhi Chand asked him to give them Rs. 1000/- for preparing correct record on the spot. They asked him to come to the house of Rakesh Kumar on 26.10.2009 with the money of Rs. 1000/-. He did not want to give bribe to the accused. Therefore, he wrote an application Ext. PW-1/A to the Dy. S.P. Vigilance, Hamirpur. He alongwith Vikas were going on scooter to give the complaint to Vigilance against the accused persons. When they reached at Badyana jungle, he saw Sunil there who was already known to him. Sunil was employed with the Vigilance department. He stopped the scooter and had a talk with Sunil. Sunil introduced him to Inspector of the Vigilance Department present there. He handed over the application Ext. PW-1/A to the Inspector and the Inspector sent the application through a Constable to Vigilance Office, Hamirpur. The Inspector gave demonstration of mixing Sodium Carbonate and Phenolphthalein. The two chemicals were mixed in water in two separate glasses, colour of the same was natural white and when both the mixtures were mixed together, colour of the same turned slight pink. The pink colour mixture was put in a nip and the nip was sealed with seal impression "H". His signatures were obtained on blank paper and memo of demonstration was not prepared in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that memo in this regard was prepared and he signed the same. He categorically deposed that the accused did not demand any money from him nor did he produce any money to the police to be given to the police. He has not paid any money to any of the accused nor they demanded anything from him. He also denied that two currency notes of the denomination of Rs. 500/- each were given to the police. He also denied that the police treated the same with the phenolpthalien and noted down its number on the memo and thereafter handed over to him with the direction not to shake the hand and to give the same on the demand made by the accused persons. He also denied that after giving the notes to him the raiding party and the witnesses washed their hands. He also denied that he was apprised by the I.O. that Vikas would accompany him and watch the proceedings and when the money is given on demand, Vikas will give signal to the police party. He also denied that in this regard the memo of handing over of the money and noting down of number and hand wash of the raiding party was prepared. He has admitted his signatures on memo Ext. PW-4/B. However, he denied that the memo was prepared in his presence and in the presence of Vikas and Gurcharan Singh. Volunteered that his signatures were obtained on the blank paper. He admitted that he went to the spot alongwith Vikas. He denied that the accused persons demanded money

from him and he gave Rs. 500/- each to each of the accused. He also denied that when he returned to the room, the accused were taking tea. He also denied that Vikas had given signal to the police and thereafter raiding party came inside the room. Volunteered that Vikas had left his company in the bazaar. He also denied that accused persons disclosed their names as Bidhi Chand and Gian Chand. He also denied that hands of the accused Bidhi Chand were washed in a plate. He also denied that the solution of the sodium carbonate was prepared and put in a glass of water and its colour remained natural. He also denied that when the hand wash of the accused was mixed in a solution of sodium carbonate, its colour turned into pink. He also denied that mixture of the hand wash was put into a nip and sealed with seal impression "H". He also denied that accused was asked to produce the bribe money and he took out from his pocket and gave it to the police. He also denied that the number of the recovered notes was tallied by one P.R. Dhiman with the memo prepared at the time of handing over the currency notes to him. He also denied that these currency notes were packed and sealed in envelope. He also denied that the shirt of accused Bidhi Chand was arranged. He also denied that one solution of sodium carbonate was prepared and the colour of the said mixture remained natural and when the cloth wash water was mixed in the solution of sodium carbonate its colour turned pink. The water was put in a nip and sealed with seal impression "H". He also denied that the shirt of accused Bidhi Chand was put in a cloth parcel and sealed with seal impression "H". He also denied that the hands of the accused Gian Chand were washed in a plate. He also denied that the hand wash of the accused was mixed in the solution of sodium carbonate, its colour turned into pink. He also denied that the mixture of the hand wash was put into a nip and sealed with seal impression "H". In his cross-examination by the learned Advocate appearing on behalf of the accused, he admitted that in a partition case titled as Raj Kumar vrs. Rakesh Kumar, Fard Mauka Kabja was prepared by the Patwari on 29.5.2009 and sent to Tehsildar. The objections were raised before the Tehsildar by the other party named Ram Rakha. When police came to the house of Rakesh Kumar, he was sent out of the room. His signatures were obtained in the Police Post Jahu. The application Ext. PW-1/A was dictated to him by Vigilance Staff and Sunil Kumar.

10. PW-5 P.R. Dhiman, deposed that he was associated in the police raiding party. He alongwith the police officials were hiding in bushes nearby the place of occurrence. After some time police party received a signal from a house and he alongwith the police officials went there and entered the room. The wrists of accused persons were caught hold by the police personnel. The hands of accused Gian Chand were washed in a plate and the water remained natural water colour. Mixture of sodium carbonate was prepared in a glass and its colour remained natural. On mixing both the mixtures, its colour turned to light pink and the same was put in a nip Ext. P-3. Thereafter, the accused Gian Chand took out the money from his pocket and gave to the police official. The said note was given to him and he tallied its number with the number noted down in the memo already prepared which was found to be correct. The note was put in an envelope Ext. P-4. Thereafter, accused Bidhi Chand took out the money from his pocket and gave to the police official. The note was given to him and he tallied its number with the number noted down in the memo. In his cross-examination, he admitted that he was given written order by the SDM at 2:15 PM. They reached at the place of occurrence at about 3:00 PM. The raid was conducted at 4-4:30 PM. The house where the raid was conducted was not visible from the place where they were standing. According to him, only Vikas was present in the room. He saw the currency notes in the hands of vigilance persons. He also admitted that the accused persons were refusing to sign by saying that the colour of nips Ext. P-2, Ext. P-3, Ext. P-6 and Ext. P-1 were not light pink and was natural colour of water.

11. PW-6 Vikas Thakur deposed that Raj Kumar had told him that the Patwari and Kanungo were demanding bribe. He had never accompanied Raj Kumar to the Vigilance Police for making complaint on his scooter. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that on 26.10.2009 Raj Kumar told him to accompany him on his scooter for making complaint. He also denied that when they reached at Badiyana jungle at about 4:00 PM, Raj Kumar saw one government gypsy standing near the road side. He also denied that he stopped his scooter and told to the police official Anil Kumar that accused persons are demanding bribe. He also denied that Raj Kumar gave an application in his presence to the Inspector. He also denied that Sunil Kumar was earlier known to him. He also denied that Inspector of Vigilance Department gave a demonstration as to the nabbing of the accused. He also denied that the police displayed the demonstration of two powders i.e. sodium carbonate and phenolphthalein, which were mixed in two separate glasses of water and their colour remained natural and when these mixtures of the glasses were mixed together its colour turned pink. He also denied that the mixture was put in a nip Ext. P-1. He also denied that the same was sealed with seal impression "H". He also denied that Police Inspector asked Raj Kumar to produce the tainted money. He also denied that he produced two notes of the denomination of Rs. 500/- each and the same were treated with phenolphthalein after noting down their numbers in the memo and these were handed over to the complainant Raj Kumar after preparing memo. He also denied that he was apprised that he would go with Raj Kumar to the spot and watch the entire proceedings. He also denied that he was apprised that when the money was to be given on demand he would give a signal to the raiding party. He also denied that memo Mark-B was prepared in his presence. However, he admitted his signatures on Mark-B. He also denied that he went to the spot along with Raj Kumar. He also denied that Bidhi Chand and Raj Kumar were caught from the wrists by the police personnel. He also denied that after he gave signal, the police raiding party entered in the room and caught hold of the accused persons from their wrists. He also denied that the hands of accused Bidhi Chand and Gian Chand were washed in a plate turn by turn and the colour of the same remained water natural colour. He also denied that mixture of sodium carbonate was prepared separately in a glass and the colour of the same remained natural water colour and on mixing both the mixtures, its colour turned to light pink. He also denied that the mixtures were put in separate nips Ext. P-2 and P-3. He also denied that accused persons turn by turn produced currency notes of denomination of Rs. 500/- each. He also denied that the same were given to PW P.R. Dhiman who tallied the same with the numbers noted down in the memo already prepared. He also denied that memo in this regard was prepared. He admitted his signatures on the memo. Volunteered that he has signed on the blank papers. He denied that notes were separately put in envelopes Ext. P-4 and P-9. He admitted signatures on envelopes Ext. P-4 and P-9. He denied that the accused were asked to arrange the shirts. He denied the preparation of nips Ext. P-6 and P-11.

12. PW-7 Hem Raj has produced the original record about the appointment and posting orders of Patwaris and Kanungos. He produced attested copies of appointment and posting orders of Bidhi Chand Kanungo vide Ext. PW-7/A and PW-7/B and the attested copies of appointment and posting orders of Gian Chand Patwari vide Ext. PW-7/C and PW-7/D.

13. PW-8 Const. Gurbachan Singh deposed that on 26.10.2009, he alongwith Insp. Khushi Ram, and other police party had gone on patrolling in a vehicle bearing No. HP-03-3025 driven by Const. Surinder Kumar. They went to Badiyana jungle and stopped there for Nakabandi. At about 4:00 PM, two persons came in a scooter and on seeing HHC Sunil Kumar, they stopped there and talked with him. One of the persons disclosed his

name as Raj Kumar and told him that Patwari Gian Chand and Kanungo Bidhi Chand were demanding bribe from him for giving demarcation and Fard Kabja Nishandehi. He did not want to give bribe for the work. Thereafter the complaint was lodged. Inspector Khushi Ram gave the demonstration. Accused were nabbed. In his cross-examination, he deposed that Raj Kumar and Vikas met them in Badiyana jungle at about 4:00 PM. He admitted that whenever they go on patrolling, the departure is noted in the daily diary register. He also admitted that his name does not find mention in Ext. DX. Volunteered that he obeyed the orders of his superior.

14. PW-9 HHC Gian Chand deposed that Inspector Khushi Ram after reading the application Ext. PW-1/A made endorsement and gave it to him to be taken to Dy. S.P. SV and ACB, Hamirpur, Vijay Rana. He took the same to the Dy. S.P.

15. PW-10 HC Umeshwar Singh deposed that the case property was deposited with him.

16. PW-11 Insp. Khushi Ram deposed that he alongwith his team was on patrolling duty. At 4:00 PM, they stopped at Badiyana jungle. In the meantime, two persons came on a scooter and on seeing them stopped their scooter and started talking with HHC Sunil Kumar. HHC Sunil Kumar brought them to him and disclosed that Raj Kumar intended to talk to him. Thereafter, Raj Kumar told him that he was going to SV and ACB PS Hamirpur to give application to the effect that Patwari Gian Chand and Kanungo Bidhi Chand were demanding bribe of Rs. 1000/-. He did not want to give bribe. Raj Kumar has written application Ext. PW-1/A. He made endorsement. The same was sent to Dy. S.P. He gave demonstration before the complainant and witnesses. The raiding party was constituted. They went to Jahu. The police party was informed that the accused were waiting in the house of Rakesh Kumar. He along with other persons of the raiding party was standing near the house of Rakesh Kumar. Raj Kumar and Vikas entered the house of Rakesh Kumar. After 10 minutes, they got a signal from shadow witness Vikas. Then HHC Sunil Kumar and Const. Gurbachan Singh went inside the house of Rakesh Kumar. They also followed them. The accused were nabbed and formalities were completed on the spot. The accused handed over the currency notes to him. Thereafter, the hands of accused persons were got washed. Their shirts were also washed. Nips were prepared. The case property was deposited with MHC Ramesh.

17. The case of the prosecution has not been supported by complainant PW-4 Raj Kumar and PW-6 Vikas. Both the witnesses were declared hostile. PW-4 Raj Kumar in his cross-examination by the learned Public Prosecutor has denied that the accused had demanded any money from him nor they have produced any currency before the police. In his cross-examination, he has admitted that in a partition case titled as Raj Kumar vrs. Rakesh Kumar, Fard Mauka Kabja was prepared by the Patwari on 29.5.2009 and sent to the Tehsildar. The objections were raised by the other party before the Tehsildar named Ram Rakha. When Fard Mauka Kabja was already prepared on 29.5.2009, there was no occasion for the accused to demand gratification on 26.10.2009. PW-6 Vikas in his cross-examination by the learned Public Prosecutor has denied that Raj Kumar has given application in his presence to the Inspector. He also denied that the demonstration was given by the Inspector Vigilance Department. He also denied that complainant produced two notes of denomination of Rs. 500/- and the same were treated with powder. He denied that he was apprised that he would go with Raj Kumar to the spot. He denied that he went to the spot with Raj Kumar. He also denied that accused were caught from the wrists by the police personnel. He also denied that after he gave signal, the police raiding party entered in the room and caught hold of the accused persons from their wrists. He also denied that the hands of accused Bidhi Chand and Gian Chand were washed in a plate turn by turn and the

colour of the same remained water natural colour. He denied that the shirts of the accused were also washed. PW-4 Raj Kumar and PW-6 Vikas have not corroborated the story of the prosecution regarding demand or acceptance of the tainted money by the accused. The prosecution has failed to establish the demand of bribe money by the accused from the complainant and its acceptance by the accused.

18. According to PW-5 P.R.Dhiman, only Vikas was present in the room. Thus, he has denied the presence of complainant in the room. He has also admitted that the accused were refusing to sign by saying that the colour of nips Ext. P-2, Ext. P-3, Ext. P-6 and Ext. P-1 were not light pink and was natural water colour. He also deposed that the statements of accused and Vikas were not written in his presence. He saw the currency notes in the hands of vigilance persons. Thus, he has demolished the case of the prosecution that accused had produced currency notes to the police in his presence. He also admitted that all the papers including recovery memos were prepared and statements of witnesses were recorded in the Police Post, Jahu. According to him, the accused were arrested and thereafter taken to Police Post and after that the case was prepared.

19. PW-8 Gurbachan Singh was also the member of the raiding party. However, his name is not mentioned in document Ext. DX, copy of daily dairy dated 26.10.2009. The names of all the police officials are mentioned in Ext. DX except the name of PW-8 Gurcharan Singh.

20. The case of the prosecution, precisely, is also that the complainant has met PW-11 Insp. Khushi Ram at 4:00 PM and thereafter endorsement was made on Ext. PW-1/A and matter was sent for registration of FIR. The request was made by the I.O. for bringing two independent witnesses vide Ext. D-1. The order was passed on application by SDM Bhoranj at 1:55 PM. PW-5 P.R.Dhiman has testified that he was given written order by the SDM at 2:15 PM. They reached at the place of occurrence at about 3:00 PM. It further belies the case of the prosecution that the complaint was made at 4:00 PM. It proves that the things were planned much before the alleged complaint. The authenticity of "Fard Mauka Kabza" dated 29.5.2009, certified copy of which was Ext. DA, Ext. DB the copy of Tatima, Ext. DC copy of field book, Ext. DD copy of statement of Raj Kumar and Ext. DE copy of report of Field Kanungo dated 29.5.2009, was never in dispute. These documents were prepared on 29.5.2009.

21. The prosecution of the accused persons was sanctioned vide Ext. PW-3/A and PW-3/B. These documents have not been proved by summoning the sanctioning authority. These were only produced by PW-3 Parkash Chand who was posted as Reader to Deputy Commissioner. Their lordships of the Hon'ble Supreme Court in the case of ***K.L.Bakolia vrs. State through Director, Central Bureau of Investigation,*** reported in ***(2015) 8 SCC 395,*** have held that in order to prove case under Section 7 and 13(2) read with Section 13(1) (d), firstly, there must be demand and secondly there must be acceptance in the sense that accused received illegal gratification. It has been held as follows:

> "8. For coming to the finding of guilt for the offence under Section 13(1)(d) of the Act, firstly, there must be a demand and secondly, there must be acceptance in the sense that the accused received illegal gratification. Courts below recorded concurrent findings that there was evidence on record to substantiate the fact that there was a demand and the complainant paid the bribe amount to the appellant who has accepted the same. Courts below also recorded concurrent findings that there is no reason to discredit the testimony of the complainant (PW4) and Inspector of Police-A.K. Kapoor (PW7). Defence plea of the accused that the currency notes were put under

the sofa without his knowledge was rightly rejected by the courts below. Conviction of the appellant under Section 7 andSection 13(2) read with Section 13(1)(d) of the Act is unassailable."

22. In the instance case, the prosecution has failed to prove both the ingredients. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 4.10.2012.

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

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

State of HP & anr. ...Petitioners
Versus
Saunu Ram & ors. ...Respondents

Civil Revision No. 184 of 2015
Date of decision: 09. 10.2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a suit seeking permanent prohibitory injunction- they filed an application for amendment of the plaint to incorporate the relief of possession- held, that relief of injunction proceeds on the premises that a person claiming such relief is in possession of the property- the date of dispossession of the plaintiffs was not pleaded - plaintiffs could have sought injunction if they were in possession and if they are out of possession only then they can seek relief of possession- both these pleas are self-contradictory and cannot be claimed simultaneously – amendment makes out a new case- it was also not pleaded as to why the amendment could not be sought earlier despite exercise of due diligence- application dismissed. (Para-3 to 6)

Cases referred:
Anathula Sudhakar Vs. Buchi Reddy (Dead) by L.Rs & ors, AIR 2008 SC 2033
Adusumilli Venkateswar Rao & anr Vs Chalasani Hymavathi, AIR 1990 AP 161
Mount Mary Enterprises Vs. Jivratna Medi Treat Private Limited, (2015) 4 SCC 182

For the Petitioners: Mr. V.K. Verma, Mr.Meenakshi Sharma, Addl. AGs, with Ms.Parul Negi, Dy. AG.
For the Respondents: Mr. Amit Singh Chandel, Advocate

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

This Petition under Section 115 of the Code of Civil Procedure is directed against the order passed by learned trial court whereby the application filed by the respondents for amendment of the plaint has been ordered to be allowed.

2. It is not in dispute that the suit initially filed by the respondents/plaintiffs was for permanent prohibitory injunction, but thereafter, an application under order 6 Rule 17 CPC was filed incorporating the relief of possession. The learned trial court allowed the application by recording the following reasons:

> *"6. The suit filed by the applicants/plaintiffs is for permanent injunction and mandatory injunction. During the pendency of the suit, the applicants/ plaintiffs intend to amend the plaint to recover the possession. Though, it has not been stated in the application that the respondents/defendants have possessed the suit and during the pendency of the suit, but from the contents of the application, it appears that the respondents/defendants have possessed the suit land during the pendency of the suit and now, the applicants/plaintiffs intend to recover the possession on the basis of title. In case the present application is allowed, the respondents/defendants shall not be prejudiced, as they have right to cross-examine the PWs. The amendment sought appears to be necessary for determining the real controversy between the parties. When the applicants/ plaintiffs have filed a suit for injunction and thereafter intend to amend the pleadings by claiming right of possession neither will change the nature of the suit land nor this claim could be raised by the applicant/plaintiff despite due diligence. Accordingly, the present application is allowed subject to cost of Rs.500/-. Application stands disposed of."*

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

3. It is more than settled that the relief of injunction proceeds on the premises that the person claiming such relief is in possession of the property. Now, the question arises as to whether in a suit for injunction, possession can be claimed or not? This question has been considered by the Hon'ble Supreme Court in **Anathula Sudhakar** Vs. **Buchi Reddy (Dead) by L.Rs & ors, AIR 2008 SC 2033** wherein it was held:

> *"17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :*
>
> *(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.*
>
> *(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.*
>
> *(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a*

> *suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*
>
> *(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case".*

4. It would be evident from para (b) supra that injunction simpliciter is concerned only with possession and this question has to be decided with reference to the finding on possession.

5. It is thus clear that possession alone is material in a suit for injunction. Now, in case the plaintiffs/respondents were in possession, then when and how they came to be dispossessed is not forthcoming. The application for amendment on this aspect is conspicuously silent. Therefore, either of the claims set up by the respondents are false for the simple reason that in case respondents were in possession of the property, then alone they could have sought injunction and similarly in case they were out of possession, then the main relief in such a case would be for possession. But in no event can both the reliefs which are self contradictory to each other be claimed.

6. Adverting to the original suit, it would be noticed that the same was for permanent prohibitory injunction restraining the defendants/petitioners from causing interference in the peaceful possession of the plaintiff. It is not the case that it was during the pendency of the suit that they had been dispossessed from the suit land. Therefore, in such circumstances, I fail to understand as where from did the learned trial court infer that the respondents have been dispossessed during the pendency of the suit because had it been so, then it was incumbent upon the respondents to have made necessary averments to this effect.

7. Learned counsel for the respondents has sought to justify the order passed by the learned trial court by relying upon the following observations made in para-3 by learned Single Judge of Andhra Pradesh High Court in **Adusumilli Venkateswar Rao & anr** Vs **Chalasani Hymavathi, AIR 1990 AP 161,** which reads thus:

> *"3.In my opinion, both the contentions are untenable. It has been held in a number of cases by various High Courts, including our High Court that a suit for injunction can be converted into a suit for possession and that such conversion does not amount to alteration of the nature of the suit. It is surprising that in spite of the settled law (See K. Kameswara Rao v. K. Rajyalakshmi, 1970(1) APLJ 309) in this behalf*

in all the High Courts, still the same points are being raised in the Lower Courts."

Learned counsel for the respondents has also placed reliance on the following observations made by the Hon'ble Supreme Court in **Mount Mary Enterprises** Vs. **Jivratna Medi Treat Private Limited, (2015) 4 SCC 182.**

"7. In our opinion, as per the provisions of Order 6 Rule 17 of the Civil Procedure Code, the amendment application should be normally granted unless by virtue of the amendment nature of the suit is changed or some prejudice is caused to the defendant. In the instant case, the nature of the suit was not to be changed by virtue of granting the amendment application because the suit was for specific performance and initially the property had been valued at Rs.13,50,000/- but as the market value of the property was actually Rs.1,20,00,000/-, the appellant-plaintiff had submitted an application for amendment so as to give the correct value of the suit property in the plaint.

8. It is also pertinent to note that the defendant had made an averment in para 30 of the written statement filed in Suit No.1955 of 2010 that the plaintiff had undervalued the subject matter of the suit. It had been further submitted in the written statement that the market value of the suit property was much higher than Rs. 14 lacs. The defendant had paid Rs.13.5 lacs for the said premises in the year 2002 when the said premises had been occupied by a tenant bank. Even according to the defendant value of the suit property had been undervalued by the plaintiff in the plaint. If in pursuance of the averment made in the written statement the plaintiff wanted to amend the plaint so as to incorporate correct market value of the suit property, the defendant could not have objected to the amendment application whereby the plaintiff wanted to incorporate correct value of the suit property in the plaint by way of an amendment. The other contention that the valuation had already been settled cannot also be appreciated since the High Court has held that the said issue was yet to be decided by the trial Court.

9. The main reason assigned by the trial court for rejection of the amendment application was that upon enhancement of the valuation of the suit property, the suit was to be transferred to the High Court on its original side. In our view, that is not a reason for which the amendment application should have been rejected.

10.With regard to amendment of plaint, the following observation has been made by this Court in the case of North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by LRs. (2008) 8 SCC 511 :

"16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and others (1957) 1 SCR 595 which still holds the filed, it was held that all amendments ought to be allowed which satisfy

the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

11. In our opinion, on the basis of the aforestated legal position, the amendment application made by the plaintiff should have been granted, especially in view of the fact that it was admitted by the plaintiff that the suit property was initially undervalued in the plaint and by virtue of the amendment application, the plaintiff wanted to correct the error and wanted to place correct market value of the suit property in the plaint.

12. For the aforestated reasons, we are of the view that the amendment application should not have been rejected by the trial court and the High Court should not have confirmed the order of rejection. We, therefore, set aside the impugned judgment delivered by the High Court and the order dated 22nd November, 2013 of the trial court, whereby the amendment application had been rejected.

13 We allow the appeal and direct the trial court to permit the appellant-plaintiff to amend the plaint as prayed for in the amendment application so as to change valuation of the suit property. There is no order as to costs.

8. None of the cited judgments, in my opinion, are attracted to the facts of the present case. It is clear that the amendments sought for by the respondents makes out a totally new cause of action as well as a new case. The original plaint has been filed on the allegation that the respondents are in possession and enjoyment of the property. If the recovery of possession is by way of an alternate relief, then probably, this court could not have any objection in ordering the amendment as the same would then be covered by the respondent in Adusumilli Venkateswar Rao (supra). But the respondents cannot under the garb of amendment introduce a totally new and an inconsistent case which changes the very nature of the case.

9. That apart, the learned court below has even failed to consider the proviso to order 6 Rule 17 CPC, which clearly lays down that no application for amendment can be allowed after the trial has commenced unless the court comes to the conclusion that inspite of due diligence the petitioner could not have raised the matter before the commencement of the trial. Not only are pleadings, but even findings to this effect are lacking.

10. For all the above stated reasons, the order passed by learned court below cannot be sustained and is accordingly set aside. The petitioner is allowed in the aforesaid terms, leaving the parties to bear the costs.

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

Smt. Sunita and others .....Appellants.

Versus

Sh. Vinay Nanda and others ...Respondents

FAO (MVA) No. 28 of 2009.
Date of decision: 9th October, 2015.

Motor Vehicles Act, 1988- Section 166- Salary of deceased is proved to be Rs. 6,000/- per month and by way of guess work Tribunal found that claimants had lost service of deceased in the orchard -loss was assessed to be Rs. 3,000/- per month- claimants have lost source of dependency to the tune of Rs.3,000+Rs.4,500/-= Rs.7,500/- Applying the multiplier of 15, compensation of Rs. 13,50,000/-(Rs. 7500x12x15) along with interest awarded.

(Para-3 to 7)

For the appellants: Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. V.S. Chauhan, Advocate for respondent No.2.
Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

By the medium of this appeal, the claimants have questioned the judgment and award dated 17.10.2008, made by the Motor Accident Claims Tribunal Shimla, in MAC Petition No. 47-S/2 of 2007, titled Smt. Sunita and others versus Sh. Vinay Nanda and others, for short "the Tribunal", whereby compensation to the tune of Rs.9,50,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The claimants have questioned the impugned award on the ground of adequacy of compensation. Thus, the only question to be determined in this appeal is whether the amount awarded is meager or otherwise.

4. I am of the considered view that the compensation awarded is meager and merits to be enhanced for the following reasons.

5. The Tribunal in paras 23 and 24 of the impugned award has held that the deceased was 37 years of age at the time of accident and was in the employment of a Government contractor Vishal Shankta. He was getting salary to the tune of Rs.6000/- per month. The salary certificate has been duly proved which is Ext.PW3/E. The Tribunal has also discussed in paras 26 to 29 of the impugned award that the deceased was owner of an orchard and was getting the sale price of the apple to the tune of Rs.2,50,000/- per year, as is evident from Ext. PW3/K to Ext. PW3/N.

6. After making a guess work, the Tribunal has come to the conclusion that though the orchard is there but the claimants have lost, at least, the services of the deceased and assessed the loss to the tune of Rs.3000/- per month but has fallen in an

error in deducting 1/3rd, which is not permissible and also fallen in an error in deducting 1/3rd out of Rs.4500/-, in view of the discussion made in the award and also herein.

7. Having said so, the claimants have lost source of dependency to the tune of Rs.3000/-+4500 i.e. Rs.7500/- per month. The Tribunal has also fallen in an error in applying the multiplier. However, the insurer has not questioned the same thus, it is upheld. Accordingly, the claimants are held entitled to Rs.7500x12x15, i.e., total to the tune of Rs.13,50,000/- with interest, from the date of claim petition, as awarded by the Tribunal.

8. Having said so, the appeal is allowed and the amount of compensation is enhanced, as indicated hereinabove.

9. The insurer is directed to deposit the entire amount in the Registry within six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

10. Send down the record, forthwith, after placing a copy of this judgment.

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

Udho Ram. ...Petitioner.

Versus

Jitender Kumar. ...Respondent.

Civil Revision No.16/2005
Reserved on : 8.10.2015
Decided on: 9.10.2015

H.P. Urban Rent Control Act, 1987- Section 14- A petition for eviction of the tenant was filed on the ground that tenant is in arrears of rent- Rent Controller held the tenant to be in arrears of rent @ Rs. 5,000/- per annum- Appellate Authority held the tenant to be in arrears of rent @ Rs. 12,000/- per annum- initially rate of rent was Rs. 700/- per annum which was enhanced to Rs. 5,000/- per annum and subsequently rent was enhanced to Rs.12,000/- per annum- tenant also admitted that he had paid Rs. 12,000/- per annum as rent- Appellate Authority had rightly determined the tenant to be in arrears of rent @ Rs. 12,000/- per annum. (Para-12 and 13)

For the Petitioner: Mr. Bhupender Gupta, Sr. Advocate with
Mr. Ajit Jaswal, Advocate for the appellant.

For the Respondent: Mr. Rajneesh Lal, Advocate vice counsel for the respondent.

The following judgment of the Court was delivered:

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

This revision petition is directed against the judgment dated 27.9.2004 passed by the learned Appellate Authority (II), Solan in Rent Appeal No. 7-S/14 of 2003.

2. "Key facts" necessary for the adjudication of this petition are that respondent filed eviction petition against the petitioner under section 14 of the H.P. Urban Rent Control Act, 1987. Case of the respondent is that he is landlord of Prem Chand building situate in Ward No.5, The Mall, Solan. Petitioner was tenant in the demised premises comprising of

one room shop measuring about 26x12 feet on a rent of Rs.1,000/- per month. Petitioner was in arrears of rent since April, 1998 and previous rent was paid vide receipt dated 2.4.1998. Petition for eviction of the petitioner has been sought on the grounds of arrears of rent.

3. Petition was contested by the petitioner. According to the petitioner, rent of the shop was Rs.700/- per annum. The rent was increased to Rs.5,000/- per annum. The rent upto 31.3.1997 has been paid vide receipt dated 1.4.1997. He has also paid rent upto August, 2000.

4. Issues were framed by the Rent Controller on 10.7.2001. Rent Controller gave findings that rent of the tenanted premises was proved to be only Rs. 5,000/- per annum. The petition was allowed on ground of arrears of rent with effect from 1.4.1998 to 31.3.2003 to the extent of Rs. 25,500/- with costs and interest @ 12% per annum. Landlord filed an appeal against the order dated 17.3.2003 before the Appellant Authority-II, Solan. The Appellate Authority allowed the appeal and petitioner was held to be in arrears of rent @ Rs. 12,000/- per annum. An order of eviction of the petitioner from the premises on the ground of non-payment of rent was passed in favour of the respondent and against the petitioner. However, order was directed not to be executable if upto date arrears of rent from 1.4.1998 onwards till date @ Rs. 12,000/- per annum alongwith interest @ 9% per annum was deposited with the Rent Controller.

5. Mr. Bhupinder Gupta, learned Senior Advocate, has vehemently argued the appellate authority has wrongly relied upon Ex.DX-4 and Ex.DX-5. According to him, initially the rent was Rs. 700/- per annum and thereafter the same has been enhanced to Rs. 5,000/- per annum. His client has never agreed to pay Rs. 12000/- per annum as rent to the landlord with effect from 1.4.1998.

6. Mr. Rajnish K. Lall has supported the judgment dated 27.9.2004 rendered by the appellate authority.

7. I have heard the learned counsel for the parties and have perused the order and judgment passed by the authorities below.

8. Landlord has appeared as PW-1. He has deposed that he was owner of the shop in question. Udho Ram was inducted as tenant. Rent of the premises was Rs. 1,000/- with effect from 1.4.1998. He has been paid only a sum of Rs. 12,000/- towards rent with effect from 31.3.1998. Earlier rent was Rs. 5,000/- per annum. The rent was enhanced to Rs. 12000/- per annum after making necessary repairs in the premises.

9. Petitioner has appeared as RW-1. He has admitted that respondent was the landlord of the premises. He was Halwai by profession. He was inducted tenant in the year 1964. He was earlier paying Rs. 700/- per annum and thereafter the rent was enhanced from 1991 to Rs. 5,000/- per annum. In his cross-examination, he has admitted that he has paid Rs. 12,000/- on 1.4.1998. He could not state whether the signatures on mark 'X' at point 'A' were his signatures since it was a photocopy.

10. RW-2 Vijay Mohan Singha has deposed that he was also tenant of Jitender Kumar.

11. RW-3 Khem Singh has deposed that Udho Ram used to pay Rs. 5000/- per annum as rent. However, Jitender Kumar asked him to pay Rs. 12,000/- since he was in need of Rs. 12,000/-. In his cross-examination, he has admitted the signatures of Udho on Ex.DX-4 and Ex.DX-5.

12. Petitioner was inducted as tenant by the landlord. Initially, the rent of the premises was Rs. 700/- per annum. It was enhanced to Rs. 5,000/- per annum. However, the same was subsequently enhanced to Rs. 12,000/- per annum as is evident from Annexure Ex.DX-5. Petitioner has signed the receipt though while appearing as RW-1 he has deposed that he was not certain whether he has signed the same or not. RW-2 Vijay Mohan Singha has categorically admitted in his cross-examination that receipts Ex.DX-4 and Ex.DX-5 were signed by Udho Ram. The version of the tenant that since the landlord was in urgent need of Rs. 12,000/-, he paid the same vide Ex. DX-5 cannot be believed. It has come in the evidence of PW-1 that necessary repairs of the premises were undertaken and thereafter the rent was increased. No tangible evidence has been placed on record by the tenant that his signatures were obtained on blank papers. It is evident from the phraseology employed in Ex.DX-5 that sum of Rs. 12,000/- was received as rent for the period with effect from 1.7.1997 to 31.3.1998. Rather tenant has made admission against his own interest that he has paid a sum of Rs. 12,000/- per annum as rent. Tenant has failed to prove that a sum of Rs. 12,000/- was paid as an advance rent beyond 1.4.1998 to 31.3.2000. It was duly proved by the landlord that tenant was in arrears of rent with effect from 1.4.1998 @ 12,000/- per annum. Landlord has duly proved that rent was Rs. 12,000/- per annum and not Rs. 5,000/-, as claimed by the tenant.

13. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Petitioner is directed to deposit arrears of rent as per the order of the appellate authority with the Rent Controller, Solan within 30 days from today with effect from 1.4.1998 till date with interest @ 12% failing which he shall be liable to be evicted from the suit premises. Pending application(s), if any, also stands disposed of. No costs.

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

United India Insurance Co. Ltd. .....Appellant

Versus

Reena Devi & others .....Respondents

FAO No.311 of 2009
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Deceased was 13 years of age at the time of accident- multiplier of '15' is applicable- an amount of Rs.3,60,000/- (Rs.24,000X15) awarded under the head 'loss of dependency'- Rs.10,000/- each awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses' - total compensation of Rs. 4 lacs awarded. (Para-4 to 7)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120.

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

For the respondents: Nemo for respondents No.1 to 4.
Mr. Ajay Sharma, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 26th March, 2009, passed by the Motor Accident Claims Tribunal-II, Fast Track Court, Hamirpur (H.P.), (for short, "the Tribunal") in MAC Petition No.1 of 2008, titled Reena Devi vs. Karanbir & others, whereby a sum of Rs.4,25,000/- alongwith interest at the rate of 6% per annum came to be awarded as compensation in favour of the claimants (for short the "impugned award").

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

3. Only the insurer has questioned the impugned award on the ground of adequacy of compensation. The learned counsel for the appellant has argued that the Tribunal has fallen in error in applying the multiplier of '17'.

4. The age of the deceased was 30 years at the time of the accident and the multiplier applicable was '15' in view of Schedule-II appended to the Motor Vehicles Act, 1988 read with the judgment 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,*** which decision was upheld by the larger Bench of the Apex Court in ***Reshma Kumari & others*** versus ***Madan Mohan and another***, reported in ***2013 AIR (SCW) 3120.***

5. In view of the above, multiplier of 15 is just and appropriate multiplier applicable in the present case. Accordingly, the claimants are held entitled to compensation to the tune of Rs.24,000X15= 3,60,000/- under the head loss of dependency.

6. The Tribunal has awarded Rs.2,000/- under the head 'funeral expenses', Rs.5,000/- under the head 'loss of consortium and Rs.10,000/- under the head 'loss of love & affection, which amount is also on the lower side. In view of the recent judgment of the Apex Court, a sum of Rs.10,000/- each is awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

7. In view of the above discussion, the claimants are held entitled to Rs.3,60,000/- + Rs.40,000/-, (Rs.4,00,000/- in all), alongwith interest as awarded by the Tribunal. The impugned award is modified accordingly.

8. The Registry is directed to release the compensation amount, alongwith interest, in favour of the claimants strictly as per the terms and conditions contained in the impugned award and the excess amount, if any, be refunded to the appellant-insurer through payees' account cheque.

9. The appeal stands disposed of accordingly alongwith all pending CMPs, if any.

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

FAO No.322 of 2009 a/w FAO No.380 of 2009
Date of decision: 09.10.2015

1. FAO No.322 of 2009

Uttam Saini .....Appellant

Versus

Avrosh Kumar alias Sonu & another ..... Respondents

2. FAO No.380 of 2009

Avrosh Kumar alias Sonu & another .....Appellants

Versus

Uttam Saini ..... Respondents

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 20% disability- Tribunal assessed monthly income of the claimant as Rs. 3,000/- per month- applying multiplier of '13' amount of Rs. 93,600/- was awarded towards diminishing of future prospects - Rs. 46,158/- were awarded towards medical expenses- Rs. 10,000/- were awarded towards attendant compensation - Rs. 10,800/- were awarded towards conveyance charges and Rs. 20,000/- were awarded towards Pain and suffering- held, that Tribunal had rightly assessed the compensation- appeal dismissed. (Para-4 and 5)

FAO No.322 of 2009

For the appellant: Mr. Naveen K. Bhardwaj, Advocate.

For the respondents: Mr. J.S. Bagga, Advocate vice Ms. Seema Sood, Advocate.

FAO No.380 of 2009

For the appellants: Mr. J.S. Bagga, Advocate vice Ms. Seema Sood, Advocate.

For the respondent: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of these appeals, the appellants have questioned the award, dated 16th May, 2009, passed by the Motor Accident Claims Tribunal(I) Kangra at Dharamshala, (for short, "the Tribunal") in M.A.C.P. No.66-K/II-2006, titled Uttam Saini vs. Avrosh Kumar alias Sonu & another, whereby a sum of Rs.1,80,558/- alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimant (for short the "impugned award").

2. The claimant has challenged the impugned award by filing FAO No.322 of 2009, for enhancement of compensation, while the owner and the driver have questioned the same by the medium of FAO No.380 of 2009.

3. I have gone through the pleadings and the impugned award.

4. The claimant had sought compensation to the tune of Rs.9,75,000/- as per break-ups given in the claim petition. Admittedly, the claimant has suffered 20% disability. The Tribunal has rightly assessed the compensation in paragraph 18 of the impugned award, which is reproduced herein:

> *"18. The submission of learned Advocate appearing on behalf of the petitioner that petitioner has sustained permanent disability in the motor vehicle accident and is legally entitled for compensation is accepted for the reasons hereinafter mentioned. Although the petitioner has pleaded his monthly income as Rs.50,000/- but no income certificate placed on record from the competent authority of law. The petitioner has also pleaded that he is income tax payee but no income tax return placed on record in support of his version. On the contrary the petitioner has pleaded that he took loan from the Bank to the tune of Rs.33,32,000/- and in such situation I have no option except to assess the*

monthly income of the petitioner on the concept of Minimum Wages Act and I assess his monthly income at Rs.3000/- per month. The petitioner has suffered permanent disability to the extent of 20%. The age of the petitioner at the time of accident was 50 years. Hence, multiplier of 13 is applied and I award the following compensation to the petitioner:-

i)	*Diminishing of future prospects (on the basis of 20% permanent Disability) awarded.....*	*Rs.93,600/-*
ii)	*Medical expenses awarded.....*	*Rs.46,158/-*
iii)	*Attendant compensation awarded.....*	*Rs.10,000/-*
iv)	*Conveyance charges (As per receipts Ex.P-1 to P-9).....*	*Rs.10,800/-*
iv)	*Pain and suffering award.....*	*Rs.20,000/-*
	Total compensation awarded	***Rs.1,80,558/-***

The award amount shall be deposited by the respondents jointly and severally. Issue No.2 is decided in favour of the petitioner and against the respondents."

5. In view of the above discussion, I am of the considered view that the Tribunal has rightly passed the impugned award, has rightly assessed the amount of compensation and has rightly held the original respondents liable to pay the compensation.

6. Having said so, there is no merit in the instant appeals and the same are dismissed. The Registry is directed to release the amount in favour of the claimant, after proper identification.

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

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

Vikram Chand and another .....Appellants

Versus

Bidhi Chand and others ..... Respondents

FAO No.263 of 2008
Date of decision: 09.10.2015

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver of the truck/original respondent No. 2 had driven the vehicle in a rash and negligent manner and had hit the scooter- driver of the scooter died in the accident - an FIR was registered against the deceased and was closed as untraced- therefore, an inference cannot be drawn that accident was the outcome of rash and negligent driving on the part of truck driver- appeal dismissed.

(Para-6 to 8)

For the appellants: Mr.Tara Singh Chauhan, Advocate.
For the respondents: Mr.Ajit Sharma, Proxy Counsel, for respondent No.1.

Nemo for respondent No.2.
Mr.Sanjeev Kuthiala, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 29th February, 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, (for short, the Tribunal) in M.A.C. Case No.107 of 2004, titled Vikram Chand and another vs. Bidhi Chand and others, whereby the claim petition filed by the claimants (appellants herein) came to be dismissed, (for short, the impugned award).

2. The precise case of the claimants before the Tribunal was that the driver of truck bearing No.HP-22-4666, namely, Raj Kumar, (original respondent No.2), had driven the said truck rashly and negligently on the night intervening 12/13.12.2003, at about 12.35 A.M., and hit the scooter bearing registration No.CH-01A-3918, being driven by Manmohan, near I.P.H. Office on NH-21, as a result of which the said Manmohan sustained injuries and lateron succumbed to the same. Thus, the claimants, being the widow and the son of the deceased, had filed the Claim Petition claiming compensation to the tune of Rs.25.00 lacs, as per the break-ups given in the claim petition.

3. The claim petition was resisted by the respondents, by filing replies. The Tribunal, after examining the pleadings of the parties, framed the following issues:

> *"1. Whether Manmohan alias Goldy has died in an accident due to the rash and negligent driving of respondent No.2, driver of truck No.HP-22-4666? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the petition is bad for non-joinder and mis-joinder of necessary parties? OPR*
>
> *4. Whether respondent No.2 was not having a valid and effective driving licence at the time of accident, if so, its effect? OPR-3*
>
> *5. Whether respondent No.2 was plying the vehicle without valid documents i.e. R.C., R.P., fitness certificate and valid insurance, as alleged? OPR-3.*
>
> *6. Whether the accident took place due to the contributory negligence on the part of respondent No.2 and deceased person? OPR-3.*
>
> *7. Relief."*

4. Parties led evidence. The Tribunal, after examining the evidence, decided Issues No.1 and 6 against the claimants and has not returned findings on issue No.2. The Tribunal has also decided issues No.3 to 5 in the negative. I wonder why the Tribunal has returned findings on issues No.3 to 5 since these issues were to be decided only in case issues No.1 and 6 had gone in favour of the claimants.

5. The Tribunal has discussed the entire evidence in the impugned award, in paragraphs No.10, 11, 12, 13, 14, 15, 16 and 17, and decided issues No.1 and 6 against the claimants.

6. I have gone through the pleadings and the evidence and am of the considered view that the claimants have failed to prove that original respondent No.2 i.e.

driver of the truck, namely Raj Kumar, had driven the truck, in question, rashly and negligently on the fateful day and caused the accident.

7. In fact, in regard to the accident, an FIR bearing registration No.399 of 2003 (Ext.PW-3/A) was registered on 13th December, 2003, at Police Station, Sadar, Bilaspur, against the deceased Manmohan Singh and the said FIR was closed as untraced, as per the order, dated 29th June, 2005, passed by the Chief Judicial Magistrate concerned, (Ext.RW-1/A).

8. Thus, the only inference which can be drawn is that the claimants have not been able to prove that the accident was the outcome of rash and negligent driving on the part of the truck driver, namely, Raj Kumar. Therefore, the findings returned by the Tribunal merit to be upheld and the same are upheld. As a consequence, the appeal is dismissed, along with pending CMPs, if any.

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

Aarti Rana. ...Petitioner.

Versus

Gaurav Rana and others. ...Respondents.

CMPMO No. 365 of 2015
Reserved on: 28.9.2015
Decided on: 12.10.2015

Code of Civil Procedure, 1908- Section 151- Marriage between the parties was solemnized out of which two children were born - petitioner took the children to her paternal home - respondent filed a petition under Section 6 of Hindu Minority and Guardianship Act, 1956 for the custody of minor children – an application under Section 12 was filed, which was allowed and the petitioner was directed to produce the minor children before the Court on 22.8.2015- petitioner filed an application for recall/modification of the order and also for extension of time- a show cause notice was issued to the petitioner as to why contempt proceedings for deliberate disobedience of order of the Court be not initiated against her- it has come on record that respondent No. 1 is in the habit of consuming liquor and taking drugs - he is taking treatment from the rehabilitation centre Panthaghati - congenial atmosphere is of utmost importance while bringing up the children- order for custody of the minor children was passed on the ground that respondent No. 1 is a businessman who has sufficient amount with him- held, that welfare of the child and not affluence of the parents is a paramount consideration while deciding the question of custody- Court had erred in ordering the production of children and dismissing the application filed by the petitioner- petition allowed and order passed by Civil Judge (Senior Division) set aside. (Para-7 to 20)

Cases referred:

Rosy Jacob vs. Jacob A. Chakramakkal AIR 1973, SC 2090
D. Rajaiah vs. Dhanapai and another, AIR 1986 Madras 99
Narinder Kaur vs. Parshotam Singh, AIR 1988 Delhi 359
Sajjan Sharma vs. Dindayal Sharma, AIR 2008 Calcutta 224
Gaurav Nagpal vs. Sumedha Nagpal, (2009) 1 SCC 42
Athar Hussain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654
Mohan Kumar Rayana vs. Komal Mohan Rayana, (2010) 5 SCC 657

Ruchi Majoo vs. Sanjeev Majoo, (2011) 6 SCC 479
Gaytri Bajaj vs. Jiten Bhalla, (2012) 12 SCC 471
Gaytri Bajaj vs. Jiten Bhalla, (2012) 12 SCC 478

For the Petitioner	:	Mr. Anjali Soni Verma, Advocate.
For the Respondents	:	Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the orders dated 18.8.2015 and 24.8.2015 rendered by the Civil Judge (Senior Division), Court No.2, Shimla in case No.6-2 of 2015.

2. "Key facts" necessary for the adjudication of this petition are that marriage between petitioner and respondent No.1 Gaurav Rana was solemnized on 29.1.2007. Two children were born. Son, namely, Yuvraj is approximately 7 years of age and daughter is approximately 5 years of age. The relations between petitioner and respondent No.1 are strained. Petitioner has taken away the children to her parents' house. Children were admitted in Adarsh Senior Secondary School on 14.8.2015. They are pursuing their studies at Pragpur. Respondents filed a petition under section 6 of the Hindu Minority and Guardianship Act, 1956 read with sections 25, 7, 8 and 10 of the Guardian and Wards Act, 1890 for the custody of minor children before the learned Civil Judge (Senior Division). Application under section 12 of the Guardian and Wards Act, 1890 was also filed. Civil Judge (Senior Division) allowed the application on 18.8.2015 and directed the petitioner to produce the minor son Yuvraj before the court between 10.00 A.M. to 4.00 P.M. on 22.8.2015.

3. Petitioner filed an application under section 151 of the Code of Civil Procedure for recalling/modification of order and also application for extension of time to produce the child before the trial court. She also filed an application under sections 9 (1) and 3 of the Guardian and Wards Act, 1890 for returning the petition to be presented before the appropriate court. Petitioner was permitted to file the reply and show cause notice was issued to the petitioner why contempt proceedings for deliberate disobedience of order dated 18.8.2015 be not initiated against her. Hence, the present petition.

4. Ms. Anjali Soni Verma has vehemently argued that orders dated 18.8.2015 and 24.8.2015 are not in accordance with law. She has also argued that while deciding the custody of child, paramount consideration is the welfare of the child.

5. Mr. Sanjeev Bhushan, learned Senior Advocate has supported the orders dated 18.8.2015 and 24.8.2015.

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

7. The marriage between petitioner and respondent No.1 was solemnized on 29.1.2007. Son Yuvraj is 7 years old. He needs constant care and protection by the mother. It has come on record that respondent No.1 is in habit of consuming liquor and taking drugs. He used to go for treatment in habitation centre Panthaghati. Congenial atmosphere is of utmost importance while up-bringing the children. Learned Civil Judge (Senior Division) while ordering the custody of the child to the respondents has opined that Yuvraj

was studying in reputed St. Edwards' School, Shimla and annual examinations are to be held in the month of December. He has also opined that respondent No.1 is a businessman having sufficient means to take care of his son Yuvraj. It is reiterated that it is not affluence of the party which is to be taken into consideration, but the existence of congenial atmosphere is also required to be taken into consideration while deciding the custody of the children. In view of this, the court below has erred in law by directing the production of child in the court on 22.8.2015 and rejecting the application for modification of the order and issuing show cause notice to the petitioner for violation of order dated 18.8.2015. There is no inherent contradiction in the reliefs sought for by the petitioner while moving applications for extension of time as well as for compliance of the order.

8. Their Lordships of the Hon'ble Supreme Court in ***Rosy Jacob vs. Jacob A. Chakramakkal AIR 1973***, SC 2090 have held that whether under one Act or the other the primary consideration governing the custody of the children is the welfare of the children and not the right of their parents. Their Lordships have held as under:

> **[13] Now it is clear from the language of S. 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of hi, person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Court is entrusted with 8 judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leaves little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation, under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree: S. 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years: S. 3 (5). The Court under the Divorce Act would thus be incompetent now to make any order under Ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent-husband under these circumstances he cannot approach the Court uncle, the Divorce Act for relief with respect to the custody of these children and now that these children have ceased to be minors under that Act, the orders made by that Court have also lost their vitality. On this**

reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act: in case this section is not applicable, then the husband contended, that his application (O. P. 270 of 1970) should be treated to be an application under S. 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could get the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under S. 7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that Sections 7 and 17 of that Act also postulate welfare of the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served if they remain in her custody.

[16] The respondent's contention that the court under the Divorce Act had granted custody, of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of a grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also, in our opinion, be much better looked after by his mother than by his father who will have to work hard to make a mark in his profession. He has quite clearly neglected his profession and we have no doubt that if he devotes himself wholeheartedly to it he is sure to find his place fairly high up in the legal profession.

[18] We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patent Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under Section 25 of the Guardians and Wards Act. The directions given by him with respect to access of the parties to their children are also restored."

9. Learned Single Judge of Madras High Court in ***D. Rajaiah*** vs. ***Dhanapai and another***, AIR 1986 Madras 99 have held that under the Hindu Minority and Guardianship Act, 1956 the welfare of the minor children is paramount consideration and the same cannot be measured in terms of money. Learned Single Judge has held as under:

"[3] Before, I approach the question on facts, I would like to delineate and keep in mind the provisions of law, which should form guidelines in matters like this. The two minor children being Hindu Girls, with regard to natural guardianship as such the provisions of Hindu Minority and

Guardianship Act, 1956 (No. 32 of 1956), hereinafter if occasion comes, referred to as Act 32 of 1956, shall first speak. Section 6 of Act 32 of 1956 says that in the case of an unmarried Hindu minor girl, the father and after him, the mother shall be the natural guardian. The mother had gone out of the picture by her demise. The father as such does not suffer any disqualification set forth in the proviso to S. 6 of Act 32 of 1956. Section 13 of Act 32 of 1956 reads as follows:

13(1) "In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

Section 2 of Act 32 of 1956 says that the provisions of the Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890), hereinafter referred to as Act 8 of 1890. Section 17 of Act 8 of 1890, reads as follows:

" 17. Matters to be considered by the Court in appointing guardian.

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and- capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by Act III of 1951.

(5) The court shall not appoint or declare any person to be a guardian against his will."

The rule of Hindu law is that no one other than the father and failing him the mother has an absolute right to have the guardianship, over and custody of an unmarried Hindu minor girl. The Hindu Law recognises primarily the father as the legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contingency. But an unmarried Hindu minor girl if she has not completed the age of 5 years shall ordinarily be in the custody of the mother. As stated above, the mother is not in the picture at all. Furthermore, the minors have passed the age of 5. The first minor has completed the age of 12 and is running the 13th year and the second minor has completed the age of 11 and is running the 12th year. Section 6 of Act 32 of 1956 does not make any substantial alteration in the law on the subject and gives legislative

sanction to the principle well established already. As such, the father could legitimately claim the right to have the guardianship over and custody of his unmarried minor girls. In this context, S. 19 of Act 8 of 1890 can also be adverted to, when it countenances, that if the father of the minor is alive, no other guardian can be appointed, unless, in the opinion of the Court, the father is not fit for appointment, The father as natural guardian is primarily entitled to the custody of his minor children unless there are overwhelming circumstances to the contrary. It is true that there is an appreciable difference between custody and guardianship, for guardianship is a more comprehensive and a more valuable right than mere custody. The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor. The Court is bound to take into consideration all the facts and circumstances of the case, bearing in mind that the pivotal factor is the benefit and well being of the minor. That the dominant factor for consideration of the Court is the welfare of the child, has found statutory footing both in S. 17(l) of Act 8 of 1890 and S. 13 of Act 32 of 1956, Both the provisions emphasize that the powers of the Court are to be exercised for the welfare of the minor, which should be the paramount consideration. The' rule of Hindu law recognising the father to be the guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors. The father being primarily entitled to the guardianship over and custody of his unmarried minor daughters, it is for the maternal grandfather, who wants to maintain a contrary position, to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of, the father. The father can be deprived of such rights only if the facts and circumstances of the case warrant it. Keeping in mind the above salient principles of law, this Court has to examine the facts of the case to find out as to whether' strong and convincing circumstances have been made out against the father to take away from him the guardianship and the custody annexed to it of his unmarried minor daughters or to deny him the custody of his unmarried minor daughters, maintaining guardianship with him. I am visualising the latter contingency because in the course of arguments advanced on behalf of the maternal grandfather, it was stated that though the guardianship of the father need not be disturbance yet the custody of the two minor children should be permitted to be with the maternal grandfather.

[7] Learned counsel for the maternal grandfather would urge that the fact that the two minor children have remained in the maternal grandparents house from May, 1982 should not be lost sight of and if at this juncture they are to be snatched away from that atmosphere, which would be against their will, it will bring about a trauma in their mind and will not behave well for the interests of the minors. It is true that the paramount consideration that should weigh with the Court is the welfare of the minor children. From the bare fact, for two years and more in the past the two minor children happened to be in the custody of the maternal grandparents, it is not possible to say that such a custody should be continued in preference to the legitimate claims of

the father, on the ground of paramount interests of the two minor children. The financial affluence of the maternal grandparents should not be the sole criterion. It is not claimed that the father is a man of no means and he could not maintain and bring up his two minor children comfortably and according to his status. On the other hand, as adverted to earlier, the evidence of the maternal grandfather examined as P.W.1 points out a different position; and makes out that the father will cater to all the comforts of his minor children and bring thin up as good as the maternal grandparents. The coming over of the mother of the two minors for treatment at Madurai, her demise at Madurai and the children coming along with her earlier to that and staying with the maternal grandparents could only be treated as temporary phases, and they cannot govern as paramount factors with regard to the welfare of the minors. After all, they are the children of the father and when the Court has found that the father has not suffered any disqualification from being a guardian and custodian of his two minor children and nothing has been brought to the notice of the Court that it will not be desirable to leave the guardianship and custody of the two inaner children with the father, the situation that the maternal grandparents would look after the children in a more better and affluent circurnstances is not a relevant factor that should weigh with the Court to deny the legitimate parental right of the father to the guardianship and custody over his two minor children. A proposition that wherever affluence and luxury are prevailing that should be the proper atmosphere for minor children to be brought up, denying the legitimate rights of the parents and lawful guardians, would be a dangerous one. Primarily, the children should be in the custody of their parents, who are their lawful guardians. They cannot expect a status and upbringing de hors the status of the parents while they are being brought up by them. No one else could be allowed to snatch away the children from the parental household on the ground that they could afford luxury and affluence to the children. The welfare of the minor children is not to be measured only in terms of money and physical comforts. The word "welfare7' must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. The two minor children are girls. Shortly they will come up age and they will have to be married. In our Indian society and in particular Hindu society any body seeking matrimonial alliance will certain give due importance to the girls living with the parent and a situation, where a girl is living away from her parent will be looked at askance, and may draw assertive remarks too."

10. Learned Single Judge of Delhi High Court in ***Smt. Narinder Kaur*** vs. ***Parshotam Singh***, AIR 1988 Delhi 359 has held that merely mother is not having any income of her own is no ground to deprive her of the custody of the minor child. Learned Single Judge has further held that court has power to modify order if circumstances so demand during pendency of proceedings. Learned Single Judge has held as under:

"[5] The father also made allegation against the mother that she was of unsound mind. These allegations were also made before Mrs. Kanwal Inder, the then Guardian Judge. She observed in her order that the mother had been appearing before her and making submissions and that there was nothing in her conduct from which it could be inferred that

the mother was suffering from any mental disorder disentitling her to the custody of her own child. During the pendency of this appeal on an application (CM 4365/86) Leila Seth, J. in her order dated 26.5.87 also observed that the mother had been attending the proceedings in Court and appeared to be well behaved. Before me also the mother had been appearing on various dates and she appeared to be quite normal. Merely that mother is not having any income of her own is no ground to deprive her of the custody of the minor child. No amount of wealth is substitute for the love, affection and care which a mother can bestow on her infant child. Further merely because the parents of the mother are not affluent people is again no ground to deprive the mother of the custody of the child. If the mother is not having an independent income for her maintenance and that of the child father can certainly be asked to give that maintenance but he cannot use this as a handle to deprive the mother of the custody of the child. I cannot believe the father when he says that the mother did not breast feed the child. It just appears to be his imagination.

[7] It was contended by Ms. Santosh Kaira learned counsel for the appellant that the learned Guardian Judge had no jurisdiction to review his order and also that even assuming if he had such jurisdiction the case did not fall with any of the clauses under Rule I of Order 47 of the Code of Civil Procedure. She said that her application for grant of interim custody of the child was under Section 151 of the Code. Section 12 of the Act provides that a court may make such order for the temporary custody and protection of a minor as it thinks proper. It is immaterial if the application is labelled under Section 151 of the Code. If the court has power under Section 12 of the Act for grant of temporary custody during the pendency of the proceedings it will have jurisdiction as well to modify that order if the circumstances so demand during the pendency of the proceedings. The Court must be deemed to possess such powers by necessary intendment and it cannot, therefore, be said that the order for interim custody of the child cannot be modified or varied though perhaps the review may not be the proper word but effect remains the same. Then Mr. Mitra learned counsel for the father said that if that be so no appeal could be filed against an order made under Section 12 of the Act. In this connection be referred to Section 47 of the Act. An order under Section 12 is not one of the orders against which an appeal would lie. This submission appears to be correct but then it is a fit case to exercise iurisdiction under Article 227 of the Constitution of India which I do."

11. Leaned Single Judge of Calcutta High Court in ***Sajjan Sharma*** vs. ***Dindayal Sharma***, AIR 2008 Calcutta 224 has held that paramount welfare of child is the only criterion which should be considered while deciding application, irrespective of the applicant and his relation with the child. Learned Single Judge has further held that environment and surroundings conducive for child to grow and become a good human being should be guiding factor for deciding application under section 12 of the Guardians and Wards Act, 1890.

12. Their Lordships of the Hon'ble Supreme Court in ***Gaurav Nagpal*** vs. ***Sumedha Nagpal***, (2009) 1 SCC 42 have held that paramount consideration of the court in determining the question as to who should be given custody of a minor child, is the welfare

of the child and not the rights of the parents. Their Lordships have further held that there should be proper balance between rights of the respective parents and the welfare of the child. Their Lordships have held as under:

> **29. In Halsbury's Laws of England, Fourth Edition, Vol. page 217 it has been stated;**
>
> **"Where in any proceedings before any Court the custody or upbringing of a minor is in question, then, in deciding that question, the Court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."**
>
> **(emphasis supplied)**
>
> **It has also been stated that if the minor is of any age to exercise a choice, the Court will take his wishes into consideration. (para 534; page 229).**
>
> **[30] Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.**
>
> **[43] The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.**
>
> **[46] In Rosy Jacob Vs. Jacob A. Chakramakkal, 1973 (1) S.C.C. 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.**
>
> **[47] Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, 1982 (2) S.C.C. 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.**
>
> **[50] When the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and**

above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others."

13. Their Lordships of the Hon'ble Supreme Court in ***Athar Hussain*** vs. ***Syed Siraj Ahmed and others***, (2010) 2 SCC 654 have held that in matters of custody the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Their Lordships have further held that while deciding the question of interim custody, the court must be guided by the welfare of the children since section 12 of the Guardians and Wards Act, 1890 empowers the court to make any order as it deems proper. Their Lordships have held as under:

> **30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.**
>
> **[36] Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.**
>
> **[37] The appellant placed reliance on the case of R.V. Srinath Prasad v. Nandamuri Jayakrishna, 2001 AIR(SC) 1056. This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held:**
>
> **"The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom their father is staying and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."**
>
> **What is important for us to note from these observations is that the Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.**

[38] Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of Mausami Moitra Ganguli v. Jayant Ganguli, 2008 AIR(SC) 2262. This Court held:

"We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him."

[39] After taking note of the marked reluctance on part of the boy to live with his mother, the Court further observed:

"Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

14. Their Lordships of the Hon'ble Supreme Court in ***Mohan Kumar Rayana*** vs. ***Komal Mohan Rayana***, (2010) 5 SCC 657 have held that welfare of the minor is paramount consideration. Their Lordships have further held that though petitioner father was fond of the child and concerned about her welfare and future, but in view of his business commitments not right or even practicable to disturb status quo regarding the child's custody.

15. In the instant case children are with the mother and it would not be proper to disturb the company and surroundings of the children.

16. Their Lordships of the Hon'ble Supreme Court in ***Ruchi Majoo*** vs. ***Sanjeev Majoo***, (2011) 6 SCC 479 have laid down the tests for determining jurisdiction under section 9 of the Guardians and Wards Act, 1890 as under:

[24] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

17. Their Lordships of the Hon'ble Supreme Court in ***Gaytri Bajaj*** vs. ***Jiten Bhalla***, (2012) 12 SCC 471 have held that the interest and welfare of the minor should be treated as being of paramount consideration. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. Their Lordships have held as under:

[14] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily

residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

18. Their Lordships of the Hon'ble Supreme Court in ***Gaytri Bajaj*** vs. ***Jiten Bhalla,*** (2012) 12 SCC 478 have held as under:

> **[6] In the aforesaid facts and circumstances, we feel that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.**
>
> **[8] In the relevant facts and circumstances of the case, we are convinced that the interest and welfare of the children will be best served if they continue to be in the custody of the father. In our opinion, at present, it is not desirable to disturb the custody with the father. However, we feel that ends of justice would be met by providing visitation rights to the mother. In fact, during the hearing on 12.12.2011, Ms. Indu Malhotra, learned senior counsel for the petitioner-wife represented that if such visitation rights, namely, visiting her children once in a fortnight is ordered that would satisfy the petitioner-wife. Learned senior counsel also represented that if the said method materializes, the petitioner-wife is willing to withdraw all civil and criminal cases filed against the respondent-husband which are pending in various courts.**

19. In the present case since serious allegations have been made by the petitioner against respondent N.1 of his being drug addict, the Court is of the considered view that the custody of the child should be with the mother.

20. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Orders dated 18.8.2015 and 24.8.2015 are set aside. Learned Civil Judge (Senior Division) is directed to conclude the proceedings within six months from today. The parties through their counsel are directed to appear before the trial court on 26.10.2015. Pending application(s), if any, also stands disposed of. No costs.

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

Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited and others ...Appellants.

Versus

Shri Kartar Singh ...Respondent.

LPA No. 104 of 2014
Decided on: 12.10.2015

Constitution of India, 1950- Article 226- Petitioner was holding the additional charge of Junior Accountant- he prayed for the relief of special pay which was denied- he filed a writ

petition which was allowed- appeal was preferred against the order of the writ court- held that petitioner had discharged the additional duties and is entitled to special pay in terms of bye-laws- writ petition dismissed. (Para-2 to 5)

For the appellants: Mr. Dhruv Shaunak, Advocate.
For the respondents: Ms. Archana Dutt, Advocate.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to the judgment and order, dated 30.10.2012, made by the Writ Court in CWP No. 5660 of 2012, titled as Shri Kartar Singh versus H.P. Horticultural Produce Marketing & Processing Corporation Ltd. and others, whereby the writ petition came to be allowed and the writ respondents were directed to grant special pay to the writ petitioner-respondent herein in terms of Chapter 4.13 of the Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Limited, Employees Service Bye-laws (hereinafter referred to as "Service Bye-laws") (for short "the impugned judgment").

2. The writ petitioner-respondent herein was holding the additional charge of Junior Accountant with effect from February, 1994 till 31.03.1996, had prayed for release of special pay in terms of the Service Bye-laws, was denied by the writ respondents-appellants herein, constraining him to file writ petition, which was allowed vide the impugned judgment.

3. We have gone through paras 2 and 3 of the impugned judgment, which do disclose that the writ petitioner-respondent herein is entitled to special pay for the period he has discharged the additional duties, in terms of Chapter 4.13 of the Service Bye-laws.

4. It is apt to reproduce Chapter 4.13 of the Service Bye-laws herein:

> *"4.13. Special pay at a rate not exceeding 10% of presumptive pay to be determined by the appointing authority may be allowed to a person holding charge of an independent post in addition to his own duties for a period exceeding one month."*

5. Learned counsel for the appellants argued that the writ petitioner-respondent herein is not entitled to special pay in terms of revised pay, which is misconceived. The writ petitioner-respondent herein is entitled to special pay as per the pay scale, which was existing during such period.

6. Having said so, the impugned judgment is legal and speaking one, needs no interference. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

****

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

Tej Ram .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 190 of 2015
Reserved on: October 09, 2015.
Decided on: October 12, 2015.

N.D.P.S. Act, 1985 - Section 20- Accused was apprehended with the bag- bag was checked and was found to be containing 1.150 grams of charas- independent witness did not support the prosecution version- testimonies of police officials are contradictory- PW-13 admitted that accused was told that his personal search can be conducted in the presence of gazetted officer, police or Magistrate- there is no provision of search before police official- this amounted to violation of Section 50- no entry was made in the Malkhana register regarding the taking out of the case property for production before the Court or re-depositing the same- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-15 to 22)

Cases referred:
Suresh and others vrs. State of Madhya Pradesh, (2013) 1 SCC 550
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345

For the appellant: Mr. Vinay Thakur, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 10.4.2015, rendered by the learned Special Judge, Chamba, H.P, in Sessions Trial No. 3 of 2013 (44/13), whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 23.12.2012, at 6:30 AM, ASI Rajinder Kumar, I.O Police Post Sultanpur, alongwith HC Raghubir Singh, Const. Dalip Kumar and HHG Harsh Jasrotia and I.O. kit was present at Bataluan Mor near Hanuman Mandir in connection with Nakabandi. In the meantime, Sanjeev Kumar son of Taru Ram, resident of Mangla and Harish Chander son of Tara Chand resident of Obri, Chamba also came there. One person was noticed coming from Sultanpur side who was on his way towards Mangla side. On noticing the police party, he turned back and started running. The person was holding a bag in his right hand, which raised suspicion in the mind of ASI Rajinder Kumar. He suspected that the person might be carrying some contraband or narcotic drugs. The person was nabbed by the police party at a distance of 40 meters alongwith the bag. The person disclosed his name as Tej Ram. ASI Rajinder Kumar in the presence of witnesses Sanjeev Kumar and Harish Chander told accused that his bag was to be searched and that he has a legal right to be searched in the presence of a Magistrate or a Gazetted Officer. Accused told that he is illiterate and only knows how to sign. He told the police that he wanted to be searched in the presence of a Gazetted Officer. The Addl. S.P., Chamba, Kulwant Singh was informed and requested to visit the spot. A consent memo was prepared in this regard. The police officials including the witnesses gave their personal search to the accused and on the direction of Addl. S.P., the bag of the accused was checked which was found to be containing carry bag having black substance in it. It was weighed. It weighed 1 kg 150 grams. Thereafter, the recovered contraband was

put in the same carry bag and the other bag in the same manner as it was recovered which was packed in a cloth parcel and sealed with six seals of impression "T". NCB forms in triplicate were filled in. Specimen of seal "T" were retained on a separate cloth piece. The seal "T" after its use was handed over to witness Harish Chander. The charas was taken into possession. Rukka was prepared and sent to the Police Station through Const. Dalip Kumar for registration of a case against the accused. FIR was got registered. The case property was produced before ASI Bishambhar Singh for resealing. ASI Bhishambhar Singh resealed the parcel with seal impression "S" and prepared reseal memo. He deposited the case property with MHC Pawan Kumar. The case property was sent to FSL Junga. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 16 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. His defence was of simplicitor denial. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Vinay Thakur, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, for the State has supported the judgment of the learned trial Court dated 10.4.2015.

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

6. PW-1 Sanjeev Kumar, deposed that on 23.12.2012, at about 7:00 AM, he was going to bring vegetable on his scooter. When he reached near Bhataluna Nalla, he found that the police had laid a Naka. In the mean time, one Harish Kumar, who was on morning walk, also came there. He was stopped by the police for checking. The police told him to stop there as they wanted to make him as witness. Nothing had happened in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that on 23.12.2012, at about 6:30 AM, the accused came from Obri Mohalla towards Bhatalwan temple. He denied that on seeing the police, the accused tried to escape from the spot. He denied that he was carrying a Thela (bag) in his right hand. He also denied the suggestion that the accused was apprehended by the police at a distance of 40 meters from the place of Naka. He also denied the suggestion that the accused disclosed his name as Tej Ram son of Pamtu. He also denied the suggestion that the police gave any option for search to the accused in his presence. He also denied the suggestion that the I.O. informed Addl. S.P, Chamba. He also denied the suggestion that Addl. S.P. Kulwant Singh gave option to the accused for his search. He also denied the suggestion that the bag which the accused was carrying was searched in their presence. He also denied portion D to D of his statement mark 'A" to be correct. According to him, he has not made any such statement. Neither the bag was searched nor the carry bag was found inside the bag. The bag was not opened in their presence. He also denied the suggestion that the carry bag was opened in their presence and cannabis in the shape of sticks was found in the carry bag. He also denied the suggestion that the recovered cannabis was again put in the same carry bag and the same was put in a parcel and sealed with six seals of seal "T". He admitted his signatures on memo Ext. PW-1/A. He identified his signatures at Mark "B". His signatures were obtained by the police of Police Post Sultanpur. No personal search of the accused was taken by the police in his presence. The case property was produced by the learned P.P. while recording the statement of PW-1 Sanjeev Kumar. In his cross-examination, by the learned Advocate appearing on behalf of the accused, he admitted that he was acquainted with the police people.

7. PW-2 Harish Chander was also declared hostile. He categorically deposed in his examination-in-chief that nothing has happened in his presence. He denied the suggestion that on 23.12.2012, at about 6:30 AM, the accused was coming from Obri Mohalla towards Bhatalwan temple. He denied that on seeing the police, the accused tried to escape from the spot. He denied that he was carrying a Thela (bag) in his right hand. He also denied the suggestion that the accused was apprehended by the police at a distance of 40 meters from the place of Naka. He also denied the suggestion that the bag which the accused was carrying was searched in his presence. He denied portion C to C of his statement mark "B". According to him, he has not made any such statement. He also denied that the accused told the police that he was totally uneducated and he could only sign. He also denied that the IO informed the Addl. SP, Chamba about the apprehension of the accused. He also denied that Addl. SP Kulwant Singh gave option to the accused for his search. He also denied that the bag which was being carried by the accused was searched in his presence. He denied portion D to D of his statement mark "B". No statement was made by him before the police. He also denied that in his presence bag was searched and carry bag was found inside the bag which was tied. He also denied that cannabis was found in his presence in the shape of sticks. He also denied that the charas was weighed in their presence and it weighed 1 kg. 150 grams. He also denied that the recovered charas was again put in the same carry bag. He also denied that the recovered charas was sealed with six impressions of seal "T". He also denied that the sample of seal "T" was taken on cloth piece by the police and seal after use was handed over to him. He also denied that the recovered charas was taken into possession vide memo Ext. PW-1/A. He identified his signatures on mark "B" and his signatures were obtained at Police Post Sultanpur. In his cross-examination by the learned Advocate appearing on behalf of the accused, he admitted that he has been made as witness by the police people in number of cases.

8. PW-3 HC Raghubir Singh deposed that on 23.12.2012, he alongwith Const. Dalip Singh HHG Harash Jasrota accompanied ASI Rajinder Kumar in his personal vehicle for Nakabandi alongwith IO kit and home light and laid Naka at Bhatalwan morh near Hanuman Mandir at 6:30 AM. The accused was seen coming from Obri Mohalla side. He tried to run away. He was carrying one Thela (bag) in his right hand. On suspicion, he was nabbed and enquiry was made. The accused was informed of his legal right that he has a right to give personal search and the search of his Thela in the presence of Magistrate or a Gazetted Officer. The accused told that he is illiterate and only knows to sign and he wanted to give his personal search and that of bag (Thela) to the Gazetted Police Officer. Consent memo Ext. PW-3/A was prepared. It was signed by Sanjeev Kumar and Harish Chander in his presence. He also signed the same. Thereafter, Addl. SP Kulwant Singh through wireless set was informed and he reached the spot. The bag was searched. It contained charas. It weighed 1 kg 150 grams. The sealing proceedings were completed on the spot and NCB forms in triplicate were also filled in. The case property was also produced while examining PW-3 HC Raghubir Singh. In his cross-examination, he deposed that first of all search of bag (Thela) of the accused was taken and personal search was taken at the time of his arrest. When the personal search of the accused was taken, the accused was not informed that he has legal right to be searched before the Gazetted Officer or Magistrate.

9. PW-9 HHC Karam Singh deposed that on 23.12.2012 at about 11:00 AM, ASI Rajinder Kumar produced the case property stated to be containing 1 kg 150 grams charas sealed with six seals of seal "T" along with NCB forms and sample seal before ASI Bishambhar Singh for resealing. In his presence, ASI Bishambhar Singh resealed the parcel with three seals of seal "S" and filled in the NCB forms and memo Ext. PW-9/A was prepared.

10. PW-10 HC Pawan Kumar deposed that on 23.12.2012, ASI Bishambhar Singh handed over to him one parcel stated to be containing 1 kg 150 grams charas, sealed with six seals of seal "T" and three seals of "S" alongwith sample seals, NCB forms, recovery memo and he entered the same in Malkhana register at Sr. No. 723. He sent these articles to FSL Junga through Constable Krishan Kumar.

11. PW-11 Krishan Kumar deposed that he took the samples to FSL Junga and deposited the same on 24.12.2012.

12. PW-13 ASI Rajinder Kumar deposed the manner in which the accused was seen, apprehended, charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot. In his examination-in-chief, he has categorically deposed that he told the accused that he might be carrying some suspicious substance and his search was required to be taken and he could give his search in the presence of Gazetted Officer, him or the Magistrate. The accused told him that he want to give his search before the higher officer of the Police. He prepared rukka Ext. PW-13/B. It was sent to the Police Station through Const. Dalip Kumar.

13. PW-14 ASI Bishambhar Dass deposed that the case property was produced before him for re-sealing. He resealed the same.

14. PW-15 Addl. S.P. Kulwant Singh deposed that on 23.12.2012, he received a message through wireless that ASI Rajinder Kumar, Incharge PP Sultanpur has detained one person namely Tej Ram at Bhatalwan morh near Hanuman temple. He proceeded towards the spot. He reached the spot at about 7:00 AM. ASI Rajinder Kumar told him that accused has been detained by the police party he suspected to have some contraband in his bag. He gave his introduction to Tej Ram He ordered ASI Rajinder Kumar to conduct search of the bag of the accused. Search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he deposed that his statement under Section 161 Cr.P.C. was recorded. He got recorded in his statement under Section 161 Cr.P.C that he has ascertained from the accused whether he wanted to be searched before the Gazetted Officer. Confronted with statement mark "Y", wherein it is not so recorded. Volunteered that he had interrogated the accused on his willing for search. He denied that the accused never opted to be searched before the Gazetted Officer.

15. The case of the prosecution has not been supported by independent witnesses PW-1 Sanjeev Kumar and PW-2 Harish Chander. According to them, nothing has happened in their presence. The accused was never apprehended. He was not carrying any Thela (bag). No search of the bag was carried out. The carry bag was not opened in their presence and no cannabis was recovered in their presence. it was not weighed in their presence. It has come in the statement of PW-2 Harish Chander that he has appeared as witness in many cases.

16. PW-3 HC Raghubir Singh has admitted specifically in his examination-in-chief that the accused was informed about his legal right that he has right to give personal search and that of bag (Thela) in the presence of Magistrate or Gazetted Officer. In his cross-examination, he has admitted that when the personal search of the accused was taken, the accused was not informed that he has right to be searched before the Gazetted Officer or Magistrate. There is a major contradiction in his statement.

17. PW-13 ASI Rajinder Kumar has in his examination-in-chief, categorically deposed that he told the accused that he might be carrying some suspicious substance and his search was required to be taken and he could give his search in the presence of Gazetted Officer, him or the Magistrate. The accused is required to be informed of his legal right to be

searched either before the Executive Magistrate or before the Gazetted Officer and not before the Police Officer. There is no provision of third option under the ND & PS Act to be given to the accused. Since the charas has been recovered from the bag, it was not necessary to conduct the personal search of the accused. However, it is evident from the statement of PW-3 HC Raghubir Singh and PW-13 ASI Rajinder Kumar that the personal search of the accused was also undertaken. He was to be told specifically that he has legal right to be searched before the Executive Magistrate or the Gazetted Officer. PW-3 HC Raghubir Singh, as noticed hereinabove, in his cross-examination has admitted that when the personal search of the accused was taken he was not informed that he has right to be searched before the Gazetted Officer or Magistrate. Similarly, illegality has been committed by PW-13 ASI Rajinder Kumar while asking the accused at the time of his personal search as to whether he wanted to be searched before the Magistrate, Gazetted Officer or before him.

18. Their lordships of the Hon'ble Supreme Court in the case of ***Suresh and others vrs. State of Madhya Pradesh,*** reported in ***(2013) 1 SCC 550,*** have held that in a case where the accused were merely asked whether they would offer their personal search to police officer concerned or to gazetted officer and the appellants gave their consent for their personal search by police officer concerned, it will amount to non-compliance of Section 50(1) of the ND & PS Act. Their lordships have held as follows:

> "16) The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev singh's case.
>
> 17. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernadez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law."

19. In the instant case the accused was to be apprised of his legal right to be searched either before the Gazetted Officer or before the Magistrate and not before the Police Officer.

20. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held that if merely a bag is carried by person is searched without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

21. The case property was produced while recording the statement of PW-1 Sanjeev Kumar, PW-3 HC Raghubir Singh and PW-13 ASI Rajinder Kumar. The extract of copy of the malkhana register is Ext. PW-10/A. There is entry of the deposit of the contraband on 23.12.2012 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case

property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back. It is necessary to keep the case property in safe custody from the date of seizure till its production in the Court in ND & PS cases.

22. The prosecution has failed to prove the case against the accused for the commission of offence under Section 20 of the N.D & P.S., Act.

23. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 10.4.2015, rendered by the learned Special Judge, Chamba, H.P., in Sessions trial No. 3 of 2013 (44/2013), is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

****

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

Ram Lal Dogra .....Petitioner.

Versus

State of H.P. .....Respondents.

CRMMO No. 300 of 2015.
Decided on: 13.10.2015.

Code of Criminal Procedure, 1973- Section 446- Petitioner had stood surety for appearance of the accused- accused jumped the bail- he was asked to show cause but he did not appear- Court held that petitioner had nothing to say in the matter and issued warrant to realise the forfeited amount- held, that forfeiture of personal bond is not a condition precedent to forfeiture of the surety bonds- amount of surety bond can be recovered as if it were a fine imposed by the Court. (Para-6 to 9)

Cases referred:

Ram Lal vrs. State of U.P., AIR 1979 SC 1498,

Roshan Lal vrs. Krishan Lal and another, 1991 Cri. L.J. 428

Kopparakandathil Narayanan and others vrs. The Distt. Collector, Kannur and others, 1993 Cri. L.J. 3718

For the petitioner: Mr. Virender Singh, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 1.9.2015, rendered by the learned Special Judge -III, Solan in case No.67 ASJ-II/4 OF 2015.

2. Key facts, necessary for the adjudication of this petition are that the petitioner stood surety for the accused, namely, Hukam Chand before the trial Court. The accused jumped over the bail and did not put his presence before the trial Court. The proceedings were initiated against the petitioner under the relevant provisions of the Code of Criminal Procedure. The petitioner has not placed on record the entire jimni orders on record but it is evident from order dated 27.8.2014 placed on record that proceedings under Section 446 Cr.P.C. were initiated against the petitioner and he was not present on that date. The case was repeatedly called but none appeared on his behalf. The learned trial Court came to the conclusion that since the petitioner has not put in appearance, he has nothing to say in the matter, therefore, appropriate warrant to realize the forfeited amount was issued against him and report was called for 13.10.14. The matter was taken up on 1.12.2014. Neither the penalty amount was paid nor necessary warrant to realize the forfeited amount was issued. The matter was to come up on 17.1.2015. The matter was adjourned on 17.1.2015 for 13.2.2015. In these circumstances, the trial Court was constrained to issue warrant of attachment to the District Collector and the report was called for 16.4.2015. The matter again came up on 1.6.2015. The petitioner who was present on the previous date of hearing was not present. The case was repeatedly called, however, there was no appearance and appropriate warrant to realize forfeited amount of Rs. one lac was issued and the report was called for 14.7.2015. The petitioner has shown his inability to pay the surety amount. The matter was ordered to be listed on 1.9.2015.

3. The learned trial Court issued warrant under Section 421 Cr.P.C. to the District Collector to realize the amount of the penalty imposed against the petitioner in the sum of Rs. one lac from his moveable and immoveable property and arrears of land revenue. Thereafter, the District Collector was directed to deposit the amount before the Court on the next date of hearing i.e. 5.10.2015. The warrant issued under Section 421 Cr.P.C was not received back after compliance. Notice was issued to the District Collector why he failed to execute the warrant in accordance with law and why action shall not be initiated against him as per law. The matter was ordered to be taken up on 17.10.2015. Hence, this petition.

4. Mr. Virender Singh, Advocate, has vehemently argued that proceedings initiated against the petitioner under Section 421 Cr.P.C are concerned with the levy of fine and is only meant for the offender who has been sentenced to pay fine. He then contended that the petitioner could not appear due to old age. On the other hand, Mr. Parmod Thakur, Addl. AG, has supported the order of the learned trial Court.

5. I have heard the learned counsel for the parties and has also gone through the records and orders of the case, carefully.

6. It is evident from the facts, enumerated hereinabove, that the petitioner has failed to produce the accused. He was given repeated opportunities to file reply to the show-cause notice as to why the bail bonds be not forfeited. The warrant of attachment has been

issued to the District Collector to realize the forfeited amount. The District Collector has failed to comply with the orders of the Court, including order dated 1.9.2015.

7. Their lordships of the Hon'ble Supreme Court in the case of ***Ram Lal vrs. State of U.P.,*** reported in ***AIR 1979 SC 1498,*** have held that forfeiture of personal bond of accused is not a condition precedent to forfeiture of bonds of sureties. It has been held as follows:

> "3. Section 499(1) of the Code of Criminal Procedure Code 1898 was in the following terms:
>
> "Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such persons shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be".
>
> Now, this provision contemplated the execution of a bond by the accused, and by the sureties. The provision did not imply that a single bond was to be executed by the accused and the sureties, as it were, to be signed by the accused and counter signed by the sureties. Form No. 42 of Schedule V, Code of Criminal Procedure, 1898, was as follows:
>
> "XLII-bond and bail-bond on a preliminary Inquiry before a Magistrate.
>
> (See Sections 496 and 499) I, (name), of (place), being brought before the Magistrate of (as the case may be charged with the offence of, and required to give security for my attendance, in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge, and, should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me; and, in case of my making default, herein, I bind myself to forfeit to Government the sum of rupees Dated this day of 19 (Signature) I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and, in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Government the sum of rupees Dated this day of 19 (Signature)"
>
> The undertaking to be given by the accused as may be seen from form No. 42 of Schedule V was to attend the Court on every day of hearing and to appear before the Court whenever called upon. The undertaking to be given by the surety was to secure the attendance of the accused on every day of hearing and his appearance before the Court whenever called upon. The undertaking to be given by the surety was not that he would secure the attendance and appearance of the accused in accordance with the terms of the bond executed by the accused. The undertaking of the surety to secure the attendance and presence of the accused was quite independent of the undertaking given by the accused to appear before the Court whenever called upon, even if both the undertakings happened to be executed in the same document for the sake of convenience. Each undertaking being distinct could

be separately enforced. It is true that before a person is released on bail he must execute a personal bond and, where necessary, sureties must also execute bonds. There can be no question of an accused being released on bail without his executing a personal bond. But it does not follow therefrom that if a person is released by mistake without his executing a personal bond the sureties are absolved from securing his attendance and appearance before the Court. The responsibility of the surety arises from the execution of the surety bond by him and is not contingent upon execution of a personal bond by the accused. Nor is the liability to forfeiture of the bond executed by the surety contingent upon the execution and the liability to forfeiture of the personal bond executed by the accused. The forfeiture of the personal bond of the accused is not a condition precedent to the forfeiture of the bonds executed by the sureties. The Calcutta High Court in Sailash Chandra Chakraborty v. The State (supra) and single Judge of the Allahabad High Court in Brahma Nand Misra v. Emperor, (supra) proceeded on the assumption that the bond executed by the accused and the sureties was single and indivisible and if the accused did not join in the execution of the bond, the bonds executed by the sureties alone were invalid. We do not find any warrant for this assumption in Section 499 of the Criminal Procedure Code of 1898. We are afraid that there has been some confusion of thought by the importation of the ideas of 'debt' and 'surety' from the civil law. As pointed out in Abdul Aziz & Anr. v. Emperor(supra) under Section 499 Criminal Procedure Code, the surety did not guarantee the payment of any sum of money by the person accused who was released on bail but guaranteed the attendance of that person and so the fact that the person released on bail himself did not sign the bond for his attendance did not make the bond executed by the surety an invalid one. In Mewa Ram & Anr. v. State (supra) the difference between a surety under the Code of Criminal Procedure and a surety under the Civil Law was pointed out and the view taken in Abdul Aziz & Anr. v. Emperor (supra) was reiterated. We agree with the view expressed in Abdul Aziz & Anr. v. Emperor, and Mewa Ram & Anr. v. State(supra).

8. In the case of ***Roshan Lal vrs. Krishan Lal and another,*** reported in ***1991 Cri. L.J. 428,*** the learned Single Judge of the Punjab and Haryana High Court has held that the Chief Judicial magistrate is not competent to attach or sell the immovable property under Section 421 Cr.P.C. and for that purpose, he could issue a warrant to the Collector of a District. It has been held as follows:

> "4. After hearing the learned counsel for the parties, I find force in the contentions raised on behalf of the petitioner. The Chief Judicial Magistrate was not competent for attachment or sale of any immovable property under Section 421 of the Code of Criminal Procedure. For that purpose he could issue a warrant to the Collector of the District as provided therein."

9. In the case of ***Kopparakandathil Narayanan and others vrs. The Distt. Collector, Kannur and others,*** reported in ***1993 Cri. L.J. 3718,*** the learned Single Judge of the Kerala High Court has held that Section 446 of the Code of Criminal procedure, 1973 lays down the procedure for forfeiture of bail bonds and for imposition of penalty. It further provides that the amount can be recovered as if it were a fine imposed by the Court. Section 421 lays down the modes of recovery of fine. It has been held as follows:

"2. Section 446 of the Code of Criminal procedure, 1973 lays down the procedure for forfeiture of bail bonds and for imposition of penalty. It further provides that the amount can be recovered as if it were a fine imposed by the Court. Section 421 lays down the modes of recovery of fine. To recover the amount, the Court may issue a warrant to the District Collector authorizing him to realize the amount as an arrear of land revenue from the movable or immovable property or both of the defaulter. The Court has invoked this provision for recovery of the penalty of Rs. 1500/-."

10. Accordingly, there is no merit in this petition and the same is dismissed.

October 13, 2015.

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

The State of H.P. and others .....Appellants.
Versus
Shankar Lal .....Respondent.

LPA No.201 of 2010
Decided on: 13.10.2015.

Constitution of India, 1950- Article 226- Petitioner was regularized as work charge Fitter Grade-II and was regularized against the said post - respondent issued a notice calling upon petitioner to exercise option, whether he wanted to be regularized as Beldar or Mechanic Grade-II - petitioner was never asked whether he wanted to be regularized on the post against which he was working and was regularized i.e. Fitter Grade-II- it was contended that petitioner was wrongly placed in the cadre of Fitter Grade-II, and notice was issued on detection of the mistake - however, the notice does not state that petitioner was wrongly placed in the cadre of Fitter Grade- II by mistake- notice was issued without giving an opportunity of hearing to the petitioner- notice quashed with liberty reserved to the respondent to pass appropriate order after affording the opportunity of hearing to the petitioner. (Para-3 to 6)

For the appellants: Mr.Romesh Verma, Mr.Anup Rattan and Mr.M.A. Khan, Addl.A.Gs.
For the respondent: Mr.Dilip Sharma, Senior Advocate, with Ms.Nishi Goel, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This Letters Patent Appeal is directed against the judgment, dated 23rd July, 2010, passed by a learned Single Judge of this Court in CWP(T) No.5152 of 2008, titled Shankar Lal vs. State of H.P. and others, whereby the writ petition filed by the petitioner (respondent herein) came to be allowed and Annexure A-3 was quashed, (for short, the impugned order).

2. At the very outset, we may reproduce the operative portion of the impugned judgment hereunder:

> *"In view of the above, the petition is allowed, memo dated 25.3.1998 Annexure A-3 is quashed and respondents are directed not to take any action against the petitioner on the basis of memo dated 25.3.1998."*

3. Though the writ petitioner was regularized as work charged Fitter Grade-II w.e.f. 1.1.1994 and was confirmed against the said post w.e.f. 1st January, 1996, the writ respondents issued a notice, dated 25th March, 1998, (Annexure A-3 with the writ petition), calling upon the writ petitioner to exercise option as to whether he wanted to be regularized as Beldar w.e.f. 1.1.1994 or as Mechanic Grade-II w.e.f. 1.1.1999. However, the writ respondents never asked the petitioner whether he wanted to be regularized on the post against which he was working and was regularized i.e. Fitter Grade-II.

4. Mr.Anup Rattan, learned Additional Advocate General, sought to argue that the writ petitioner was wrongly placed in the cadre of Fitter Grade-II and after noticing the said mistake, the Department had issued the notice Annexure A-3. However, a perusal of the notice Annexure A-3, as discussed supra, shows that there was nothing in the said notice that the writ petitioner was wrongly placed in the cadre of Fitter Grade-II, as submitted by the learned Additional Advocate General. Thus, the only inference, which can be drawn, is that the notice Annexure A-3 has been issued without affording an opportunity of hearing to the writ petitioner.

5. In view of the above discussion, we are of the considered view that the learned Single Judge has rightly quashed the notice Annexure A-3.

6. Having said so, we deem it proper to dispose of the present appeal by providing that the writ respondents (appellants herein) are at liberty, if advised, to pass appropriate order after affording an opportunity of hearing to the writ petitioner (respondent herein), of course, as per the law applicable. Ordered accordingly.

7. Pending CMPs, if any, also stand disposed of.

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

Tulshi Ram .....Petitioner.

Versus

The Superintending Engineer, HPPWD and others .....Respondents.

CMPMO No.18 of 2014.
Judgment reserved on: 08.10.2015.
Date of decision: October 13th , 2015.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff contended that he is joint owner in possession with his brother over Khasra No.154- defendants were raising construction over the same- defendants stated that there was a katcha passage constructed by Gram Panchayat which was taken over under the scheme PMGSY for the construction of the road- when construction work reached at Khasra No.155, plaintiff raised objection - it was found during demarcation that road was being constructed on Khasra No. 155 and not on the suit land- an application for interim injunction was dismissed by the trial Court

which order was upheld in appeal- State further averred that proceedings for ejectment have been initiated against the plaintiff for encroachment upon the government land bearing Khasra No. 155/1 over which the plaintiff has raised construction of three stroyed building- held, that once it was established that road was not being constructed on the land of the plaintiff and the plaintiff was facing eviction proceedings for encroaching upon the land where the construction was being raised, no prima facie case was made out- further interest of public is a relevant consideration while granting/refusing injunction- hence, order passed by trial Court does not suffer from any infirmity- appeal dismissed. (Para-6 to 12)

Cases referred:
M.Gurudas and others versus Rasaranjan and others (2006) 8 SCC 367
Mahadeo Savlaram Shelke and others versus Pune Municipal Corporation and another 1995 (1)Scale 158: (1995) 3 SCC 33

For the Petitioner : Mr.Rajiv Jiwan, Advocate.
For the Respondents : Mr.V.K.Verma and Ms.Meenakshi Sharma, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No.1 and 3.
Mr.Rajiv Rai, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned District Judge, Bilaspur, on 31.10.2013 whereby the appeal preferred by the petitioner against the order dated 11.04.2013 passed by the learned Civil Judge (Senior Division), Bilaspur, in an application under Order 39 Rule 1 and 2 CPC readwith Section 151 CPC, was ordered to be dismissed.

The facts, in brief, may be noticed.

2. The petitioner filed a civil suit for permanent prohibitory injunction for restraining respondents No.1 to 3 from interfering in the land comprised in Khasra No.154, Khewat/Khatauni No.11/21 min, measuring 2-12 bighas, situate at Village Suin, Pargana Bahadurpur, Tehsil Sadar, District Bilaspur (hereinafter referred to as suit land). It was averred that the petitioner was joint owner in possession with his brother in the suit land. It was further averred that the respondents were trying to raise construction over the said land. Alongwith the suit, the petitioner had also filed application under Order 39 Rule 1 and 2 CPC for grant of injunction restraining the respondents from doing such acts.

3. On the other hand, the respondents in their written statement denied that any construction was being raised over the suit land. It was averred that there was a 'katcha' passage over Khasra No.155 which was constructed by the Gram Panchayat, Suin Surhar in the year 1995 and this passage had been taken over under the scheme known as 'PMGSY' in the year 2008-2009 for the construction of the road. The respondent No.1 floated tender for this work and the work was awarded to the respondent No.2. It was further averred that when the work reached at Khasra No.155, the petitioner raised objection and after demarcation, it was found that the construction of the road is over Khasra No.155 and not 154.

4. The learned trial Court vide order dated 11.04.2013 dismissed the application under Order 39 Rules 1 and 2 CPC observing that the petitioner had failed to show prima facie case, balance of convenience and irreparable loss which are sine qua non for the grant of interim injunction. The appeal filed by the petitioner against the aforesaid order also came to be dismissed vide order dated 31.10.2013 passed by the learned District Judge, Bilaspur, leading to the filing of the present petition.

5. It is vehemently argued by Shri Rajiv Jiwan, Advocate,that the findings recorded by the learned Courts below are not only against fact but also against law. It is further argued that once the petitioner is indisputably the owner of the suit land comprised in Khasra No.154 as revealed by the revenue record, then there was no reason why the respondents should not be restrained from interfering in his possession qua this khasra number. It is also argued that before proceeding on the merits of the case, the trial Court should have appointed a Local Commissioner to demarcate the land as it was then alone that the issue in controversy could have been settled once for all.

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

6. The factors required to be borne in mind while granting or refusing injunction have been succinctly dealt with by the Hon'ble Supreme Court in ***M.Gurudas and others*** *versus* ***Rasaranjan and others (2006) 8 SCC 367*** in the following manner:-

> "18.While considering an application for injunction, it is well- settled, the courts would pass an order thereupon having regard to:
>
> (i) Prima facie case
>
> (ii) Balance of convenience
>
> (iii) Irreparable injury.
>
> 19. A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhawan that the decision of House of Lords in American Cyanamid v. Ethicon Ltd. (1975) 1 All ER 504 would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.(1999) 7 SCC 1 and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, but we are not persuaded to delve thereinto.
>
> 20. We may only notice that the decisions of this Court in Colgate Palmolive (supra) and S.M. Dyechem Ltd (supra) relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. (2006) 1 SCC 540 stating: (SCC pp. 552-53, paras 36-40)
>
> > "36.The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co. v. Ethicon Ltd.(1975)1 All ER 504 holding: (All ER p.510 c-d)
> >
> > > 'Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a

> discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'

It was further observed (All ER pp.511 b-c & 511j)

> 'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.
>
> * * *
>
> The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy.'

37.We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke (1996) 1 All ER 853] opined: (All ER p.864 c-e)

> 'In many cases before American Cyanamid the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'

38. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. (1999) 7 SCC 1, this Court observed that Laddie, J. in Series 5 Software (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid. In

that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.

39.In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating : (SCC p.591, para 21)

> '21.....Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.'

40.The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.(2001) 5 SCC 73."

21. While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.(See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, United Commercial Bank v. Bank of India (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545, Bina Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd (supra)."

7. Adverting to the facts of the case, it would be noticed that the petitioner is admittedly a co-owner in joint possession alongwith his brother over Khasra No.154 as emerges from the record and his case is that the respondents/defendants are trying to raise construction of road over the suit land. Whereas, the specific case of the respondents/defendants is that the road in question is being constructed over Khasra No.155 that too after taking due demarcation from the revenue authorities and that the demarcation report dated 02.02.2011, prima facie, shows that no road has been laid over the suit land.

8. The respondents-State has specifically stated that the proceedings for eviction under Section 163 of the H.P. Land Revenue Act have already been initiated against the petitioner for encroaching upon the government land comprised in Khasra No.155 and the same is delineated by Khasra No.155/1 measuring 1-0 bigha over which the petitioner has allegedly raised three storeyed building including bathroom and retaining wall.

9. To my mind, once the respondents have, prima facie, established that the road in question is being laid after due demarcation and also that the petitioner is facing eviction proceedings under Section 163 of the H.P. Land Revenue Act and the petitioner having failed to file a counter-document to the documents relied upon by the respondents, then it can conveniently be held that the petitioner has failed to carve out a prima facie case in his favour. Therefore, there is no question of any irreparable loss or injury being caused to him.

10. That apart, the work carried out by the respondents is that of laying down the road which is meant for larger public interest including the petitioner and, therefore, in such circumstance, injunction cannot normally be granted as the right of an individual is subservient to the rights of the public at large. The Court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused by the opposite party and it is not necessary that in all cases even upon establishment of the prima facie case that injunction ought to be granted.

11. The Court is also required to find out whether the plaintiff would be adequately compensated for damages, if injunction is not granted. Public interest is one of the material and relevant considerations in either exercising or refusing to grant injunction. The Courts in the cases where injunctions are to be granted should necessarily consider the effect on public purpose thereof and, therefore, also suitably mould the relief and injunctions as against public purpose, especially, in cases relating to public purpose like construction or widening of the road should normally not be granted. This was so observed in ***Mahadeo Savlaram Shelke and others*** *versus* ***Pune Municipal Corporation and another 1995 (1)Scale 158: (1995) 3 SCC 33***, wherein the Hon'ble Supreme Court held as under:-

> *"7. In Shiv Kumar Chadha v. Municipal Corporation of Delhi (1993) 3 SCC 161, a Bench of three Judges of this Court held that(SCC p. 175, paras 30, 31)*
>
> > *".....A party is not entitled to an order of injunction as a matter of course. Grant of injunction c is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles-ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him."*
>
> *Further*
>
> > *"The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court."*
> >
> > *8. In Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, a Bench of two Judges (in which K. Ramaswamy, J. was a Member) of this Court held that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to*

either party and whether the plaintiff could be adequately compensated if injunction is refused. The Court further held: (SCC p.721, para 5)

> *"The existence of prima facie right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."*

9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession. It is true that the appellants placed reliance in their plaint on resolutions passed by the municipality on 11-11-72 and 29-11-72. A reading of those resolutions would prima facie show that possession would be taken where the acquisition proceedings have become final and land acquisition proceedings would not he pursued where award has not been made as on the date of the resolutions. In this case since the acquisition proceedings have become final, then necessarily possession has to be taken by the Corporation for the public purpose for which the acquisition was made. In that context the question arises whether the appellants can seek reliance on two resolutions. They furnish no prima facie right or title to the appellants to have perpetual injunction restraining the Corporation from taking possession of the building. The orders of eviction were passed by due process of law and had become final. Thereafter no right was created in favour of the appellants to remain in possession. Their possession in unlawful and that therefore, they cannot seek any injunction against the rightful owner for evicting them. There is thus neither balance of convenience nor irreparable injury would be caused to the appellants.

10. In Woodroffe's Law Relating to Injunctions, 2nd revised and enlarged Edn., 1992, at page 56 in para 30.01, it is staled that

> *"an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant who must have a personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair prima fade case in support of the title which he asserts".*

At page 80 in para 33.02, it is further stated that

> *"if the court be of opinion that looking to these principles the case is not one for which an injunction is a fitting remedy, it has a discretion to grant damages in lieu of an injunction. The grounds upon which this discretion to grant damages in lieu of an injunction should be exercised, have been subject of discussion in several reported Indian cases".*

At page 83, is stated that "the court has jurisdiction to grant an injunction in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief is not defined, but it is probably used to mean - such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before. The determination of the question whether relief by injunction or by damages shall be granted depends upon the circumstances of each case.

11. In Law of Injunctions by L.C. Goyle, at page 64, it is stated that

> *"an application for temporary injunction is in the nature of a quia timet action. Plaintiff must, therefore, prove that there is an imminent danger of a substantial kind or that the apprehended injury, if it does come, will be irreparable. The word "imminent" is used in the sense that the circumstances are such that the remedy sought is not premature. The degree of probability of future injury is not an absolute standard : what is aimed at is justice between the parties, having regard to all the relevant circumstances".*

At page 116, it is also stated that

> *"in a suit for perpetual or mandatory injunction, in addition to, or in substitution for, the plaintiff can claim damages. The court will award such damages if it thinks fit to do so. But no relief for damages will be granted, if the plaintiff has not claimed such relief in the suit."*

12. In Modern Law Review, Vol. 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages". In The Law Quarterly Review" Vol 109, at page 432 (at p. 446), A.A.S. Zuckerman under Title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies stated that

> *"if the plaintiff is likely of suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant _for any*

unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury ending trial, the courts have to strike a just balance".

At page 447, it is stated that

"the court considering an application for an interlocutory injunction has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".

13. In Injunctions by David Bean, 1st Edn., at page 22, it is stated that

"if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf."

In "Joyce on Injunctions" Vol. 1 in paragraph 177 at page 293, it is stated

"Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law."

14. It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction. While exercising the discretionary power, the court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in p favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the

damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the work etc., which is retrained by an order of injunction made by the court. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor be a bar to award damages beyond it pecuniary jurisdiction. In this behalf, the grant or refusal of damages is not founded upon the original cause of action but the consequences of the adjudication by the conduct of the parties, the court gets inherent jurisdiction in doing ex debito justitiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit It is common knowledge that injunction is invariably sought for in laying the suit in a court of lowest pecuniary jurisdiction even when the claims are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons. Therefore, the pecuniary jurisdiction is not and should not stand an impediment for the court of first instance in determining damages as the part of the adjudication and pass a decree in that behalf without relegating the parties to a further suit for damages. This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff.

15. Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose, was delayed. As a consequence execution of the project has been delayed and the costs now stand mounted. The courts in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. In the event the plaintiffs losing ultimately the suit, they should necessarily bear the consequences, namely, escalation of the cost or the damages the Corporation suffered on account of injunction issued by the courts. Appellate court had not adverted to any of the material aspects of the matter. Therefore, the High Court has rightly, though for different reasons, dissolved the order of ad interim injunction. Under these circumstances, in the event of the suit to be dismissed while disposing of the suit the trial court is directed to assess the damages and pass a decree for recovering the same at pro rata against the appellants."

12. The petitioner has not been able to prima facie establish that the road in question has been constructed or is being constructed over the suit land and even if all other considerations including public interest are kept aside, even then the petitioner has not been able to carve out a prima facie case in his favour for grant of injunction. Therefore, no fault can be found with the orders concurrently passed by the learned Courts below refusing the grant of injunction to the petitioner. The findings recorded by the learned Courts below do not suffer from any illegality, perversity or impropriety so as to call for interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

13. Accordingly, there is no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Anubhav Bansal ...Petitioner.

Versus

H.P. University and others ..Respondents.

CWP No. 4851 of 2014
Judgment reserved on : 09.10.2015
Date of decision: October 14, 2015.

Constitution of India, 1950- Article 226- Petitioner applied for admission to 5 year B.A. L.L.B course- he deposited the amount of Rs. 32,900/- on admission- subsequently, he got admission in the Punjab University Regional Centre, Ludhiana- he surrendered the seat and applied for refund which was declined- held, that Educational Institution cannot act like commercial establishment - fee can be refunded in case of surrender of the seat if the surrendered seat is filled, but if seat remains vacant, there is no question of refund of fee - the University had taken a specific stand that seat vacated by the petitioner had remained vacant and was not filled by any other person- therefore, refund of the fee cannot be directed in these circumstances. (Para-19 to 24)

Cases referred:

Prabhjot Singh vs. Punjab University, Chandigarh, CDJ, 2009 PHC, 151

Ramdeo Baba Kamala Nehru Engineering College and others vs. Sanjay Kumar and others, (2002) 10 SCC 487

Islamic Academy of Education and another vs. State of Karnataka and others (2003) 6 SCC 697

Kalka Institute for Rese and Advance Studies and another vs. Hitesh Kumar and others, (2006) 127 DLT 606

Sharifa B.T. Mohamed Ali Jinnaha vs. The Vice Chancellor, Manipal Academy of Higher Education, ILR 2006, KAR 2220

For the Petitioner : Mr. Mukul Sood, Advocate.

For the Respondents : Mr. J. L. Bhardwaj, Advocate, for respondents No. 1 and 2.
Mr. Ajit Sharma, Advocate, vice counsel for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner by way of this writ petition has sought a direction against the respondents to release/refund the fees alongwith interest deposited by him at the time of his admission.

2. The petitioner in May, 2012 applied for admission to 5 year B.A.LLB course in various institutions and universities including respondent No.2 institute affiliated with respondent No.1-University. In the counselling held in June, 2012, he got admission and deposited the requisite fee and other charges amounting to Rs.32,900/- vide receipt No. 1178 dated 22.6.2012. He thereafter got admission in the Punjab University Regional Centre, Ludhiana where too, he deposited the necessary fee.

3. Vide application dated 25.7.2012, the petitioner surrendered the seat. After more than a month of the surrender, he approached the respondent-University for refund of the fee through e-mail dated 28.8.2012. However, the request was finally turned down on 12.8.2013 by invoking the provisions contained in the Handbook/Prospectus for 2012-2013, which provided that the fees once deposited would not be refunded under any circumstance.

4. This action of the respondents has been challenged by seeking aid of letter issued by the UGC dated 23.4.2007 whereby, according to the petitioner, clear direction had been issued to all the Universities to refund the fee after deducting a sum of Rs.1000/- in case where the students opts out of the course at the initiation of the course itself.

5. Respondents have filed the reply wherein by raising the preliminary objection that the petitioner never applied for refund of fee on 25.7.2012 as is being alleged by him, rather it was only on 28.8.2012, that too, after getting admission in the Punjab University, Regional Centre, Ludhiana that the petitioner for the first time applied for refund of the fee. Whereas, on merits, the respondents have specifically claimed that they would be bound to refund the fee, only if, the seat vacated by the candidate is filled up or has been allotted to some other student. But in case the seat vacated by a student remains vacant, then the fee cannot be refunded.

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

6. Before proceeding further, certain judgments on the subject which tend to support the contention of the petitioner may be noticed.

7. In ***Atam Parkash Khatter*** vs. ***Commissioner and Secretary and another to Government of Haryana and others,*** CWP No. 13308 of 2009 decided on 21.7.2010, the Punjab and Haryana High Court observed that Education Institution cannot act like commercial establishment and there is no justification on the part of the institution in retaining the substantial fee paid by a student, who decides not to pursue his/her studies in the said institution.

8. In ***Prabhjot Singh*** vs. ***Punjab University, Chandigarh,*** reported in CDJ, 2009 PHC, 151, the Punjab and Haryana High Court held that in view of the instructions of the AICTE and UGC, the respondent-University was duty bound to refund the fee, if the student has withdrawn before the commencement of the course.

9. In ***Ramdeo Baba Kamala Nehru Engineering College and others*** vs**.** ***Sanjay Kumar and others, (2002) 10 SCC 487,*** it was held by the Hon'ble Supreme Court that in the event of cancellation of admission at the behest of either party, money ought to be refunded, subject to deductions.

10. Now, the judgments supporting the case of the respondents may also be noticed.

11. In ***Islamic Academy of Education and another*** vs. ***State of Karnataka and others (2003) 6 SCC 697*** the Hon'ble Supreme Court had not decided against the

collection of entire course fee at the time of admission it only stated that if the entire fee is collected in advance, one year fee alone will be used by the institution and balance amount would be kept invested in fixed deposit in a nationalized bank and the interest accrued thereon shall be refunded to the student at the end of the course. It was further stated that the institution is authorized to require the student to furnish a bond/bank guarantee that the balance fees for the whole course would be received by the institution even if the student left in midstream. Meaning thereby the bank guarantee so obtained would be enforceable for collection of balance whole course fee, in the event of the student left in midstream. It is nowhere stated in this decision that the student, who leaves in midstream is not liable to pay whole course fee, when the vacant seat so caused remain unfilled. It is clearly laid down that the student who leaves the college after the commencement of the course and after the closure of date of admission, is not entitled for refund of the fees already paid and is liable to pay the balance fees for all the semesters.

12. In ***Amit Sadashiv Vaidya*** vs. ***The Principal, K.C. College of Engineering Kopri, Thand and others***, Writ Petition No. 2933 of 2011, decided on 11.6.2012, the Bombay High Court having regard to the Rules, framed by the Directorate of Technical Education to the effect that no refund of fees except for the security of deposit can be granted, where a request for cancellation of admission is received before or after the start of the academic session as the seat cannot be filled by the institute was pleased to observe that the rules seek to balance on one hand, refund of tuition fees to students, who obtain more preferential allotments, with the rights of management as a result of the withdrawal by the petitioner from the seat allotted, the seat would remain vacant for a period of four years. Accordingly, the Bombay High Court declined to grant the relief for refund of tuition fees already paid.

13. In ***L.K.Talwar and another*** vs***. Lovely Professional University***, CWP No. 1133 of 2011, decided on 9.5.2012, the Punjab and Haryana High Court held that if the seat consumed is still lying vacant, then there is no question for refund of fees.

14. In ***Kalka Institute for Rese and Advance Studies and another*** vs. ***Hitesh Kumar and others,*** reported in (2006) 127 DLT 606, the Delhi High Court held that since the petitioner had attended the classes for about one month and applied for withdrawal much after closure of admission, the fee was not refundable.

15. In ***Sharifa B.T. Mohamed Ali Jinnaha*** vs. ***The Vice Chancellor, Manipal Academy of Higher Education,*** ILR 2006, KAR 2220, the Karnataka High Court held that once a candidate has declared and signed the condition/rules and regulations of the University/College, such a candidate is not entitled to turn down the undertaking and redress the grievance contrary to the existing rules and regulations.

16. In ***M. Shajila*** vs***. The University of Calicut and others,*** W.P. No. 29635 of 2004, decided on 15.3.2011, the Kerala High Court observed that the Court would not be justified in compelling the management to refund the fee and special fee, if the discontinuance is after the closure of the admission and when the petitioner is not able to demonstrate that the seat vacated by her/him was filled up by admitting some other candidate.

17. It is the consistent view of the Madras High Court that if the student withdraws after the commencement of the classes with the seat remaining unfilled, the terms agreed upon at the time of admission is binding on the petitioner; the institution has every right to collect the fees from the petitioner and there is no illegality in such action. It has further been held that the prospectus has force of law and that the institution as well as

student is bound by the prospectus for admission. Therefore, in case there is a condition in the prospectus, that the fee already paid cannot be refunded, then the parties are bound by such condition. (**Refer**: ***(i) WP (MD) No. 13041/2011 dated 7.2.2013, B. Uthanda Harihara Sudhan vs. The Registrar, Sasthra University, Thanjavur; (ii) WP (MD) No. 935 of 2008 dated 17.7.2008 G.Maria Jeblin Lincy vs. The Principal, Sun College of Engineering and Technology, Kanyakumari District and another ; (iii) WP No. 21490 of 2007 dated 9.11.2010 S.K.Sethuraman vs. The Registrar, Sastra University; (iv) (2012) 4 MLJ 666, R.Gowthami vs. Regional Officer, All India Council for Technical Education, Chennai and others ; and (v) WP No. 2956 of 2008 dated 12.2.2013 A. Arun vs. The Registrar, Tamil Nadu Agricultural University, Coimbatore and others***).

18. In ***Bhagwan Mahavir Institute of Engineering and Technology*** vs. ***The Haryana State Counselling Society and others,*** CWP No. 9711 of 2010, decided on 06.01.2012, the Punjab and Haryana High Court after concluding that the seat vacated by the candidate had not been filled up and was still lying vacant, approved the action of the College of not refunding the admission fee deposited by the candidate to be in consonance with AICTE norms and it was held as follows:

> *"This norm, as has been laid down by the AICTE has a rationale behind it i.e. the colleges especially the unaided colleges survive on the fee charged by them from the students. They do not depend upon the aid from any source and for their survival they are primarily dependent on the fee collected from the candidates/students. Candidates, on their part, are not mandated to deposit the complete admission fee the moment they are allotted the seats in the institute. If a candidate is willing to accept the seat, he is only required to deposit a token admission fee of Rs.20,000/- and can thereafter without taking admission in the institute participate in the second counselling as provided in clause 7.2 (A) sub-clause 9. It would also not be out of way to mention here that as per clause 17, the fee to be deposited in the institute should be deposited after deducting token admission fee already deposited in the Counselling Society's account. Once the fee has been deposited with the institute, for refund of the same, clause 7.4(C) comes into play and if the conditions provided therein are fulfilled, it is only then that a candidate who is withdrawing from an institute will be entitled to refund of the admission fee deposited in the institute.*
>
> *In view of the above, order passed by the Counselling Society-respondent No.1 directing the petitioner-college to refund the admission fee to the private respondents cannot sustain as the same is against the AICTE notification."*

19. Now, what can be culled out from the aforesaid conspectus of the judgments is that the dominant view of majority of the Courts is that :

(i) The college or other educational institution has every right to collect the fees;

(ii) The prospectus has the force of law ; and

(iii) If the seat consumed is still lying vacant, then there is no question for refund of fees.

20. Learned counsel for the petitioner would then rely upon the letter issued by the UGC on 23.4.2007 to contend that the University at best could have deducted

processing fee of not more than Rs.1000/- and should have refunded the remaining amount. In fact, Mr. J.L.Bhardwaj, learned counsel for the respondent, too has relied upon this letter to claim that once the seat vacated by the petitioner has not been filled by admitting any other student, the petitioner cannot seek refund.

21. In this background, it is apt to quote para-3 of the letter dated 23.4.2007, which reads thus:

> *"3. The Ministry of Human Resource Development and University Grants Commission have considered the issue and decided that the Institutions and Universities, in the public interest, shall maintain a waiting list of students/candidates. In the event of a student/candidate withdrawing before the starting of the course, the waitlisted candidates should be given admission against the vacant seat. The entire fee collected from the student, after a deduction of the processing fee of not more than Rs.1000/- (one thousand only) shall be refunded and returned by the Institution/University to the student/candidate withdrawing from the programme. Should a student leave after joining the course and if the seat consequently falling vacant has been filled by another candidate by the last date of admission, the institution must return the fee collected with proportionate deductions of monthly fee and proportionate hostel rent, where applicable."*

22. It is evident from the aforesaid letter that a candidate would be entitled to refund of fee after deduction of processing fee of not more than Rs.1000/- only in the event when the candidate withdraws from the programme and the seat falling vacant has been filled by another candidate. But in case the seat vacated has not been filled by admitting any other student, then the petitioner cannot ask for the refund of money.

23. That apart, it is more than settled that the provisions contained in the prospectus issued by the University are binding on the parties. It is also not in dispute that the prospectus in question contained the following condition:-

> ***"The fees once deposited shall not be refunded under any circumstances" under the head "Procedure for Seeking Admission" except the Library Security i.e. Rs.800/- (Rupees Eight hundred) only."***

Therefore, in the teeth of such condition and without assailing this condition, the petitioner being bound by the prospectus cannot claim any refund.

24. As already observed earlier, it is the specific stand of the respondents that the seat vacated by the petitioner remained vacant and was not filled up or allotted to some other student. The petitioner has failed to rebut this stand and therefore in such circumstances the University cannot be made to suffer for no fault on its part and asked to refund the fee and thereby put to unnecessary loss.

25. For the foregoing reasons, I see no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their costs.

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

Bhagat Ram. ...Appellant.

Versus

Khushi Ram and others. ...Respondents.

RSA No. 232 of 2005
Reserved on: 12.10.2015
Decided on: 14.10.2015

Indian Succession Act, 1925- Section 63- Plaintiff claimed that deceased 'R' had executed a Will in his favour and he is owner in possession of the suit land- defendants denied the execution of the Will and claimed that Will was forged- it was duly proved on record that 'S' was the legally wedded wife of the deceased and the defendants No. 3 and 4 were sons of the deceased- Will shows that testator was unmarried- it was not established as to how the propounder of the Will is related to the deceased and what services were rendered by him to the deceased- PW-6 is resident of different village and his presence at the spot is doubtful- plaintiff has failed to remove suspicious circumstances surrounding the Will. (Para-14)

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. N.K. Thakur,Sr.Advocate with Mr. Rohit Bharol, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 10.3.2005 rendered by the Additional District Judge, Fast Track Court, Una in Civil Appeal No. 155/97 RBT 72/04/1997.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake) to the effect that plaintiff was owner in possession of the land as per the details given in the plaint on the basis of "will" dated 11.12.1985 executed by Rattan Chand son of Hako son of Kahna resident of village Santokhgarh. Defendants have no right, title or interest in the suit land left by Rattan Chand. He has also prayed for relief of injunction restraining the defendants from interfering or alienating in any manner or taking forcible possession of the suit land. The suit land was owned and possessed by Rattan Chand. He has executed "will" in favour of the plaintiff in sound and disposing mind. Rattan Chand died on 8.12.1986. He performed his last rites.

3. Suit was contested by defendant Nos. 2, 3 and 4, namely, Shanti Devi, Sukhdev and Avtar Chand. According to them, no "will" was ever executed by Rattan Chand, husband of defendant No.2 and father of defendant Nos. 3 and 4. Rattan Chand was of unsound mind and he had no capacity to understand and manage his affairs. Plaintiff attempted to get forged "will" registered from the office of Sub-Registrar. It was rejected. Defendant filed an appeal before the Registrar. It was also dismissed. They were in possession of the suit property.

4. Replication was filed by the plaintiff. Issues were framed by the Sub Judge 1st Class on 20.11.1992. He dismissed the suit on 29.8.1997. Plaintiff preferred an appeal

against the judgment and decree dated 29.8.1997 before the Additional District Judge, Fast Track Court, Una. He dismissed the same on 10.3.2005. Hence, the present appeal. It was admitted on 26.11.2007 on the following substantial questions of law:

1. **"Whether the document Ex.PW-5/A is true and genuine document and the findings of the learned courts below having held the same to be shrouded by suspicious circumstances vitiated the impugned judgments and decrees?**
2. **Whether DW-2 having not stepped into witness box adverse interference was liable to be drawn and in view of the documents Ex.PW-4/A and Ex.P-5 and Ex.P-6 findings as returned by learned courts below stand vitiated?**

5. Mr. Ajay Sharma, on the basis of the substantial questions of law framed, has vehemently argued that the "will" Ex.PW-5A was legal and valid. He has also contended that both the courts below have misconstrued the oral as well as documentary evidence.

6. Mr. N. K. Thakur, learned Senior Advocate has supported the judgments and decrees passed by both the courts below.

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

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

9. Plaintiff has appeared as PW-1. He has testified that deceased Rattan Chand was his uncle. He used to live with him. He died on 8.12.1996 in Canal Hospital, Nagal. Police handed over the dead body of Rattan Chand to him. He has repaid the debt taken by Rattan Chand to one Kedar Nath. Defendant No. 2 is the wife of defendant No. 1 Khushi Ram. Defendants used to reside at Nangal and they have no right, title or interest with the property of Rattan Chand. Rattan Chand has executed a Will in his favour. He has admitted that Rattan Chand was in armed forces. He has sold some portion of his land to him. Rattan Chand has executed a gift deed in his favour for 2 kanals and 6 marlas of land. Ram Nath was real brother of Rattan Chand. He has denied that Sukh Dev and Avtar Singh were sons of deceased Rattan Chand. He has also denied that Shanti Devi was wife of Rattan Chand. The Will was scribed in his shop. The Will was scribed at Una as Rattan Chand was not feeling well on that day. He was in sound disposing state of mind. PW-2 Amrit Lal has produced the record.

10. The Will was scribed by PW-5 Madan Lal. He has deposed that Rattan Chand executed the "Will" Ext. PW-5/A in sound disposing state of mind in presence of marginal witnesses Sada Singh and Bachan Singh. The contents of the Will were read over to Rattan Chand. He admitted the same to be correct and thereafter put his signatures. Thereafter the witnesses have signed the same as marginal witnesses. He has admitted that the Will was scribed in the shop of Bhagat Ram. He went to the house of Bhagat Ram to inquire about the health of Rattan Chand.

11. PW-6 Sada Singh is the marginal witness. He has admitted that he has made statement before Tehsildar Una. He has not supported the version of the plaintiff.

12. Defendant Sukh Dev Chand has appeared as DW-3. According to him, he was son of Rattan Chand. His father was serving in Armed Forces. He was residing at Santokhgarh. He and his brother were born at Nangal, as their father was serving at Nangal

before joining Armed Forces. His father had sold land to third person and he and his brother filed preemption suit against their father through their maternal grand father. The suit was decided in their favour and thereafter, they are in possession of the suit land. Bhagat Ram was not legal heir of his father. The Will produced by the plaintiff was forged and they came to know about the Will when Bhagat Ram tried to get it registered in the Office of Sub Registrar, Una. Sub-Registrar refused to register the Will.

13. DW-4 Ram Nath was the real brother of Rattan Chand. He has deposed that Rattan Chand has contacted marriage with Shanti Devi, daughter of Biru Ram and out of their wedlock Sukh Dev and Avtar Chand were born. DW-5 Choudhary Hazari Lal, Advocate has proved on record certified copy in Civil Suit No. 150/61, decided on 15.11.1966, certified copy of statement of Amrit Lal, Pleader Ext. DW-5/B, copy of written statement Ext. DW-5/C and statement of Ram Nath Ext. DW-5/D.

14. DW-2 Biru has deposed that Shanti Devi was his daughter. She was married to Rattan Chand.

15. In school leaving certificate Ext. D-4 of Sukh Dev, copy of affidavit Ext. D-9, copy of missal Hakiyat for the year 1967-68, Ext. D-6, copy of Jamabandi for the year 1973-74 Ext. D-7 and copy of Jamabandi for the year 1983-84, Ext. D-8, Sukh Dev and Avtar Chand have been shown as sons of Rattan Chand son of Haku. According to pedigree table, Ext. D-9, one Kahna had two sons Rala and Haku. Thereafter Rala had two sons, Daya Ram and Khushi Ram, whereas Haku had two sons, Ram Nath and Rattan Chand. Sukhdev and Avtar Chand are shown as sons of Rattan Chand. Defendants have conclusively proved that Shanti Devi was legally wedded wife of Rattan Chand and defendants No. 3 and 4, namely Sukh Dev and Avtar Chand were sons of Rattan Chand. According to the recitals in the Will, Ext. PW-5/A, the testator claimed himself to be unmarried. The fact of the matter is that Sukh Dev and Avtar Chand had filed a suit for pre-emption against Rattan Chand. It was decided in their favour being sons of Testator in the year 1961. The prepounder of the Will has tried to prove that wife and children were of defendant No. 1. It is reiterated that defendants have duly proved that Shanti Devi was married to Rattan Chand and Sukh Dev and Avtar Chand were born out of this wedlock. PW-6 Sada Singh is resident of different village. His presence has rightly been doubted at the time of the execution of the Will by the learned Courts below. The natural heirs have been left out in the Will Ext. PW-5/A. There is no tangible evidence on record to establish that how and in what manner the prepounder was related to Rattan Chand and what services he has rendered to him. Names of wife and children of Rattan Chand have not been mentioned in the Will. The plaintiff has tried to get the Will registered in the office of Sub-Registrar, Una. He refused to register the Will. Plaintiff filed an appeal before the Registrar. It was also dismissed by the Registrar. Plaintiff has failed to remove the suspicious circumstances surrounding the “will” dated 11.12.1985 Ex.PW-5/A.

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

17. The substantial questions of law are answered accordingly.

18. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Bhartiya Govansh Rakshan Sanverdhan Parishad, H.P .....Petitioner.

Versus

The Union of India & ors. ....Respondents.

CWP No. 6631 of 2014.
Reserved on: 4.9.2015.
Date of Order: 14.10.2015.

Constitution of India, 1950- Article 226- Deputy Commissioners were directed to ensure that the land is transferred for the construction of Gosadans to the respective Panchayats within a period of three months and to submit the amount to be incurred for the construction of Gosadans- Deputy Commissioners filed affidavits in compliance of the directions of the High Court outlining the steps taken by them- direction issued to Director Animal Husbandry to release the necessary funds for the construction of Gosadans- Panchayati Raj Institutions also directed to ensure that funds are made available for the construction of Gosadans- Superintendent of Police directed to ensure the compliance and to file a status report after every three months- Panchayat also directed to adopt micro-chipping number process on private/stray cattle- Chief Secretary directed to take disciplinary action against the Superintendent Engineer, Commissioner, M.C. Shimla, Executive Officers of all the Municipal Councils, Nagar Panchayats and Pradhans of the Gram Panchayats in whose jurisdiction stray cattle are found on the road- Union of India directed to consider to enact a legislation to prohibit slaughtering of cow/calf, import and export of cow/calf and selling of beef or beef products within three months- Union of India directed to provide necessary funds to the State Government for providing fodder to cows /stray animals within three months. (Para-38 to 41, 43 to 45 and 50 & 51)

Cases referred:

State of Gujarat vrs. Mirzapur Moti Kureshi Kassab Jamat and others, (2005) 8 SCC 534
Supreme Court Employees' Welfare Association vrs. Union of India and another, (1989) 4 SCC 187
State of Jammu and Kashmir vrs. A.R. Zakki and others, AIR 1992 SC 1546
S.R. Bommai and others etc. etc. vrs. Union of India and others, AIR 1994 SC 1918,

For the petitioner(s): Mr. Varun Thakur, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI with Mr. Nipun Sharma, Advocate, for respondents No. 1,2 & 10.
Mr. M.A.Khan, Addl. AG with Mr. P.M.Negi, Dy. AG and Ramesh Thakur, Asstt. AG for respondents No. 3 to 7 & 9.
Mr. Rakesh Korla, Dy. Secretary, Panchayati Raj.

The following order of the Court was delivered:

Per Justice Rajiv Sharma, J.

The Deputy Commissioner, Shimla was directed on 2.5.2015 to ensure that the land is transferred for the construction of Gosadans to the respective Panchayats within

a period of three months from 2.5.2015. He was also directed to send realistic figures of the amount to be incurred for the construction of Gosadans in Distt. Shimla after getting the building plans etc. prepared from the duly qualified Architect within a period of two months. The concerned departments were directed to ensure that the Gosadans are constructed in District Shimla within a period of six months and the necessary funds are also made available immediately. The remaining Panchayats in the District were also directed to make proposals for the construction of Gosadans to the SDMs concerned through BDO and their cases were ordered to be processed within a period of three months. The construction of Gosadans was ordered to be supervised personally by the SDMs of the concerned Blocks, by convening periodic meetings.

2. In sequel to the directions issued by this Court on 2.5.2015, the Deputy Commissioner, Shimla has filed an affidavit on 13.8.2015. According to the averments contained in the affidavit, out of the total 363 Gram Panchayats in the District Shimla, total 357 Panchayats have identified and selected the land for the construction of Gosadana, however, feasibility of construction of Gosadan in each Panchayat was to be ascertained by the BDO as well as the SDM of that area, keeping in view the high cost of construction and maintenance of these Gosadans. The estimate of the cost of construction of one unit of Gosadan to house 30 animals on scientific patters amounts to Rs. 28.50 lac as submitted by District Panchayat Officer, dated 31.7.2015. The cowshed would cost amounting to Rs. 16.41 lac, fodder store would cost Rs. 8.92 lac and guard room would cost Rs. 3.16 lac. These estimates were again got checked by the competent Engineer who endorsed the estimates. It was proposed to construct at least three to four Gosadans in the first phase in each Block to rehabilitate the stray cattle moving on the highways and roads on priority basis and as such in the first phase 40 Gosadans with all three building plan component could be constructed requiring approximately 10.00 Crore for construction work of Gosdans and it would be extended to other Panchayats of the District.

3. The meeting of the Sub-Committee, Rampur Sub Division under the Chairmanship of SDO(Civil), Rampur was held on 25.7.2015, wherein directions to expedite the process of transfer of land for the construction of Gosadans were issued to Rural Department/BDOs. In Sub Division Rampur, selection of land in all the 76 Gram Panchayats had been completed and construction work of two Gosadans is under progress in Gopalpur Panchayat. The Cattle Registration work is under progress in collaboration with Animal Husbandry Department and in five Panchayats of Kumarsain Block, cattle registration work has been completed. The directions have been issued to National Highway/HPPWD Department to adopt the necessary measures to restrict the entry of the stray cattle on the Highways by erecting barricades at the main entry points and deploying manpower so as to avoid accident.

4. The SDM(Rohru) reported that the selection of land in all the 82 Panchayats has been completed. Similarly, the selection of land in MC, Rohru and Nagar Parishad Jubbal has also been done. As the land is forest land, the cases are being processed accordingly.

5. In the meeting of Sub Divisional Level Committee, Chopal, dated 27.7.2015, the selection of land for the construction of Gosadans in all the 54 Panchayats has been completed. Since the land was forest land selected, the direction has been issued to the concerned BDO to send the cases to Panchayats Van Adhikar Samities to complete the formalities to procure NOC. The BDO Chopal has been directed to nominate one employee as Nodal Officer to pursue the land transfer cases. The Chairman also directed BDO Chopal to initiate the work of construction of Goshala on priority basis in Gram Panchayat Chanjo (Chopal), Nerwa and Juddu-Shilal (Kupvi). The Chairman also issued direction to DFO

Chopal for the settlement of the land transfer cases immediately as and when these are received in the office. The PWD representative informed that the direction has been issued to the staff for strict vigilance on the roads to avoid and restrict the entry of the stray animals on the roads.

6. The meeting under the Chairmanship of SDO(Civil), Theog was held on 29.7.2015. The directions were issued to process the cases of land transfer of 72 Panchayats as per the guidelines of Forest Conservation Act.

7. The meeting of Sub-Committee Shimla (Rural) was held on 31.7.2015. The directions have been issued to BDO Mashobra and Basantpur Block to complete the cases of land transfer on priority basis and all the formalities done at the time of joint inspection of the land. In Block Mashobra, selection of land has been done in 45 Panchayats and out of these; joint inspection has been conducted in 10 Panchayats. The Gosadan construction work is almost complete in Chamyana Panchayat. In Basantpur Block, selection of land has been completed in 20 Panchayats and out of these, the joint inspection has been conducted in 2 Panchayats. The BDOs were directed to expedite the process of registration of cattle.

8. The SDO(Civil) Dodra Kawar reported that there is no stray cattle in all the five Panchayats of the Sub Division and the process of land transfer to construct the Gosadan in one Panchayat Dhandwari at Kutag place is under progress.

9. The Animal Husbandry Department has treated 118 stray cattle in Shimla District. Five awareness camps have already been convened. Accordingly, the Deputy Commissioner, Shimla is directed to ensure that 40 Gosadans with all the three building plan component are completed, as undertaken within 4 months from today. The SDM Rampur Sub Division, SDM, Rohru, SDM Chopal, SDO (Civil), Theog, SDM Shimla (Rural) are directed to complete the transfer of land within a period of three months, positively and thereafter to construct the Gosadans. All the concerned authorities are directed to cooperate for the early completion of the Gosadans and the funds are also released accordingly.

10. The Deputy Commissioner, Mandi was directed to forward the case for diversion of the forest land required for the Gram Panchayats within a period of 8 weeks and thereafter the Department of Forests/Animal Husbandry was directed to take up the cases with the newly added respondent No. 10. Respondent No. 10 was directed to grant the permission within a period of two weeks after the receipt of the proposal. The Deputy Commissioner was also directed to provide necessary funds and, if necessary, by taking up the issue for the release of additional grant/aid with the State Government. All the steps were ordered to be taken within a period of six months.

11. The Deputy Commissioner, Mandi has filed the compliance affidavit on 1.8.2015. According to him, the cluster point wise approach has been adopted for opening Gosadans in Mandi District and 32 cluster points have been identified. Gosadans in Dheem Katary, Bhambla, Darpa, Gahar, Pangna and Sandhole are functioning. A sum of Rs. 9.00 lacs ha been allocated for an existing Gosadan in Sundernagar for construction of additional animal shed of the capacity of 80 adult animals. The process for opening of other new Gosadans in other 26 cluster points is also going on by identification and transfer of land in the name of Panchayati Raj Institutions. The non-forest land identified recently at Kunnu, Tehsil Padhar, Distt. Mandi, H.P. was transferred to Department of Panchayati Raj. The District Panchayat Officer has been designated as Nodal Officer by the Deputy Commissioner Mandi for preparing and pursuing these cases in collaboration with Sub-

Divisional Co-ordination Committees to facilitate various orders of this Court. 21 cases of Forest land are being processed for transfer to Panchayati Raj Department under Forest Conservation Act. In principle, approval for diversion of forest land for construction of Gosadan at Naugram in Tehsil Chachiot Distt. Mandi, H.P. has been obtained. The Animal Husbandry Department has treated 1072 animals and 142 awareness camps have been organized. A sum of Rs. 5,80,000/- has been sanctioned for distribution of dry fodder to already running Gosadans in the District.

12. Accordingly, there shall be direction to Deputy Commissioner, Mandi to ensure that the land is transferred to respective Panchayats within 4 months from today and thereafter construction of the Gosadans is undertaken within a further period of four weeks and complete the same within a further period of four months.

13. The Deputy Commissioner, Una was directed to get all the codal formalities completed and to ensure that the Gosadans are completed within a period of six months. The affidavit has been filed by Deputy Commissioner, Una on 13.8.2015. The affidavit filed is not at all satisfactory. He is directed to ensure that the Gosadans are constructed in the Gram Panchayats as well as Municipal Councils, falling within the jurisdiction of Una District within a period of six months from today, failing which, stern action shall be taken against the Deputy Commissioner, Una, in accordance with law.

14. The Deputy Commissioner, Hamirpur was directed to ensure the transfer of the land and construction of Gosadans as per their proposals received within a period of six months. The affidavit has been filed by the Deputy Commissioner, Hamirpur on 1.8.2015. According to the affidavit filed, the meeting of the District Coordination Committee under the Chairmanship of Deputy Commissioner, Hamirpur was held on 16.7.2015. All the concerned departments Officers/Officials were directed to comply with the directions of this Court.

15. The meeting of Sub Division Sujanpur under the Chairmanship of SDM Sujanpur was convened on 29.5.2015 wherein directions were issued to all the departments to take action as per the directions issued by this Court. SDM Sujanpur informed that land has been transferred in 13 cases and 11 cases of land transfer are under process. Accordingly, there shall be direction to SDM, Sujanpur to ensure that remaining 11 cases of land transfer are settled at the earliest and the land is transferred to the Gram Panchayat within three months.

16. The meeting of the Sub Committee under the Chairmanship of SDM, Barsar was convened on 29.5.2015. SDM Barsar informed that land has been transferred in 11 cases, 15 cases of land transfer are under process and NOC is to be obtained in 7 cases. Consequently, there shall be direction to SDM, Barsar to ensure that the transfer of land in 15 remaining cases and NOC in 7 cases is obtained at the earliest within three months.

17. The meeting of Sub Committee under the Chairmanship of SDM Nadaun was convened on 19.5.2015. The SDM Nadaun informed that the land has been transferred in 5 cases, 23 cases of land transfer are under process and NOC is to be obtained in 31 cases. Consequently, there shall be direction to the SDM, Nadaun to ensure that the transfer of land in 23 cases and NOC in 31 cases is obtained at the earliest within three months.

18. The meeting of Sub Committee under the Chairmanship of SDM Bhoranj was convened on 29.6.2015. It is intimated that no land has been transferred. 18 cases are under process and in 4 cases, NOC is to be obtained. Consequently, there shall be direction to the SDM Bhoranj to ensure that the land is transferred in all the 23 cases at the earliest within three months.

19. The meeting of Sub Committee under the Chairmanship of SDM Hamirpur was convened on 30.6.2015. It is intimated that land has been transferred in 16 cases, 7 cases of land transfer are under process and NOC is to be obtained in 28 cases. Consequently, there shall be direction to the SDM Hamirpur to ensure that the land is transferred in all the 7 cases and NOC obtained in 28 cases at the earliest within three months.

20. The Deputy Commissioner, Bilaspur was directed to ensure that the Gosadans within his jurisdiction were completed within six months and necessary funds could be raised from Shree Naina Devi Ji and Baba Balaknath temple trusts. The affidavit has been filed. According to the affidavit, the BDO Sadar submitted the standard drawing alongwith the estimate amounting to Rs. 2.65 lac for construction of Chowkidar hut in the proposed Gosadans for Bilaspur District. BDO Ghumarwin also submitted standard drawing and estimate for construction of Gosadans amounting to Rs. 60.00 lacs. All the BDOs were directed to use these standard drawings for construction work of Gosadans. It was intimated by BDO Swarghat that the construction work of boundary wall at Talli has been started. The BDOs were instructed by the Deputy Commissioner to start the work immediately and complete the construction of boundary wall within next 20 days. The BDO Swarghat intimated that the representatives of Panchayats have agreed to contribute 5% of their respective incomes towards corpus funds for running and maintenance of Gosadans. Deputy Commissioner directed all the BDOs/Executive Officers MC and Secretary Nagar Panchayats that they should maintain online separate bank accounts for the purpose. Initially, six Gosadans are being constructed in the district, namely, Talli, Balghad, Balhseena, Kuthera, Ranikotla and Barmana (Lagat). The construction of boundary wall and fencing around Gosadan at Talli has been undertaken. The BDO, Shree Naina Devi Ji at Swarghat submitted that against an amount of Rs. 7.40 lac, Rs. 5.00 lac has already been released and Rs. 4.00 lac has been utilized. Budget for the purpose has been allocated from Shree Naina Devi Ji Temple Trust. The foundation work has been completed at Talli Gosadan. The necessary funds be released by the Trust Shree Naina Devi Ji within eight weeks and Gosadan completed within three months.

21. The BDO Jhandutta has intimated that first installment of Rs. 8.61 lacs has been sanctioned for construction of boundary wall and site development and Rs. 5.00 lac has been released to Gram Panchayat concerned for the construction of Gosadan. The funds for the purpose have been made from Baba Balak Nath Temple Trust. The construction work of Gosadan at Balghad be completed within three months.

22. The BDO Jhandutta has informed that first installment of Rs. 9.66 lacs has been sanctioned for the construction of boundary wall and site development and Rs. 5.00 lac has been released to Gram Panchayat Balhseena. The site development work has been completed. The allocation of funds has been made from Baba Balak Nath Temple Trust. The construction work of Gosadan at Balhseena be completed within three months.

23. The BDO Ghumarwin has informed that the first installment of Rs. 10.00 lacs has been sanctioned and received and site development work has been completed and retaining wall work is under progress of Gosadan at Kuthera. The budgetary provision of Rs. 10.00 lac has been made from Shree Naina Devi Ji Temple Trust. The construction work of Gosadan at Kuthera be completed within three months.

24. The BDO, Sadar Bilaspur has informed that first installment of Rs. 10.00 lacs has been sanctioned by Zila Parishad Bilaspur out of which Rs. 0.25 lacs has been utilized for land leveling so far for Gosadan at Ranikotla. The construction work of Gosadan at Ranikotla be completed within three months.

25. The BDO, Sadar has also informed that first installment of Rs. 10.80 lac has been sanctioned by the Block Samiti for land leveling and construction of boundary wall out of which Rs. 0.75 lac has been utilized for land leveling for construction work at Gosadan Barmana (Lagat). The construction work of Gosadan at Barmana (Lagat) be completed within three months.

26. The Deputy Commissioner, Bilaspur shall be personally responsible to ensure that the Gosadans at the places, mentioned hereinabove, are completed within the period stipulated hereinabove.

27. The direction was issued to Deputy Commissioner, Kullu, to take up the matter of diversion of forest land for non-forestry use with the State Government within a period of six weeks and thereafter the State Government was directed to submit the same to the newly added respondent No. 10 within a period of eight weeks. Thereafter the respondent No. 10 was directed to process the same within two weeks. The Deputy Commissioner, Kullu was also directed to ensure the construction of Gosadan within a period of six months after completion of all the codal formalities. He has filed affidavit on 11.8.2015. The details of 7 existing Gosadans in the District has been given in the affidavit. The Deputy Commissioner, Kullu has released Rs. 16.00 lacs for repair and maintenance of Gosadans. These Gosadans are being managed by NGOs and MCs. The District Administration after scrutinizing 106 proposals received from Gram Panchayats, has decided to set up only two additional Gosadans in the first phase, one at Vazir Baudi in Nirmand Tehsil and other at Chutti Bihal near Kullu. In total, 1,53,743 cattle have been registered against the total population of 1,82,775 cattle. A pilot project has been started to insert electronic micro-chip in each animal at a total cost of Rs.4,90,000/- and micro chipping work is in progress in old Manali village on pilot basis. One micro chip costs Rs.225/-.

28. The affidavit filed by the Deputy Commissioner, Kullu is not at all satisfactory. The Court can take judicial notice of the stray animals found on the roads in entire Kullu District. The menace of stray animals at Manali is alarming. The Deputy Commissioner, Kullu is directed at least to ensure that the order dated 2.5.2015 be implemented in letter and spirit, failing which, stern action shall be taken against him in accordance with law.

29. The Deputy Commissioner, Solan was directed to take a final decision within a period of six weeks on 23 applications received from the Gram Panchayats of District Solan for construction of Gosadans and also to take steps for providing necessary funds. He was also directed to ensure that Gosadans as per the proposal received, are constructed within a period of six months. The affidavit has been filed by the Deputy Commissioner, Solan on 4.8.2015. According to the averments contained in the affidavit, the Revenue Department has transferred land for construction of Gosadan in the name of Panchayati Raj Department in 5 cases.

30. The affidavit filed by the Deputy Commissioner, Solan, is not satisfactory. The menace of stray animals on the National Highway which passes through the District Solan, causes inconvenience to the commuters. Accordingly, the Deputy Commissioner, Solan is directed to comply with the directions of order dated 2.5.2015 in letter and spirit, failing which, stern action in accordance with law shall be taken against him.

31. The Deputy Commissioner, Chamba was directed to ensure that the Gosadans, for which the funds have been allocated are constructed within a period of six months and the necessary codal formalities were directed to be completed towards the

transfer of land of Municipal Councils, Nagar Panchayats and Panchayats for the construction of Gosadans within a period of eight weeks. The Deputy Commissioner, Chamba has filed the affidavit on 11.8.2015. According to its contents, an amount of Rs. 85,17,078 has been allocated for the construction of Gosadans in 91 Gram Panchayats by the respective Panchayat Samities in compliance of the orders of this Court. Out of the 91 Gosadans, 42 were proposed to be constructed in Development Block Tissa, 35 in Development Block Salooni, 13 in Development Block Chamba and 1 in Development Block, mehla. However, it was found that the menace of stray cattle in Development Blocks, namely Salooni and Tissa were negligible. Therefore, decision was taken in the District Level Committee to initially construct a single Gosadan for a cluster of Gram Panchayats instead of constructing Gausadans in all Gram Panchayats. In the first stage in Sub Division Salooni, Gosadans are proposed to be constructed in Gram Panchayat Salooni, Gram Panchayat Salwan, Gram Panchayat Diur and Gram Panchayat Bhalei. The construction of work of Gosadan in Gram Panchayat Salooni and Salwan is in progress. Land has been identified for construction of Gosadan in Gram Panchayat Diur and Gram Panchayat Bhalei. The land identified for construction of Gosadans in two Gram Panchayats comes under the definition of "forest land" and therefore, for diverting this land for non-forestry purposes, procedural requirements were required to be completed.

32. The Deputy Commissioner, Chamba is directed to complete the formalities within 4 weeks from today. In Sub Division, Tissa, funds amounting to Rs. 25,50,000/- were earmarked for construction of Gosadans in 42 Gram Panchayats by Panchayat Samiti, Tissa, however, it was decided to construct a Gosadan in Gram Panchayat Gadfari in the first phase. The land has been identified for the construction of Gosadan. The formalities for conversion of the land have been undertaken. The Deputy Commissioner, Chamba is directed to complete the formalities within a period of four weeks. In Sub Division Bhattiyat Gosadans are proposed to be constructed in Gram Panchayat Sihunta, Parchhore, Chowari and Nainkhud. The lands have been identified. The procedural requirements are completed and the action under the Forest Conservation Act is required to be taken. In Sub Division Bharmour, Gosadan is proposed to be constructed in Gram Panchayat Khanni for which land has been identified. The formalities be completed within 6 weeks from today. The construction of Gosadan for Gram Panchayats Bhanota, Janghi, Preena, Baloth, Mehla, Kidi and Bhadiyankothi is reported to be in progress. The same be completed within six months.

33. The Deputy Commissioner, Kangra was directed to ensure that Gosadans are constructed within a period of six months and necessary funds are made available to the Municipal Council, Nagar Panchayats and Gram Panchayats immediately and the land transferred in their names. The Deputy Commissioner, Kangra has filed the affidavit on 12.8.2015. According to the averments contained in the affidavit, the construction of Gosadan at Village Jijal has been undertaken. The E.O, MC, Jawalamukhi has informed that a Committee has been constituted for management of stray cattle and Gosadans. S.D.O. (C), Dehra has informed that proposal for transfer of land for Gosadan in Muhal is under progress. SDO © Baijnath has informed that 5 Gosadans i.e. Sh. Krishan Goshala at Dharbaghi, Shiv Dham Goshala Paprola, Baijnath, Shri Sai Goculam at Kolar, Gosadan at Mahakal and Sub Divisional Go Sadan at Burlikothi with a total capacity of 220 animals are functional in Baijnath Sub Division. The SDO(C), Palampur has informed that the provision of Rs. 10 lac has been made by the MC Palampur for construction of Gosadan during 2015-16. The E.O. MC, Palampur has informed that MC Palampur and GP Aima have jointly registered as society by name of Go Nandan Society Aima at Palampur for construction of Gosadan. The land has been allocated and an amount of Rs. 5 lac has been sanctioned to the society. The SDO (C), Nurpur has informed that two Gosadans are functioning in Sub Division Nurpur; one at Baiattaria, Tehsil Indora and other at Khajjian. The work on third

Gosadan at Shri Ram Gopal Mandir Trust Damtal is almost complete and will soon be made functional. Apart from this proposal another Gosadan at Mahal Chakban Khanni is reported to be in progress. The E.O., MC Nurpur has submitted that MC Nurpur has identified land for construction of Gosadan at Chiwan Road Muhal Gahin Lagore and the transfer of land is reported to be in progress. The SDO (C), Kangra has informed that there are two Gosadans in Sub Division Kangra one at Busal near Baroh being run by NGO and other at Bye pass Kangra being run by Kangra Temple Trust. The case regarding transfer of land for construction of Gosadan in Mahal Faket Lahar, Mauza Jhikali Kothi, Tehsil Nagrota Bagwan stands received. The E.O., MC Dharamshala has informed that Gosadan at Sarah has become functional.

34. The Deputy Commissioner, Kangra is directed to ensure that all the Gosadans at the places, mentioned hereinabove, become functional within a period of six months from today. Necessary funds be also released for the work in progress.

35. The Deputy Commissioner, Sirmour has also filed the affidavit on 12.8.2015. There was a proposal to construct a Gosadan on the land of Dei Ji Sahiba Temple at Rampurghat, Paonta Sahib and it will be constructed by the Chambers of Commerce, Paonta Sahib. The land for construction of 228 Gosadana has been identified in 101 Gram Panchayats out of the total 228 Gram Panchayats. In 42 Gram Panchayats, the land has been gifted to construct Gosadans and in 21 Gram Panchayats, the construction work of Gosadans has been started. 33 Gram Panchayats of the District have sent the proposals to Zila Parishad under 13th Finance Commission and 8 Gram Panchayats forwarded the proposals to Panchayat Samities under 13th Finance Commission. Consequently, there shall be direction to Zila Parishad to release necessary funds to 33 Gram Panchayats and also to Panchayat Samities for release of amount under 14th Finance Commission on the basis of applications, so received. In 42 Gram Panchayats where the land has been gifted, the Gosadans be constructed within 6 months and where the work has already been started, the same be completed within three months.

36. All the Deputy Commissioners of the respective Districts in the State of Himachal Pradesh are directed to file their personal affidavits after three months, giving therein the status report(s), towards compliance of the orders passed by this Court from time to time.

37. The directions were also issued to all the Revenue Authorities to transfer the land of 577 Gram Panchayats and all the Zila Parishad, Panchayat Samities and Animal Husbandry Departments were directed to provide sufficient funds to 521 Gram Panchayats for the construction of Gosadans. All the Gram Panchayats through the SDM concerned within whose jurisdiction they fall, were directed to make sufficient funds available for the construction of Gosadans within a period of three months. The affidavit has been filed in sequel to the directions of this Court by Sh. Rakesh Kumar Korla, posted as Dy. Secretary (PR). According to the affidavit filed, the SDMs were requested to comply with para 30 of the judgment and all the Distt. Panchayat Officers and Block Development Officers were directed to display the relevant paras 29 and 30 of the judgment alongwith the judgment dated 2.5.2015 on the notice Board of Gram Panchayats. The revenue authorities have been requested to transfer land to 577 Gram Panchayats and the Animal Husbandry Department was requested to provide funds for the construction of the Gosadans. However, Animal Husbandry Department has expressed its inability to release funds for this purpose due to very meager budget provision in this regard.

38. Consequently, there shall be direction to the Director, Animal Husbandry Department to release necessary funds for the construction of Gosadans as per the details

given in the affidavit. The Panchayati Raj Institutions have allocated funds for the construction of Gosadans but these are meager. The Panchayati Raj Institutions are directed through Secretary (PR) to ensure that the funds are made available for the construction of Gosadans. The Secretary (PR) shall be personally liable to implement these directions. There shall also be direction to all the Urban Local Bodies to release the necessary funds for the construction of Gosadans to shelter cows and stray cattle.

39. The Superintendent of Police in the State of Himachal Pradesh are directed to ensure compliance of the directions of this Court and to file status report after every three months.

40. The Chief Secretary to the Govt. of Himachal Pradesh has also filed affidavit on 13.8.2015, pursuant to the orders dated 2.5.2015. The gist of the affidavit is that the necessary directions have been issued to all the concerned to comply with orders passed by this Court from time to time. The Chief Secretary shall file comprehensive status report before the next date of hearing. The Chief Secretary to the State of Himachal Pradesh shall be personally responsible to take up the matter with all the Deputy Commissioners concerned to comply with the directions of this Court in letter and spirit.

41. All the Panchayats throughout the State of Himachal Pradesh through Secretary (PR) are also directed to adopt micro-chipping number process on private/stray cattle, whereby an electronic chip is inserted in the animal having unique ID number which can be read with the help of a scanner and owner can be identified, for the purpose of enumeration, within 6 months from today.

42. This Court on 7.10.2014 has issued the following mandatory directions to the respondents:

> "13. Animals have their own rights and it is our duty to protect their rights. They breathe like us. These animals are also creation of the God. The Court by invoking the *parens patriae'* doctrine issue following directions to the respondents in the welfare of the Cows and other stray cattle:
>
> i) No person in the State of Himachal Pradesh shall slaughter, cause or cause to be slaughtered, or offer, or cause to be offered for slaughter, any cow/calf.
>
> ii) No person shall export cow for the purpose of slaughter either directly or through his agent or servant or any other person acting on his behalf if the same is likely to be slaughtered.
>
> iii) No person shall sell beef or beef products in any form throughout the State of Himachal Pradesh.
>
> iv) Prosecutions be launched under Sections 289, 428 and 429 of the IPC and Section 114 of the H.P. Police Act, 2007 and also under various provisions of the Prevention of Cruelty to Animals Act, 1960, against the owners of any cattle which are found on the streets, roads and public places.
>
> v) The Superintending Engineers of all National Highways in the State of Himachal Pradesh and State Highways are directed to ensure that no stray cattle, including cows and bulls come to the roads.
>
> vi) The Commissioner, M.C. Shimla and Executive Officers of all the Municipal Councils, Nagar Panchayats and Pradhans of the Gram Panchayats are directed to ensure that all the roads passing

through their jurisdiction are kept free from the stray cattle to ensure free and smooth flow of the traffic.

vii) All the cattle including cows in M.C. Shimla and Municipal Councils, Nagar Panchayats and Panchayats shall have a tag number indicative of the owner to whom the animal belongs in order to trace the owner.

viii) The entire roads in the State of Himachal Pradesh are ordered to be made free of stray cattle by 31st December, 2014. The respondents are further directed that in order to remove the stray cattle from the roads, utmost compassion is shown towards them and no unnecessary force is used by inflicting pain and suffering on them. In case the cattle are transported, in that eventuality, there should be a provision for construction of ramps and the vehicles should be driven not at a speed more than 10-15 kms/hour to avoid injuries to the animals, being transported.

ix) The Government Veterinary Officers/Doctors throughout the State of Himachal Pradesh are directed to treat all the stray cattle. The Executive Officers of the M.C. Shimla, Municipal Councils, Nagar Panchayats and all the Gram Panchayats are directed to ensure that the stray cattle suffering from any injury or disease are got treated from the Veterinary Hospitals in their respective jurisdictions. All the Veterinary Hospitals in the State of Himachal Pradesh are directed to provide necessary medical treatment to the cows and animals as and when brought before them. No Government Veterinary Officer/Doctor shall refuse to treat stray cattle brought before him by the authorities or any enlightened citizen. Every citizen has a right to bring to the notice of the Veterinary Officer/Doctor throughout the State of Himachal Pradesh the location of the Cow or stray animal suffering from any disease or injury for its treatment. The necessary registers to this effect shall also be maintained punctually by the Veterinary Officers.

x) The State Government is also directed to make the citizen throughout the State of Himachal Pradesh aware about the animal rights and their welfare by issuing public notices in the leading English and Vernacular Newspapers within two weeks.

xi) All Local Bodies including M.C. Shimla, Municipal Council, Nagar Panchayats and Panchayats are directed to construct in their respective jurisdiction 'gaushalas'/ 'gausadans' or shelters for housing cows and stray cattle within a period of six months from today. The 'gaushalas'/ 'gausadans' or shelter should be constructed on scientific lines, taking into consideration the comfort of animals to be housed there. The necessary funds shall be released by the State Government to all the local bodies for the construction of 'gaushalas'/ 'gausadans' or shelters within a reasonable period. It shall be the responsibility of the Local Authorities to provide proper food to the animals housed therein.

xii) The State Government is directed to appoint infirmaries within a period of 7 days in order to treat and take care of the animals as per Section 35 of the Prevention of Cruelty to Animals Act, 1960.

> xiii) A Co-ordination Committee shall be constituted in each district comprising of the Deputy Commissioner, Superintendent of Police, Government Veterinary Officers/Doctors. This Committee shall be responsible for eradicating the menace of stray cattle.
>
> xiv) The Principal Secretary to the Government of Himachal Pradesh is directed to issue necessary instructions towards the implementation of the aforesaid orders. He shall be personally liable for the implementation of the orders."

43. The Superintending Engineers of all National Highways in the State of Himachal Pradesh and State Highways were directed to ensure that no stray cattle, including cows and bulls come to the roads. The Commissioner, M.C. Shimla and Executive Officers of all the Municipal Councils, Nagar Panchayats and Pradhans of the Gram Panchayats were directed to ensure that all the roads passing through their jurisdiction are kept free from the stray cattle to ensure free and smooth flow of the traffic. However, the fact of the matter is that despite the mandatory directions issued by this Court, the stray animals are still a menace on the roads. The presence of stray animals on roads causes accidents and in the process the innocent animals also receive fatal injuries. The directions were issued though on 7.10.2014 but till date, the roads in the State of Himachal Pradesh are not free from menace of stray cattle.

44. Accordingly, the Chief Secretary to the Government of Himachal Pradesh is directed to take disciplinary proceedings against the Superintending Engineers who were made responsible to ensure that no stray cattle, including cows and bulls come on the roads. The Chief Secretary is also directed to initiate disciplinary proceedings against the Commissioner, M.C. Shimla and Executive Officers of all the Municipal Councils, Nagar Panchayats and Pradhans of the Gram Panchayats in whose jurisdiction stray cattle are found on the roads passing through their respective jurisdiction in order to implement the orders dated 7.10.2014 in letter and spirit.

45. This Court has also directed, as noticed hereinabove, that no person in the State of Himachal Pradesh shall slaughter, cause or cause to be slaughtered, or offer, or cause to be offered for slaughter, any cow/calf and no person shall export cow for the purpose of slaughter either directly or through his agent or servant or any other person acting on his behalf if the same is likely to be slaughtered. The cow/calf are being exported and imported in various States for slaughtering purposes. The import and export of cow/calf from one State to another State requires necessary steps i.e. guidelines, regulations and legislation etc. to prohibit slaughtering of cow/calf by the Union of India in view of Article 48 of the Constitution of India, which reads as under:

> "48. **Organisation of agriculture and animal husbandry:** The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

46. Their lordships of the Hon'ble Supreme Court in the case of ***State of Gujarat vrs. Mirzapur Moti Kureshi Kassab Jamat and others,*** reported in ***(2005) 8 SCC 534,*** have held that Article 48 consists of two parts. The first part enjoins the State to "endeavour to organize agricultural and animal husbandry" and that too "on modern and scientific lines". The subject is "agriculture and animal husbandry". The second part of Article 48 enjoins the State, dehors the generality of the mandate contained in its first part, to take steps, in particular, "for preserving and improving the breeds, and prohibiting the

slaughter, of 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. Their lordships further held that fundamental duties play a significant role in determining constitutional validity of a statutory provision or executive act, or for testing reasonableness of any restriction cast by law on exercise of any fundamental right. Their lordships have interpreted the interrelationship between Article 48, 48-A and 51-A(g) of the Constitution. Their lordships have also held that the restrictions placed on any fundamental right, aimed at securing directive principles will be held as reasonable and hence *intra vires* subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution. Their lordships have further held that the expression "milch or draught cattle" in Article 48, are words which are a description of a classification of species of cattle as distinct from cattle which by their nature are not milch or draught. It has been held as follows:

> "36. "It was the Sapru Committee (1945) which initially suggested two categories of rights: one justiciable and the other in the form of directives to the State which should be regarded as fundamental in the governance of the country Those directives are not merely pious declarations. It was the intention of the framers of the Constitution that in future both the Legislature and the Executive should not merely pay lip service to these principles but they should be made the basis of all legislative and executive actions that the future Government may be taking in matter of governance of the country. (Constituent Assembly Debates, Vol.7, at page 41)" (See: The Constitution of India, D.J. De, Second Edition, 2005, p.1367). If we were to trace the history of conflict and irreconciliability between Fundamental Rights and Directive Principles, we will find that the development of law has passed through three distinct stages.
>
> 37. To begin with, Article 37 was given a literal meaning holding the provisions contained in Part IV of the Constitution to be unenforceable by any Court. In The State of Madras v. Srimathi Champakam Dorairajan, 1951 SCR 525, it was held that the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. The view was reiterated in Deep Chand and Anr. v. The State of Uttar Pradesh and Others, 1959 Supp. (2) SCR 8. The Court went on to hold that disobedience to Directive Principles cannot affect the legislative power of the State. So was the view taken in In Re : The Kerala Education Bill, 1957 , 1959 SCR 995.
>
> 38. With L.C. Golak Nath and others v. State of Punjab and Another, (1967) 2 SCR 762, the Supreme Court departed from the rigid rule of subordinating Directive Principles and entered the era of harmonious construction. The need for avoiding a conflict between Fundamental Rights and Directive Principles was emphasized, appealing to the legislature and the courts to strike a balance between the two as far as possible. Having noticed Champakam (supra) even the Constitution Bench in Quareshi-I chose to make a headway and held that the Directive Principles nevertheless are fundamental in the governance of the country and it is the duty of the State to give effect to them.
>
> > "A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly

> implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be a 'mere rope of sand'."

Thus, Quareshi-I did take note of the status of Directive Principles having been elevated from 'sub-ordinate' or 'sub-servient' to 'partner' of Fundamental Rights in guiding the nation.

39. Kesavananda Bharati Sripadagalvaru and Anr. v. State of Kerala and Anr., (1973) 4 SCC 225, a thirteen-Judge Bench decision of this Court is a turning point in the history of Directive Principles jurisprudence. This decision clearly mandated the need for bearing in mind the Directive Principles of State Policy while judging the reasonableness of the restriction imposed on Fundamental Rights. Several opinions were recorded in Kesavananda Bharati and quoting from them would significantly increase the length of this judgment. For our purpose, it would suffice to refer to the seven-Judge Bench decision in Pathumma and Others v. State of Kerala and Ors., (1978) 2 SCC 1, wherein the learned Judges neatly summed up the ratio of Kesavananda Bharati and other decisions which are relevant for our purpose. Pathumma (supra) holds :-

> "(1) Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society so that when such a right clashes with a larger interest of the country it must yield to the latter.(Para 5) (2) The Legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. The courts have recognised that there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it. (Para 6) (3) The right conferred by Article 19(1)(f) is conditioned by the various factors mentioned in clause (5). (Para 8) (4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable:
>
> (a) In judging the reasonableness of the restriction the court has to bear in mind the Directive Principles of State Policy. (Para 8)
>
> (b) The restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirements of the interests of the general public. The legislature must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience

so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article. (Para 14)

(c) No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and having regard to the changing conditions, the values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict. (Para 15)

(d) The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed. (Para 18)

(e) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. (Para 20)

(f) The needs of the prevailing social values must be satisfied by the restrictions meant to protect social welfare. (Para 22)

(g) The restriction has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Court must see whether the social control envisaged by Article 19 (1) is being effectuated by the restrictions imposed on the fundamental right. However important the right of a citizen or an individual may be it has to yield to the larger interests of the country or the community. (Para 24)

(h) The Court is entitled to take into consideration matters of common report history of the times and matters of common knowledge and the circumstances existing at the time of the legislation for this purpose. (Para 25)"

41. The message of Kesavananda Bharati is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations : first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution.

46. Very recently in Indian Handicrafts Emporium and Ors. v. Union of India and Ors., (2003) 7 SCC 589, this Court while dealing with the case of a total prohibition reiterated that 'regulation' includes 'prohibition' and in

order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the Directive Principles contained in Part IV is within the expression of 'restriction in the interests of the general public'.

47. Post Kesavananda Bharati so far as the determination of the position of Directive Principles, vis-a-vis Fundamental Rights are concerned, it has been an era of positivism and creativity. Article 37 of the Constitution which while declaring the Directive Principles to be unenforceable by any Court goes on to say "that they are nevertheless fundamental in the governance of the country." Several clauses of Article 37 themselves need to be harmoniously construed assigning equal weightage to all of them. The end part of Article 37 "It shall be the duty of the State to apply these principles in making laws" is not a pariah but a constitutional mandate. The series of decisions which we have referred to hereinabove and the series of decisions which formulate the 3-stages of development of the relationship between Directive Principles and Fundamental Rights undoubtedly hold that, while interpreting the interplay of rights and restrictions, Part-III (Fundamental Rights) and Part-IV (Directive Principles) have to be read together. The restriction which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions contained in the chapter on Directive Principles of State Policy can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the Fundamental Rights.

48. Articles 48, 48-A and 51-A(g) (relevant clause) of the Constitution read as under :-

> "48. Organisation of agriculture and animal husbandry.-The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.
>
> 48-A. Protection and improvement of environment and safeguarding of forests and wild life.-The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
>
> 51-A. Fundamental duties.-It shall be the duty of every citizen of India-
>
> (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"

Articles 48-A and 51-A have been introduced into the body of the Constitution by the Constitution (Forty-second Amendment) Act, 1976 with effect from 3.1.1977. These Articles were not a part of the Constitution when Quareshi-I, Quraishi-II and Mohd. Faruk's cases were decided by this Court. Further, Article 48 of the Constitution has also been assigned a higher weightage and wider expanse by the Supreme Court post Quareshi-I. Article 48 consists of two parts. The first part enjoins the State to "endeavour to organize agricultural and animal husbandry" and that too "on modern and scientific lines". The emphasis is not only on 'organization' but also on

'modern and scientific lines'. The subject is 'agricultural and animal husbandry'. India is an agriculture based economy. According to 2001 census, 72.2% of the population still lives in villages (See- India Vision 2020, p.99) and survives for its livelihood on agriculture, animal husbandry and related occupations. The second part of Article 48 enjoins the State, de hors the generality of the mandate contained in its first part, to take steps, in particular, "for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle".

49. Article 48-A deals with "environment, forests and wild life". These three subjects have been dealt with in one Article for the simple reason that the three are inter-related. Protection and improvement of environment is necessary for safeguarding forests and wild life, which in turn protects and improves the environment. Forests and wild life are clearly inter-related and inter-dependent. They protect each other.

50. Cow progeny excreta is scientifically recognized as a source of rich organic manure. It enables the farmers avoiding the use of chemicals and inorganic manure. This helps in improving the quality of earth and the environment. The impugned enactment enables the State in its endeavour to protect and improve the environment within the meaning of Article 48A of the Constitution.

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.

58. It is thus clear that faced with the question of testing the constitutional validity of any statutory provision or an executive act, or for testing the reasonableness of any restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition, the Directive Principles of State Policy and Fundamental Duties as enshrined in Article 51-A of the Constitution play a significant role. The decision in Quareshi-I in which the relevant provisions of the three impugned legislations was struck down on the singular ground of lack of reasonability, would have decided otherwise if only Article 48 was assigned its full and correct meaning and due weightage was given thereto and Articles 48-A and 51-A(g) were available in the body of the Constitution.

61. According to their inherent genetic qualities, cattle breeds are broadly divided into 3 categories (i) Milch breed (ii) Draught breed, and (iii) Dual purpose breed. Milch breeds include all cattle breeds which have an inherent potential for milk production whereas draught breeds have an inherent potential for draught purposes like pulling, traction of loads etc. The dual purpose breeds have the potential to perform both the above functions.

62. The term draught cattle indicates "the act of moving loads by drawing or pulling i.e. pull and traction etc. Chambers 20th Century Dictionary defines 'draught animal' as 'one used for drawing heavy loads'.

63. Cows are milch cattle. Calves become draught or milch cattle on attaining a particular age. Having specifically spoken of cows and calves, the latter being a cow progeny, the framers of the Constitution chose not to catalogue the list of other milch and draught cattle and felt satisfied by employing a general expression "other milch and draught cattle" which in their opinion any reader of the Constitution would understand in the context of the previous words "cows and calves".

64. "Milch and draught", the two words have been used as adjectives describing and determining the quality of the noun 'cattle'. The function of a descriptive or qualitative adjective is to describe the shape, colour, size, nature or merits or demerits of the noun which they precede and qualify. In a document like the Constitution, such an adjective cannot be said to have been employed by the framers of the Constitution for the purpose of describing only a passing feature, characteristic or quality of the cattle. The object of using these two adjectives is to enable classification of the noun 'cattle' which follows. Had it been intended otherwise, the framers of the Constitution would have chosen a different expression or setting of words.

65. No doubt, cow ceases to be 'milch' after attaining a particular age. Yet, cow has been held to be entitled to protection against slaughter without regard to the fact that it has ceased to be 'milch'. This constitutional position is well settled. So is the case with calves. Calves have been held entitled to protection against slaughter without regard to their age and though they are not yet fit to be employed as 'draught cattle'. Following the same construction of the expression, it can be said that the words "calves and other milch and draught cattle" have also been used as a matter of description of a species and not with regard to age. Thus, 'milch and draught' used as adjectives simply enable the classification or description of cattle by their quality, whether they belong to that species. This classification is with respect to the inherent qualities of the cattle to perform a particular type of function and is not dependant on their remaining functional for those purposes by virtue of the age of the animal. "Milch and draught cattle" is an expression employed in Article 48 of the Constitution so as to distinguish such cattle from other cattle which are neither milch nor draught.

66. Any other meaning assigned to this expression is likely to result in absurdity. A milch cattle goes through a life cycle during which it is sometimes milch and sometimes it becomes dry. This does not mean that as soon as a milch cattle ceases to produce milk, for a short period as a part of its life cycle, it goes out of the purview of Article 48, and can be slaughtered. A draught cattle may lose its utility on account of injury or sickness and may be rendered useless as a draught cattle during that period. This would not mean that if a draught cattle ceases to be of utility for a short period on account of sickness or injury, it is excluded from the definition of 'draught cattle' and deprived of the benefit of Article 48.

67. This reasoning is further strengthened by Article 51A(g) of the Constitution. The State and every citizen of India must have compassion for living creatures. Compassion, according to Oxford Advanced Learners' Dictionary means "a strong feeling of sympathy for those who are suffering

and a desire to help them". According to Chambers 20th Century Dictionary, compassion is "fellow feeling, or sorrow for the sufferings of another : pity". Compassion is suggestive of sentiments, a soft feeling, emotions arising out of sympathy, pity and kindness. The concept of compassion for living creatures enshrined in Article 51A (g) is based on the background of the rich cultural heritage of India the land of Mahatama Gandhi, Vinobha, Mahaveer, Budha, Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society. It has unity in diversity. The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember : the weak and meek need more of protection and compassion.

68. In our opinion, the expression 'milch or draught cattle' as employed in Article 48 of the Constitution is a description of a classification or species of cattle as distinct from cattle which by their nature are not milch or draught and the said words do not include milch or draught cattle, which on account of age or disability, cease to be functional for those purposes either temporarily or permanently. The said words take colour from the preceding words "cows or calves". A specie of cattle which is milch or draught for a number of years during its span of life is to be included within the said expression. On ceasing to be milch or draught it cannot be pulled out from the category of "other milch and draught cattle."

47. In the case of ***Supreme Court Employees' Welfare Association vrs. Union of India and another,*** reported in (1989) 4 SCC 187, their lordships have held that it is settled law that no Court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority. It has been held as follows:

"51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive author- ity exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legis- lature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority."

48. Their lordships of the Hon'ble Supreme Court in the case of ***State of Jammu and Kashmir vrs. A.R. Zakki and others,*** reported in ***AIR 1992 SC 1546,*** have held that writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power to make rules, which are in the nature of subordinate legislation.

49. Their lordships of the Hon'ble Supreme Court in the case of ***S.R. Bommai and others etc. etc. vrs. Union of India and others,*** reported in ***AIR 1994 SC 1918,*** have held that secularism is one of the basic feature of the Constitution:

“Ahmadi, J.:-Notwithstanding the fact that the words 'Socialist', and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amenment, the concept of Secularism was very much embedded in our Constitutional philosophy. The term 'secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit.

Sawant, J. (for himself and on behalf of Kuldip Singh, J). (Pandian, J. concurring):-

The Preamble and Arts. 25, 26, 29, 30 , 44, 51-A, 14, 15, 16 by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations. Under our Constitution whatever be the attitude or the State towards the religion, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. The State's tolerance of religion or religions does not make it either a religious or a theocratic State.

K.Ramaswamy, J. (concurring with Sawant and B.P. Jeevan Reddy, JJ.)-

Secularism is part of the fundamental law and basic structure of the Indian Political system to secure to all its people socio-economic needs essential for man’s excellence with material and moral prosperity and political justice.

B.P. Jeevan Reddy, J. (for himself and on behalf of S.C. Agrawal, J.) (Pandian, J. Concurring)-

Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the state, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.

Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religious. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in Keshavananda Bharti and Indira N. Gandhi v. Raj Narain [1975] 2 S.C.C. 159. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional. This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of Temples, Mosques and other places of worship; and maths. The power of the Parliament to reform and rationalise the personal laws is unquestioned. The command of Article 44 is yet to be realised.

> In short, in the affairs of the State (in its widest connotation) religion is irrelevant; it is strictly a personal affair. In this sense and in this behalf, our Constitution is broadly in agreement with the U.S. Constitution, the First Amendment whereof declares that " Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof..." (generally referred to as the "establishment clause"). Perhaps, this is an echo of the doctrine of separation of Church and State; may be it is the modern political thought which seeks to separate religion from the State - it matters very little. In this view of the matter, it is absolutely erroneous to say that secularism is a "vacuous word" or a "phantom concept".”

50. The law makers must respect the religious sentiments of the minorities. Article 25 of the Constitution of India guarantees equality of all religions. The secularism is one of the basic features of the Constitution of India. The people should not hurt the religious sentiments of each other. There should be cohesiveness in the society. Strifes tears apart the fibre of democracy. Strifes also generate mistrust for each other.

51. Though, no writ of mandamus can be issued to respondent No. 10 to enact a legislation to prohibit slaughtering of cow/calf and putting restrictions on import and export of cow/calf, milch and other cattle or import and export of cow/calf, including sale of beef or beef products, however, in view of Article 48, 48-A and 51-A(g) of the Constitution of India, the Union of India is directed to consider to enact the law prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products, in its own wisdom at the national level, within a period of three months from today. The Union of India is also directed to provide also necessary funds to the State Government for housing and providing fodder to cows/stray cattle form the specially framed Schemes for the protection and conservation of cow/calf within three months from today. The necessary personal compliance affidavit be filed by the concerned Secretary of the Union of India in this regard before the next date of hearing.

52. List on 6.1.2016.

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

Inder Singh son of Bazira Ram ....Petitioner

Versus

State of H.P. through Secretary and others ....Non-petitioners

CWP No. 1253 of 2013
Order Reserved on 17th September, 2015
Date of Order 14th October, 2015.

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages as Beldar- services of 1087 workmen including petitioner were retrenched- retrenchment orders of 43 workmen were set aside by the Labour Court- their services were re-instated but the services of the petitioner were not re-instated, although, he was senior- petitioner raised an industrial dispute but the case was not referred to the Labour Court on account of delay- held, that there is no limitation for reference to the Labour Court- order passed by Labour Commissioner set aside with the direction to refer the dispute to the Labour Court.

(Para-6 to 8)

Cases referred:

Raghubir Singh vs. GM Haryana Roadways Hissar , (2014)10 SCC 301

Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458

For the Petitioner: Mr. Rahul Mahajan, Advocate.

For Non-petitioners: Ms. Meenakshi Sharma, Additional Advocate General and Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India against order dated 7.7.2012 passed by learned Labour Commissioner Himachal Pradesh.

2. Brief facts of the case as pleaded are that on 1.1.1999 petitioner was engaged by co-respondent No. 3 on daily wages on muster roll as Beldar. On 8.7.2005 services of 1087 workmen retrenched by co-respondent No. 3 including petitioner. On 30.3.2009 retrenchment order of 43 workmen set aside and quashed by H.P. Industrial Tribunal-cum-Labour Court Dharamshala. On 16.9.2009 services of 43 workmen have been reinstated by co-respondent No. 3 but petitioner was not given opportunity for re-employment being a senior workmen. On 16.6.2009 petitioner raised industrial dispute under Section 2-A of Industrial Disputes Act 1947 against co-respondent No. 3 to set aside the retrenchment order dated 8.7.2005. It is pleaded that on 27.1.2010 workman Nand Lal had raised the industrial dispute under Section 2-A of Industrial Disputes Act 1947 to set aside retrenchment order dated 8.7.2005 after more than five years. It is pleaded that case of Nand Lal was referred to Industrial Tribunal-cum-Labour Court Dharamshala for adjudication. It is pleaded that Inder Singh raised the industrial dispute after lapse of more than seven years and his case was also referred to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala. It is pleaded that on 7.7.2012 learned Labour Commissioner H.P. did not refer the case of petitioner to learned H.P. Industrial Tribunal-cum-Labour Court for adjudication. Prayer to set aside order dated 7.7.2012 passed by learned Labour Commissioner sought and further prayer to refer the dispute of petitioner to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala sought.

3. Per contra response filed on behalf of co-respondents Nos. 1 and 2 pleaded therein that Industrial Dispute Act 1947 stood amended wherein workmen can directly approach the Industrial Tribunal-cum-Labour Court within a period of three years from the date of termination. It is pleaded that matter could not be settled before the Labour Officer-cum-Conciliation Officer Mandi and thereafter the report was submitted to the Labour Commissioner. It is pleaded that petitioner had raised the dispute after four years. It is pleaded that respondents have not violated Articles 14, 16 and 21 of Constitution of India and had issued the impugned order dated 7.7.2012 as per provisions of the Industrial Disputes Act 1947. Prayer for dismissal of petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioners and Court also perused the entire record carefully.

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

Point No.1

Whether civil writ petition filed by the petitioner under Article 226 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition?

Point No.2

Final order.

Findings upon point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of the petitioner that order passed by learned Labour Commissioner dated 7.7.2012 is contrary to law is accepted for the reasons hereinafter mentioned. Court has carefully perused order dated 7.7.2012 passed by learned Labour Commissioner H.P. Learned Labour Commissioner H.P. has mentioned in order that there is no justification to refer the matter to Labour Court-cum-Industrial Tribunal for adjudication because petitioner did not raise the dispute w.e.f. 7.7.2005 to 16.6.2009 continuously for four years. Learned Labour Commissioner has held that present dispute is faded away with passage of time and is no more in existence. Learned Labour Commissioner further held that demand notice is fictitious and frivolous. Learned Labour Commissioner held that there is no justification to raise the matter to Labour Court-cum-Industrial Tribunal Dharamshala for adjudication in view of ruling given by High Court of H.P. in CWP No. 398 of 2001 titled M.C. Paonta Sahib vs. State of H.P. and others and ruling given by the Full Bench of High Court of H.P. in CWP No. 1486 of 2007 titled Laiq Ram vs. State of H.P.

7. Hon'ble Apex Court of India in case reported in ***(2014)10 SCC 301 titled Raghubir Singh vs. GM Haryana Roadways Hissar*** held that there is no limitation for reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held that words "At any time" mentioned in Section 10 of Industrial Disputes Act 1947 clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of Industrial Disputes Act 1947. It was held in case reported in ***(2015)4 SCC 458 titled Jasmer Singh vs. State of Haryana and others*** that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. As per Article 141 of Constitution of India law declared by the Supreme Court is binding upon all Courts within territory of India. It is well settled law that when there is conflict between ruling given by the High Court and ruling given by the Apex Court of India then ruling given by the Apex Court of India always prevails. It is proved on record that cases of Inder Singh and Nand Lal were also referred to Labour Court-cum-Industrial Tribunal after lapse of five years. It is held that on the concept of right to equality as mentioned under Article 14 of Constitution of India it is expedient in the ends of justice that case of petitioner should be referred to the Industrial Tribunal-cum-Labour Court Dharamshala for adjudication. In view of above stated facts and case law cited supra point No.1 is decided in favour of the petitioner.

Point No. 2 (Final Order)

8. In view of findings upon point No.1 petition filed under Article 226 of Constitution of India is accepted and order of learned Labour Commissioner Himachal Pradesh dated 7.7.2012 is set aside and co-respondents Nos. 1 and 2 are directed to refer the dispute of petitioner to the Industrial Tribunal-cum-Labour Court under Section 10 of H.P. Industrial Disputes Act within one month from today. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Jai Lal .....Appellant.
Versus
National Insurance Company Ltd. & another .....Respondents.

FAO(WC) No. 139 of 2007.
Reserved on: 24.8.2015.
Decided on: 14.10.2015.

Workmen Compensation Act, 1923- Section 5- Petitioner was employed as a driver- he met with an accident and suffered 100% disability- accident was duly proved- petitioner was a driver and his licence was renewed after the accident- held, that disability had ceased the moment the licence was renewed - the compensation was rightly awarded by treating the disability as 27% on the basis of medical certificate. (Para-12 and 13)

For the appellant: Mr. Vinod Gupta, Advocate.
For the respondents: Mr. Deepak Bhasin, Advocate, for respondent No. 1.
Mr. G.R.Palsra, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the order dated 23.8.2006, rendered by the learned Commissioner, Workmen Compensation, Sundernagar, Distt. Mandi, H.P. in File No. 4.

2. Key facts, necessary for the adjudication of this FAO are that the appellant was employed as driver with respondent No. 2. He was drawing salary of Rs.6,000/- per month. He met with an accident on 13.2.2004 at Mohali, Punjab. He suffered fracture in his left leg below the ankle. Collar bone was fractured and he also received injury on the forehead. He was 35 years of age at the time of the accident. According to the appellant, he suffered 100% disability due to the accident. He was unable to discharge his duties as driver.

3. Reply was filed by respondents No. 1 & 2.

4. The learned Commissioner framed the issues. The learned Commissioner awarded a sum of Rs.21,450/-. Hence, this appeal.

5. Mr. Vinod Gupta, Advocate for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that his client has suffered 100% functional disability due to the accident dated 13.2.2004. On the other hand, Mr. Deepak Bhasin and Mr. G.R.Palsra, Advocates for the respective respondents, have supported the order dated 23.8.2006.

6. I have heard learned counsel for the parties at length and gone through the records and order very carefully.

7. The appellant has appeared as PW-1. According to him, when he was getting down from the vehicle, he was struck by the Car and he was taken to the hospital. He remained in the hospital for more than a month. He was paid Rs. 3000/- per month as

wages and Rs. 100/- per day as '*bhatta*'. PW-2 Dr. Ramesh Sen has proved disability certificate. He has assessed the disability of the appellant at 27%. PW-3 Mahinder Singh has proved FIR Ext. AW-3/A dated 24.4.2006.

8. RW-1/1 Dr. Mussarat Javed, deposed that he is working in PHC Jadol. He has issued MLC to the appellant. He has also admitted that the licence is renewed after receiving the medical certificate. The appellant had come to him on 8.1.2005. The appellant was fit to discharge duties of driver when he examined him on 8.1.2005.

9. RW-1/2 Sant Ram has proved medical certificate dated 8.1.2005.

10. RW-2/1 Bhram Dass deposed that he has purchased the vehicle in the year 1998. The registration was in his name. The appellant was engaged as driver in the year 2003. He was paying Rs. 3000/- per month to the appellant.

11. RW-2/2 Sant Ram, who had earlier appeared as RW-1/2 deposed that the driving licence was renewed w.e.f. 15.1.2005 to 14.1.2010.

12. The accident has duly been proved by HC Mahinder Singh, No. 8271, Police Station Mohali, Ropar, who has produced copy of FIR AW-3/A. The age of the appellant at the time of accident was 35 years. The driving licence is Ext. RW-2/A. The driving licence was originally issued by RLA Solan. It was renewed by RLA Sundernagar, from time to time. The appellant was possessing valid and effective driving licence at the time of accident. The learned Commissioner has assessed the income of the appellant at Rs. 3000/- per month.

13. The moot question involved in this appeal is whether the appellant has suffered 100% permanent disability or not. The disability of the appellant has been assessed at 27% as per Ext. A-1. The appellant was also examined by Dr. M. Javed. The driving licence of the appellant was renewed on the basis of fitness certificate issued by Dr. M. Javed. While determining the compensation, the functional disability has to be seen. In the present case, the appellant was driver who has not suffered 100% disability even after the injury received by him in the accident, since his licence has been renewed on the basis of the fitness certificate issued by Dr. M.Javed. It is not one of those cases where the driver has met with an accident and is not in a position to drive the vehicle. Thus, the Workmen Commissioner has rightly come to the conclusion that the disability has ceased the moment the appellant has renewed his driving licence, on the basis of the certificate issued by Dr. M. Javed. His disability was only 27% as per Ext. A-1. The learned Workmen Commissioner has rightly awarded sum of Rs.21,450/- to the appellant, strictly as per the provisions of the Workmen Compensation Act.

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

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

Joginder Pal son of Shri Prem Dass ....Petitioner

Versus

Baba Balak Nath Temple Trust Deoth Sidh and others....Non-petitioners

CWP No. 2039 of 2012
Order Reserved on 17th September, 2015
Date of Order 14th October, 2015

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer on contract basis - he sought regularization of services- record shows that petitioner worked on contract basis and thereafter worked as guest faculty – it was specifically mentioned in the agreement that contractual appointment will not confer any right for regularization and, therefore, he cannot claim regularization- petition dismissed. (Para-7 and 8)

Cases referred:
State of Gujarat and another vs. P.J. Kampavat and others, AIR 1992 SC 1685
Swati Ferro Alloys Private Ltd. vs. Orissa Industrial Infrastructure Development Corporation (IDCO) and others, 2015) 4 SCC 204

For the Petitioner:	Mr. Bhuvnesh Sharma, Advocate.
For Non-petitioners:	Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India.

2. Brief facts of the case as pleaded are that in the month of April 1992 petitioner Joginder Pal qualified M.A. in English. On 5.7.2001 petitioner was initially appointed as Lecturer (English) in Baba Balak Nath College. Thereafter appointment on contract basis made from time to time till the academic session 2004-05. Thereafter w.e.f. 2005 to November 2009 petitioner's nomenclature was changed from contract basis to guest faculty. Thereafter again in the month of December 2009 petitioner was appointed on contract basis. Petitioner has sought the relief that non-petitioners be directed to regularise the services of petitioner w.e.f. completion of eight years of service with all consequential benefits.

3. Per contra response filed on behalf of the non-petitioners pleaded therein that Baba Balak Nath Senior Secondary School is not a State or authority as defined under Article 12 of Constitution of India. It is pleaded that Senior Secondary school is run by Trust which is created under the provision of H.P. Hindu Public Religious Institutions Charitable Endowment Act 1984. It is pleaded that Trust is not aided school and Managing Committee constituted by the Trust is managing the affairs of school. It is pleaded that offerings of deity are spent by the non-petitioners for running Institutions and other activities of Trust. It is pleaded that no aid is provided from the State Government. It is pleaded that an amount of Rs.7.50 crores is annually spent for its employees. It is pleaded that petitioner was appointed purely on contractual basis w.e.f. 2001 to February 2005 and thereafter petitioner was appointed on guest faculty basis till 22.12.2009. It is pleaded that petitioner has served the Institution on period basis teacher w.e.f. 4.7.2005 to 22.12.2009. It is pleaded that contractual appointment did not confer any right for regularisation of service. It is pleaded that petitioner has not completed the normal period of eight years of contractual service for regularisation. Prayer for dismissal of civil writ petition sought.

4. Petitioner filed rejoinder and re-asserted the allegations made in civil writ petition.

5. Court heard learned Advocate appearing on behalf of the petitioner and learned Advocate appearing on behalf of the non-petitioners and Court also perused the entire record carefully.

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

Point No.1

Whether civil writ petition filed under Article 226 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition?

Point No. 2

Final Order.

Findings upon point No. 1 with reasons

7. Submission of learned Advocate appearing on behalf of the petitioner that petitioner has worked as whole time on contract basis w.e.f. 2001 to 2009 and he is legally entitled for regularisation of service after completion of eight years service is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that petitioner has worked as whole time on contract basis w.e.f. 2001 to February 2005 and it is proved on record that thereafter petitioner has worked on guest faculty basis w.e.f. 2005 to 2009. Court has carefully perused the contract agreement executed between the petitioner and Baba Balak Nath Temple Trust placed on record. There is special condition in agreement that contractual appointment would not confer any right to the petitioner for regularisation of service at any stage of case. Petitioner has signed the contractual agreement executed between the petitioner and Baba Balak Nath Temple Trust voluntarily being highly educated person as post graduate in English subject. It is not the case of petitioner that conditions of contractual agreement were not in knowledge of petitioner when he joined the services. Petitioner is Post Graduate in English and contractual agreement is also written in English language. Court is of the opinion that petitioner has voluntarily admitted the terms and conditions of contractual agreement at the time of his appointment. Court is of the opinion that no party can be allowed to flout the terms and conditions of contractual agreement executed inter se the parties at the time of appointment. In view of the fact that petitioner has voluntarily agreed in contractual agreement placed on record that petitioner would not claim any right for regularisation of service at any stage Court is of the opinion that contractual agreement executed by the petitioner in sound state of mind is binding upon him. It was held in case reported in ***AIR 1992 SC 1685 titled State of Gujarat and another vs. P.J. Kampavat and others*** that if person is appointed purely on contractual basis on specific expressed condition that he would be liable to be terminated without notice and without giving reason and his tenure would be for limited period then he would not be liable to absolve permanently.

8. Submission of learned Advocate appearing on behalf of petitioner that factually the petitioner has worked as whole time contract basis w.e.f. 2005 to 2009 but his nomenclature was illegally changed from contractual basis to guest faculty and on this ground civil writ petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether petitioner has worked as a wholetime on contract basis or worked as guest faculty w.e.f. 2005 to 2009 is an issue of fact. Plea of petitioner that petitioner did not work as guest faculty w.e.f. 2005 to 2009 is denied by non-petitioners when non-petitioners filed the response in present civil writ petition. In view of the fact that there is dispute inter se the parties relating to fact whether petitioner has worked w.e.f. 2005 to 2009 on the basis of guest faculty or on the basis of whole time contractual basis Court is of the opinion that it is not expedient in the ends of justice to give findings in

present civil writ petition. It is well settled law that disputed questions of law should not be decided in civil writ petition filed under Article 226 of Constitution of India. ***See (2015)4 SCC 204 titled Swati Ferro Alloys Private Ltd. vs. Orissa Industrial Infrastructure Development Corporation (IDCO) and others.*** In view of above stated facts point No.1 is decided in negative against the petitioner.

Point No. 2 (Final Order)

9. In view of findings on point No.1 civil writ petition filed under Article 227 of Constitution of India is dismissed. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Mulkh Raj and another .....Appellants.
Versus
Mast Ram and others .....Respondents.

RSA No. 31 of 2004.
Reserved on: 12.10.2015.
Decided on: 14.10.2015.

Limitation Act, 1963- Article 63- Plaintiff filed a civil suit seeking declaration that he had become the owner by way of adverse possession- held, that plaintiff cannot seek declaration that his adverse possession had matured into ownership and he had become owner by way of adverse possession. (Para-12 and 13)

Case referred:
Gurdwara Sahib vrs. Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669

For the appellant(s): Mr. Rajneesh K. Lall, Advocate.
For the respondents: Mr. Ashok Tyagi, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kangra at Dharamshala, H.P. dated 6.10.2003, passed in Civil Appeal No. 54-G/XIII-02.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for declaration qua ownership and in the alternative for possession against the appellants-defendants (hereinafter referred to as the defendants). The subject matter of the suit is land comprised in Khata No. 21, Khatauni No. 35, Kh. No. 148 to 151, measuring 0-42-99 hectares and Khata No. 22, Khatauni No. 36, Kh. No. 202, 203, 206, 206/1, 208 and 213, measuring 0-51-89 hectares, situated in Mohal Jakhot, Mauza Bharoli, Tehsil Dehra, Distt. Kangra, H.P., as per jamabandi for the year 1990-91 (hereinafter referred to as the suit

land). The suit land was initially owned and possessed by one Sh. Dallu son of Shibu who had two sons namely, Kihru and Jalsi. The plaintiffs are successors-in-interest of Jalsi and defendant No. 1 Mulkh Raj, is successor-in-interest of Kihru. The plaintiffs consequently filed a suit against the defendants. It was decided by the learned District Judge, Kangra on 29.8.1969. The plaintiffs were in possession of the suit land prior to the death of Dallu and after the decision of the Court in the year 1969, they continued in possession of this land asserting their right of ownership openly, peacefully, continuously and as such they claimed adverse possession. During the year 1971, Sh. Kihru, predecessor-in-interest of defendant No. 1 Mulkh Raj filed civil suit for possession of suit land against the plaintiffs. It was dismissed by the Senior Sub Judge, Kangra on 27.10.1980. However, after dismissal of suit, possession of the suit land remained with the plaintiffs. The predecessor-in-interest of the defendant No. 1 Mulkh Raj attempted to take possession of the suit land from the plaintiffs but was not allowed to take possession and they have right of ownership for the last 25 years and as such they have become owner of the suit land by way of adverse possession.

3. The suit was contested by the defendants. The defendants controverted the claim of the plaintiffs that they were coming in possession of the suit land prior to the death of Dallu and have become owners of the suit land by way of adverse possession. According to them, Dallu had executed Will dated 26.9.1962 in favour of Khiru, predecessor-interest of defendant No. 1 on the basis of which he succeeded to the estate of Dallu in the year 1963. Thereafter, Jalsi predecessor-in-interest of plaintiffs filed suit for possession of ½ share of the land of Dallu on the ground that the Will was not valid. It was decided by the learned Senior Sub Judge, Kangra. It was challenged in appeal by Khiru before the learned District Judge, Kangra and the learned District Judge, Kangra vide judgment dated 29.8.1969 modified the decree whereby the land granted to the plaintiffs was reduced from 14 kanals 4 marlas to 14 kanals. It was denied that mutation No. 66 was obtained by defendants in connivance with the revenue officials. According to them, it was at the instance of the plaintiffs that this mutation was got sanctioned in accordance with the decision in appeal dated 29.8.1969.

4. The replication was filed by the plaintiffs. The learned Sub Judge Ist Class (I), Dehra framed the issues and the suit was dismissed vide judgment dated 23.4.2002. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 23.4.2002. The learned District Judge, Kangra at Dharamshala, allowed the same on 6.10.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 7.5.2004:

> "1. Whether the plea of adverse possession was available to the plaintiff in the face of the findings in Civil Suit No. 226 of 1971 and order of the Assistant Collector dated 16th of October, 1990?
>
> 2. Whether the plaintiff can be permitted to take the plea of adverse possession in view of the fact that parties were co-sharers and partition proceedings were initiated within 12 years?
>
> 3. Whether the findings of the First Appellate Court are perverse based on misreading of oral and documentary evidence?"

6. Mr. Rajneesh K. Lall, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the plea of adverse possession was not available to the plaintiffs in view of the findings in Civil Suit No. 226 of 1971 and the order of the Assistant Collector dated 16th October, 1990. He has supported the judgment and decree

passed by the learned Sub Judge Ist Class (I), Dehra. On the other hand, Mr. Ashok Tyagi, Advocate has supported the judgment and decree passed by the learned first appellate Court dated 6.10.2003.

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

8. It is not in dispute that Dallu was common ancestor of the parties. He was owner-in-possession of the suit land. Kihru was predecessor-in-interest of defendant No. 1 and Jalsi predecessor-in-interest of plaintiffs. Dallu had executed Will dated 26.9.1962 in favour of Kihru and the same was challenged by the plaintiffs by way of Civil Suit No. 57/64. The suit was decided in favour of the plaintiffs on 14.10.1966. The decree was challenged by Kihru before the learned District Judge, Kangra. The matter was compromised on 29.8.1969. The copy of order is Ext. P-9. The plaintiffs were held entitled to 14 kanals of land in place of 14 kanals 4 marlas. Kihru also filed Civil Suit No. 226 of 1971. The learned Sub Judge, vide judgment dated 27.10.1980 Ext. D-5, dismissed the suit on merits. Kihru has admitted that he was in possession of the suit land. The decree was not assailed by Kihru Ram.

9. In jamabandi for the year 1985-86 Ext. P-4, jamabandi for the year 1977-78 Ext. P-5, jamabandi for the year 1975-76 Ext. P-6, jamabandi for the year 1968-69 Ext. P-7, the possession of the suit land continued to be recorded of that of the plaintiffs as non-occupancy tenants under Kihru.

10. The statement of PW-1 Prem Dass was corroborated by PW-2 Devi Singh. He testified that the suit land was continuously possessed and cultivated by plaintiffs since 30-35 years. Sh. Kihru in the year 1969 had requested him to get the suit land vacated from the plaintiffs and he alongwith Har Chand Singh asked the plaintiffs to give possession to Kihru but they refused.

11. DW-1 Mulakh Raj son of Kihru deposed that the plaintiffs are only entitled to get 14 kanals of land. He denied the suggestion that since 1969 plaintiffs are proclaiming themselves to be exclusive owner of 32 kanals 5 marlas of land or that plaintiffs have become owners of 18 kanals 5 marlas of land qua which his father had filed a suit.

12. The learned District Judge, Kangra returned findings to the effect that the possession of the plaintiffs was never interrupted despite the compromise decree before the Addl. District Judge, Dharamshala. According to him, due to long, continuous and recorded possession of more than 12 years, the plaintiffs have acquired title to the suit property by way of adverse possession. The plaintiffs have filed suit for declaration of ownership and also in the alternative for possession based on adverse possession.

13. Their lordships of the Hon'ble Supreme Court in the case of ***Gurdwara Sahib vrs. Gram Panchayat Village Sirthala and another,*** reported in ***(2014) 1 SCC 669,*** have held that even if the plaintiff was found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Their lordships have held as follows:

> "8. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

14. Accordingly, in view of the definitive law laid down by the Hon'ble Supreme Court in the judgment cited hereinabove, it is held that the declarative suit filed at the instance of the plaintiffs was not maintainable on the basis of adverse possession. The learned first appellate Court has erred in law by reversing the findings rendered by the learned Sub Judge Ist Class (I), Dehra dated 23.4.2002 by declaring the plaintiffs to be owners-in-possession of the suit land by way of adverse possession.

15. Consequently, the regular second appeal is allowed. The judgment and decree passed by the learned District Judge, Kangra at Dharamshala dated 6.10.2003 is set aside. The judgment rendered by learned Sub Judge Ist Class (I), Dehra, Distt. Kangra dated 23.4.2002 is restored. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Municipal Corporation Shimla through its Commissioner ... Petitioner

Versus

Savitri Devi ... Respondent

CMPMO No. 51 of 2014
Reserved on : 10.9.2015
Date of Decision : October 14, 2015

Himachal Pradesh Municipal Corporation Act, 1994- Section 253- A show cause notice was issued by the Commissioner, M.C. Shimla calling upon the respondent to show cause as to why unauthorized construction be not demolished- respondent filed a reply that construction was made strictly in accordance with the plan sanctioned by M.C. Shimla- J.E. was asked to submit a report who stated that area was approved for residential purposes and not for commercial purposes – respondent is using the premises for commercial purposes- Commissioner passed an order directing the removal/demolition of unauthorized shops- respondent filed an appeal in which it was held that report submitted by J.E. is not per se admissible – opportunity of examination should have been given to the respondent and the Commissioner had committed procedural illegality by passing the order- held, that Commissioner while exercising the power under Section 253 of the Act does not function as a Court and provisions of the Evidence Act are not applicable to the inquiries conducted by him- he exercises quasi judicial power and not administrative/ministerial power- he has to follow the principle of natural justice – provisions of Oaths Act, 1969 are not applicable to the proceedings- there is no question of examination or cross-examination of witnesses – reasonable opportunity means that party must know the issue and the material relied against it and an opportunity must be given to the party to prove its case- respondent never sought any opportunity of cross-examination- no grievance was raised in an appeal that opportunity of cross examination was not afforded- Commission had asked J.E. to submit a status report- respondent could have got her own report prepared and placed it on record, which was not done - therefore, order passed by Appellate Authority was contrary to settled principles of law and the same is set aside. (Para-2 to 85)

Cases referred:

Virindar Kumar Satyawadi vs. State of Punjab, AIR 1956 SC 153

Thakur Jugal Kishore Sinha Vs. Sitamarhi Central Coop. Bank Ltd., AIR 1967 SC 1494

Associated Cement Companies Ltd. vs. P.N. Sharma & anr., AIR 1965 SC 1595 (Five Judges)
Union of India vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1 (Five Judges)
Union of India Versus T.R. Varma, AIR 1957 SC 882 (Five Judges)
The State of Orissa and another Versus Murlidhar Jena, AIR 1963 SC 404 (Five Judges)
Maharashtra State Board of Secondary and Higher Secondary Education Versus K.S. Gandhi and others, (1991) 2 SCC 716 (Two Judges)
State of Haryana and another vs. Rattan Singh, (1977) 2 SCC 491 (Three Judges)
Essen Deinki Vs. Rajiv Kumar, (2002) 8 SCC 400 (Two Judges)
Manager, Reserve Bank of India, Bangalore vs. S. Mani and others, (2005) 5 SCC 100 (Three Judges)
Nagendra Nath Bora & another vs. Commissioner of Hills Division and Appeals, Assam & others, AIR 1958 SC 398 (Five Judges)
Gullapalli Nageswara Rao & others vs. Andhra Pradesh, State Road Transport Corporation & another, AIR 1959 SC 308 (Five Judges)
A. K. Kraipak & others vs. Union of India & others, (1969) 2 SCC 262 (Five Judges)
Saraswati Devi & others vs. State of Uttar Pradesh & others, (1980) 4 SCC 738 (Five Judges)
State of Maharashtra & others vs. Saeed Sohail Sheikh & others, (2012) 13 SCC 192 (Two Judges)
Province of Bombay vs. Khushaldas S. Advani, AIR 1950 SC 222
R. vs. Dublin Corpn. 1978 2 LR Ir 371
Frome United Breweries Co. Ltd. vs. Bath JJ, 1926 AC 586: 1926 All ER Rep 576 (HL)
State of Orissa vs. Binapani Dei, AIR 1967 SC 1269
Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405
Godrej & Boyce Manufacturing Company Ltd. & another vs. State of Maharashtra & others, (2014) 3 SCC 430 (Three Judges),
B.A. Linga Reddy & others vs. Karnataka State Transport Authority & othrs, (2015) 4 SCC 515 (Two Judges)
The New Prakash Transport Co. Ltd. vs. The New Suwarna Transport Co. Ltd., AIR 1957 SC 232 (Five Judges)
Haryana Financial Corporation & another vs. Kailash Chandra Ahuja, (2008) 9 SCC 31 (Two Judges)
Malik Ram vs. State of Rajasthan & others, AIR 1961 SC 1575 (Five Judges)
Union of India & another vs. P. K. Roy & others, AIR 1968 SC 850 (Five Judges)
Government of Mysore & others vs. J. V. Bhat & others, (1975) 1 SCC 110 (Three Judges)
Krishna Swami vs. Union of India, (1992) 4 SCC 605 (Five Judges)
Cantonment Board & another vs. Mohanlal & another, (1996) 2 SCC 23 (Two Judges)
M. P. Electricity Board, Jabalpur & others vs. Harsh Wood Products & another, (1996) 4 SCC 522 (Two Judges)
Canara Bank vs. V. K. Awasthy, (2005) 6 SCC 321 (Two Judges)
Natwar Singh vs. Director of Enforcement and another, (2010) 13 SCC 255 (Two Judges)
Automotive Tyre Manufactures Association vs. Designated Authority & others, (2011) 2 SCC 258 (Two Judges)
Ashwin S. Mehta & another vs. Union of India & others, (2012) 1 SCC 83 (Two Judges)
A. S. Motors Pvt. Ltd. vs. Union of India & others, (2013) 10 SCC 114 (Two Judges)
Keshav Mills Co. Ltd. vs. Union of India, (1973) 1 SCC 380 (Three Judges)
Union of India & others vs. Sanjay Jethi & another, (2013) 16 SCC 116 (Two Judges)
Khem Chand vs. Union of India & others, AIR 1958 SC 300 (Five Judges)

State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan, AIR 1961 SC 1623 (Five Judges)
Meenglass Tea Estate vs. The Workmen, AIR 1963 SC 1719 (Three Judges
M/s Kesoram Cotton Mills Ltd. vs. Gangadhar & others, AIR 1964 SC 708 (Two Judges)
Union of India vs. H.C. Goel, AIR 1964 SC 364 (Five Judges)
State of Uttar Pradesh vs. Om Prakash Gupta, 1969 (3) SCC 775 (Two Judges)
Uttar Pradesh Government vs. Sabir Hussain, (1975) 4 SCC 703 (Three Judges)
Mazharul Islam Hashmi vs. State of U.P. & another, (1979) 4 SCC 537 (Two Judges)
K. L. Tripathi vs. State Bank of India & others, (1984) 1 SCC 43 (Three Judges)
Union of India & others vs. Mohd. Ramzan Khan, (1991) 1 SCC 588 (Three Judges)
S. C. Girotra vs. United Commercial Bank (UCO Bank) & others, 1995 Supp (3) SCC 212 (Two Judges)
Kuldeep Singh vs. Commissioner of Police & others, (1999) 2 SCC 10 (Two Judges)
South Bengal State Transport Corpn. vs. Sapan Kumar Mitra & others, (2006) 2 SCC 584 (Two Judges)
Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra & others, (2013) 4 SCC 465 (Two Judges)
The State of Jammu & Kashmir & others, vs. Bakshi Gulam Mohammad & another, AIR 1967 SC 122 (Five Judges)
A. K. Roy vs. Union of India and others, (1982) 1 SCC 271 (Five Judges)
Lakshman Exports Ltd. vs. Collector of Central Excise, (2005) 10 SCC 634 (Three Judges)
Transmission Corpn. Of A.P. Ltd. & others vs. Sri Rama Krishana Rice Mill, (2006) 3 SCC 74 (Two Judges)
New India Assurance Company Ltd. Versus Nusli Neville Wadia and another, (2008) 3 SCC 279 (Two Judges)
Telstar Travels Private Ltd. & others vs. Enforcement Directorate, (2013) 9 SCC 549 (Two Judges)
The State of Bombay vs. Atma Ram Shridhar Vaidya, AIR (38) 1951 SC 157 (Six Judges)
M/s. Fedco (P) Ltd. & another vs. S. N. Bilgrami & others, AIR 1960 SC 415 (Five Judges)
Fazal Bhai Dhala vs. The Custodian General Evacuee Property, New Delhi & another, AIR 1961 SC 1397 (Five Judges)

For the petitioner : Mr. Hamender Chandel, Advocate, for the petitioner.
For the respondent : Mr. G. D. Verma, Sr. Advocate, with Mr. B. C. Verma, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J.

What is the nature of authority exercised by the Commissioner under the provisions of Section 253 of the Himachal Pradesh Municipal Corporation Act, 1994 (hereinafter referred to as the "Act")? Is it ministerial or quasi judicial? Is he bound to comply with the principles of natural justice? If yes, then to what extent? Do the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as the "Evidence Act") apply to such proceedings conducted by him? Whether in such proceedings report submitted by an official of the Corporation (Junior Engineer) is *per se* admissible in law or can be looked into? Whether under all circumstances, in such proceedings, a party would have a right to adduce evidence or cross-examine a person. All these issues require consideration by this court.

2. In exercise of its powers under Section 253 of the Act, Commissioner Municipal Corporation Shimla (hereinafter referred to as the Commissioner), issued notice dated 15.1.2010/23.2.2010, calling upon Savitri Devi (hereinafter referred to as the respondent) to show cause as to why unauthorized construction of 41.202 Sq. Mts., raised by her on the ground floor of the premises owned by her, be not demolished. Also as to why unauthorized commercial use thereof, be not stopped.

3. While acknowledging receipt of the notice, respondent filed response stating that the construction raised was strictly in accordance with the plan sanctioned by the Shimla Municipal Corporation (hereinafter referred to as the Corporation). With the completion of construction in the year 1978-79 itself, shops on the ground floor were put to commercial use. All construction raised was not only subjected to municipal tax but even water and electricity stood supplied, thus implying the construction to be fully authorized.

4. In such proceedings, on 2.7.2011, Commissioner directed the concerned Junior Engineer (J.E.) to consider the response and submit status report. Needful having been done, on 20.8.2011, Commissioner passed the following order:

> "Case called. Present AP, JE for the MC Shimla & Mr. Kuldeep Kumar on behalf of the respondent Mrs. Savtri Devi. As per report of the JE, the respondent has been sanctioned two storied structure with following measurements vide Executive order No. 245 dated 28.7.1975 issued by the Executive Officer, MC, Shimla.:-
>
> i) basement floor 7.31 x 4.57
>
> ii) ground floor 7.31 x 4.57.
>
> As against this area the respondent has constructed basement floor measuring 10.25 x 3.00. As per report of the JE this area was approved only for residential and not for commercial activities. The respondent is currently using these premises for commercial purposes i.e. shops etc.
>
> From the aforesaid facts, it is clear that the respondent has deviated from the sanctioned plan. It is therefore, ordered that the respondent will bring the construction to the sanctioned plan and revised drawings be submitted within six weeks for approval. The case to come up on 22.10.2011." [emphasis supplied]

5. Record reveals that thereafter neither did the respondent comply with the order nor did she participate in the proceedings and as such on 4.2.2012, Commissioner passed the following order:

> "Case called, Present JE Mr. Mohan Thakur for the MC Shimla and none for the respondent Mrs. Savitri Devi, despite service of the summon on her son. In compliance to the orders dated 20.8.2011, the JE states that construction has not been carried out as per approved plan and shops have been constructed and deviated from the approved plan, which indicates that land use has been changed without approval of the competent authority. The reply submitted by the respondent has been considered. The respondent has failed to prove that these three shops are constructed with the approval of the competent authority. Therefore, respondent is directed to remove/demolish these unauthorized shops measuring 41.202 sq. mts. as mentioned in the notice 88 dated 23.2.2010 within a period of four weeks, failing which the same shall be removed by MC, Shimla at the risk, cost and responsibility of the respondent. JE to submit compliance report on the next date of hearing. The case to come up on 07.04.2012."

[Emphasis supplied]

6. Subsequently he directed compliance of his order dated 04.02.2012.

7. Primarily on the ground that report of the J.E. stood prepared behind her back, respondent assailed the order dated 4.2.2012 by filing a statutory appeal, under the provisions of Section 253 (2) of the Act.

8. Vide impugned order dated 28.12.2013, passed by the Appellate Authority, in Civil Misc. Appeal No. 60-S/14 of 13/12, titled as *Smt. Savitri Devi Versus Municipal corporation, Shimla through its Commissioner,* appeal stands allowed, holding that: (a) Report submitted by the J.E. was not "per se admissible", hence could not have been relied upon as "evidence", without recording the "statement of the J.E." "on oath"; (b) Opportunity of cross-examination ought to have been afforded to the aggrieved party; (c) Impliedly, word "reasonable opportunity" so used in Section 253 of the Act would include right of cross-examination and right to adduce evidence in defence; (d) In deciding the case, Commissioner committed procedural illegality.

9. As such while quashing order dated 04.02.2012, matter was remanded back to the Commissioner with further directions to record the statements of the Assistant Planner and the J.E. on oath; after affording opportunity of cross-examination and adducing evidence to the parties, decide the case afresh.

10. The correctness of such findings is subject matter of consideration in this petition filed under Article 227 of the Constitution of India.

11. Careful perusal of the Act reveals that the concept of compliance of principles of natural justice/hearing is itself provided for under the Statute. However, provisions of procedure provided under the Code of Civil Procedure are made applicable only for the conduct of trial and disposal of election petitions or appeals filed before the District Judge, under the Act (Sections 17 and 379). Specifically provisions of the Evidence Act are not made applicable.

12. Chapter II of the Act deals with the Constitution of the Corporation.

13. Taxes and fee are imposed and collected under the provisions of Chapter VIII of the Act. Section 84 empowers the Corporation to levy taxes on buildings and lands and other taxes on such rates as may be notified by the State Government. However, no other tax can be imposed unless an "opportunity", in the prescribed manner, is afforded to the residents of the municipal area/affected parties for filing objections. The assessment list is prepared, which is deemed to be conclusive evidence, under Section 95 of the Act and can be amended only after affording "opportunity" to "persons who are likely to be affected". Section 99 mandates a person primarily liable to pay taxes to give notice to the Commissioner, after completion of construction of building.

14. Chapter XII deals with the supply of water, drainage and sewage disposal to the buildings constructed in the municipal area.

15. Chapter XIII deals with the management and functioning of the streets falling within the limits of municipal area. Only after affording "reasonable opportunity" to the residents likely to be affected and considering their objections, Commissioner is empowered to permanently close, whole or part of the public street.

16. Chapter XIV deals with the regulation of construction of building within the municipal area. Section 242 prohibits erection of any building except in accordance with

the provisions of the Act and bye-laws framed thereunder. Person intending to erect a building, by virtue of provisions of Section 243, has to comply and obtain necessary sanctions. After affording "reasonable opportunity" to the person affected, Commissioner is empowered to cancel such sanction on the ground of fraud/misrepresentation. He is also empowered to pass orders of demolition of unauthorized building/construction, but only after affording "reasonable opportunity" of showing cause. Such power emanates from the following Section, which is reproduced in its entirety, as is necessary for adjudication of the issues arising in the present appeal:-

> "253. Order of demolition and stoppage of building and works in certain cases and appeal.—(1) where the erection of any work has been commenced, or is being carried on or has been completed without or contrary to the sanction referred to in section 246 or in contravention of any condition subject to which such sanction has been accorded or in contravention of the provisions of this Act or bye-laws made thereunder, the Commissioner may in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or work has been commenced or is being carried on or has been completed within such period (not being less than seven days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to that person) as may be specified in the order of demolition:
>
> Provided that no order of demolition shall be made unless the person has been given, by means of a notice served in such manner as the Commissioner may think fit, a reasonable opportunity of showing cause why such order should not be made:
>
> Provided further that where the erection or work has not been completed, the Commissioner may be the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct the person to stop the erection or work until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-section (2).
>
> (2) Any person aggrieved by an order of the Commissioner made under sub-section (1) may prefer an appeal against the order to District Judge of the municipal area within the period specified in the order for the demolition of the erection or work to which it relates.
>
> (3) Where an appeal is preferred under sub-section (2) against an order of demolition, the District Judge may stay the enforcement of that order on such terms if any, and for such period, as it may think fit:
>
> Provided that where the erection of any building or execution of any work has not been completed at the time of the making of the order of demolition, no order staying the enforcement of the order of demolition shall be made by the District Judge, unless reasonable opportunity of being heard is afforded to the Commissioner and security sufficient in the opinion of the District Judge, has been furnished given by the appellant for not proceeding with such erection or work pending the disposal of the appeal.
>
> (4) Save as provided in this section no court shall entertain any suit, application or other proceedings for injunction or other relief against the Commissioner or restrain him from taking any action or making any order in pursuance of the provisions of this section.

(5) Every order made by the District Judge on appeal and subject only to such order, the order of demolition made by the Commissioner shall be final and conclusive.

(6) Where no appeal has been preferred against an order of demolition made by the Commissioner under sub-section (1) or where an order of demolition made by the Commissioner under the sub-section has been confirmed on appeal, whether with or without variation, the person against whom the order has been made shall comply with the order within the period specified therein or, as the case may be, within the period, if any, fixed by the District Judge on appeal, and on the failure of the person to comply with the order within such period, the Commissioner may himself cause the erection of the work to which the order relates to be demolished and the expenses of such demolition shall be recoverable from such person as an arrear of tax under this Act." [Emphasis supplied]

17. Chapter XXI empowers the Commissioner to issue, suspend or revoke licenses or written permissions accorded under the Act. Noticeably no order of suspension or revocation can be passed without affording "reasonable opportunity" to the aggrieved party.

18. It is thus seen that for compliance of provisions of Natural Justice, Act uses different expressions at different places:

(i) "Opportunity" : Provided "in the prescribed manner to the residents" or the affected parties to file objections. (Section 84).

(ii) "Opportunity of being heard" (Section 94)

(iii) Provide notice "to any person affected" (Section 96)

(iv) Give the owner or occupier "written notice" (Section 177).

(v) Give the owner "reasonable opportunity of showing cause". (Section 200)

(vi) Give "reasonable opportunity to the residents likely to be affected" (Section 209)

(vii) "Shall give reasonable opportunity to the person affected" (Section 248)

(viii) Give "reasonable opportunity of showing cause" (Section 253)

(ix) Give "reasonable opportunity to show cause" (Section 356)

19. Having dealt with the statutory provisions, one proceeds to examine the law on the relevant issues.

Does the Commissioner function as a Court or a Tribunal

20. In *Virindar Kumar Satyawadi vs. State of Punjab,* AIR 1956 SC 153 (Three Judges), the Court has made broad distinction between a Court and a quasi judicial Tribunal.

21. The Court in *Thakur Jugal Kishore Sinha Vs. Sitamarhi Central Coop. Bank Ltd.,* AIR 1967 SC 1494 (Two Judges), has upheld the following test for determining as to whether the authority constituted under a particular Act is exercising judicial or quasi judicial powers as a Court or not:

"(i) the dispute [which is to be decided by him] must be in the nature of a civil suit;

(ii) the procedure for determination of such a dispute must be a judicial procedure; and

(iii) the decision must be a binding one."

22. Relying upon *Associated Cement Companies Ltd. vs. P.N. Sharma & anr.,* AIR 1965 SC 1595 (Five Judges), the Court in *Union of India vs. R.Gandhi, President, Madras Bar Association,* (2010) 11 SCC 1 (Five Judges), held that:-

"The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law." … …

… … "…Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals. They are:

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions."

23. With the aforesaid guiding principles, it cannot be said that in exercise of his power under Section 253 of the Act, Commissioner is functioning as a Court.

Are the provisions of the Evidence Act applicable, to all proceedings conducted by the Commissioner.

24. The word "Court" defined under the Indian Evidence Act includes Judges, Magistrates and all persons except Arbitrators, legally authorized to take Evidence. A person can be cross-examined (under Chapter X) only if he is called as a witness and examined.

25. Evidence Act has no application to inquiries conducted by the Tribunal even though they may be judicial in character has been so held by the Constitution Bench in *Union of India Versus T.R. Varma,* AIR 1957 SC 882 (Five Judges).

26. Also inquiry held by an Administrative Tribunal is not governed by the strict and technical rules of the Evidence Act. [*The State of Orissa and another Versus Murlidhar Jena,* AIR 1963 SC 404 (Five Judges)].

27. In *Maharashtra State Board of Secondary and Higher Secondary Education Versus K.S. Gandhi and others,* (1991) 2 SCC 716 (Two Judges), the Court held that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and

place on record all necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. Therefore, when an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn. The standard of proof is not proof beyond reasonable doubt "but" the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a strait-jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The standard of proof is same both in civil cases and domestic enquiries. Similar view was taken in *State of Haryana and another vs. Rattan Singh,* (1977) 2 SCC 491 (Three Judges).

28. Even while dealing with the provisions of the Industrial Disputes Act, the Court in *Essen Deinki Vs. Rajiv Kumar,* (2002) 8 SCC 400 (Two Judges) has held that the provisions of the Evidence Act per se are not applicable in an Industrial adjudication. But however general principles would be applicable and it would be imperative upon the Industrial Tribunal to ensure that principles of natural justice are complied with. The view stands reiterated in *Manager, Reserve Bank of India, Bangalore vs. S. Mani and others,* (2005) 5 SCC 100 (Three Judges).

29. The office of the Commissioner does not fall within the definition of a Court. As already observed, neither the provisions of the Code of Civil Procedure, nor the Evidence Act are made specifically applicable to the proceedings before the Commissioner. Hence it is only the material placed by the parties, based on the principles of preponderance of probability, which is required to be considered and appreciated.

Does the Commissioner exercise Administrative or Judicial or quasi judicial function:

30. Whether or not an administrative body or authority functions as purely administrative one or in a quasi judicial capacity, has to be determined in each case on an examination of the relevant statues and rules framed thereunder.

31. In *Nagendra Nath Bora & another vs. Commissioner of Hills Division and Appeals, Assam & others,* AIR 1958 SC 398 (Five Judges) the power exercised by the authority under Section 9 of the Eastern Bengal and Assam Excise Act, 1910, was held to be judicial in nature and not administrative.

32. Whether an Administrative Tribunal has a duty to act judicially or not, and whether Secretary Incharge of transport department was discharging functions as such, came up for consideration before the Constitution Bench in *Gullapalli Nageswara Rao & others vs. Andhra Pradesh, State Road Transport Corporation & another,* AIR 1959 SC 308 (Five Judges). The Court was dealing with a case where the Motor Vehicles Act, 1939, imposed a duty upon the Tribunal to decide as to whether certain persons were to be excluded from the routes upon which the vehicles were to be plied under the provisions of the Motor Vehicles Act and the Rules framed thereunder. The Court held that if the authority is called upon to decide the rights of the contesting parties, a duty is cast upon the Tribunal to act judicially.

33. In *A. K. Kraipak & others vs. Union of India & others,* (1969) 2 SCC 262 (Five Judges), the Court held that dividing line between an administrative power and quasi-judicial power, which is quite thin, is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the

law conferring that power, the consequences resulting from the exercise of that power and the manner in which that power is expected to be exercised.

34. In *Smt. Saraswati Devi & others vs. State of Uttar Pradesh & others,* (1980) 4 SCC 738 (Five Judges) the Constitution Bench again had an opportunity of dealing with the scope of the powers to be exercised by the State Government under the provisions of the Motor Vehicles Act, 1939. Sections 68-C and 68-D empowered the State Government to modify the scheme, affecting rights of a private party. The Act provided opportunity of hearing to the parties, particularly whose rights were likely to be affected. The Court reiterated the principles laid down in *Gullapalli* (Supra).

35. Lately in *State of Maharashtra & others vs. Saeed Sohail Sheikh & others,* (2012) 13 SCC 192 (Two Judges), Court was called upon to decide as to whether the nature of the power exercised in transferring the undertrial from one to another prison was ministerial or judicial/quasi judicial in nature. While referring to its earlier decisions rendered in *Province of Bombay vs. Khushaldas S. Advani,* AIR 1950 SC 222; *R. vs. Dublin Corpn.* (1978 2 LR Ir 371; *Frome United Breweries Co. Ltd. vs. Bath JJ,* 1926 AC 586: 1926 All ER Rep 576 (HL); *State of Orissa vs. Binapani Dei,* AIR 1967 SC 1269; *A. K. Kraipak (supra)*; *Mohinder Singh Gill vs. Chief Election Commissioner,* (1978) 1 SCC 405, Hon'ble Mr. Justice T. S. Thakur, J., speaking for the Bench, held that:

> "27. Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet & Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function. It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc. We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra-distinction to what would amount to judicial or quasi-judicial function."
>
> ... .
>
> "34. Recently this Court in *Jamal Uddin Ahmad v. Abu Saleh Najmuddin* (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words: (SCC p. 270, para 14)
>
> > "14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be

delegated or performance whereof may be secured through authorization.

> 'The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all State officials who are neither legislators nor judges.'

(See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is:

> If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially. (pp. 1013-14).

Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The Judge may construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty.'" [Emphasis supplied]

36. In *Godrej & Boyce Manufacturing Company Ltd. & another vs. State of Maharashtra & others,* (2014) 3 SCC 430 (Three Judges), Hon'ble Mr. Justice Madan B. Lokur, J., speaking for the Bench, has also observed that the first rule of interpretation being that words in a statute must be interpreted literally. However at the same time, if the context in which a word is used and the provisions of a statute inexorably suggests a subtext other than literal, then the context becomes important.

37. In *B.A. Linga Reddy & others vs. Karnataka State Transport Authority & othrs,* (2015) 4 SCC 515 (Two Judges), Hon'ble Mr. Justice Arun Mishra, J. speaking for the Bench reiterated the principle that the power exercised by the authority in modifying the scheme under the Motor Vehicles Act is quasi judicial in nature mandating the authority to assign reasons and pass a speaking order. This alone would exclude arbitrariness in an action.

38. Ex-proprietary legislation, which deprives a person of his right of property, has to be strictly construed.

39. In instant case the Commissioner is required to apply his mind and return a positive finding affecting rights of parties. Such rights of the parties, so enshrined under the Constitution, can be adversely affected with the exercise of such powers. Any adverse order may entail civil consequences. Hence the power exercised by the Commissioner can be said to be quasi judicial and not administrative/ministerial.

Principle of Natural Justice, its facets and obligation of the Commissioner to comply with the same:

40. What is "natural justice" and what is the extent of hearing which is required to be afforded to an aggrieved party is now well settled

41. It is a settled principle of law that principle of natural justice would take colour from the context of its statutory provisions under which the issue is required to be adjudicated. [*The New Prakash Transport Co. Ltd. vs. The New Suwarna Transport Co. Ltd.,* AIR 1957 SC 232 (Five Judges). Also *Haryana Financial Corporation & another vs. Kailash Chandra Ahuja,* (2008) 9 SCC 31 (Two Judges)]

42. In *Nagendra Nath Bora* (supra) the court observed that:-

> "17. ... ... this Court has laid down that the rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent tribunal, is no ground for interference either under Art. 226 or Art.227 of the Constitution."
>
> (Emphasis supplied)

43. The question of applicability of *audi alteram partem* in the proceedings before the Tribunal has been inviting attention of the Courts in India. The rule that a party to whose prejudice any order is intended to be passed is entitled to hearing applies to judicial Tribunals and Bodies or persons invested with the authority to adjudicate upon the matters involving civil consequences. [*Gullapalli* (Supra)]. It is one of the fundamental rules of our Constitutional set up that every citizen is protected against the exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the functions intended to be performed. If there is power to decide and determine the prejudice of a person, duty to act judicially is implicit in the exercise of such power. This is the basic concept of rule of law.

44. While construing the meaning of expression "hearing and objections", under the provisions of Section 68-D of the Motor Vehicles Act, 1939, even where evidence could be produced and adduced, the Constitution Bench in *Malik Ram vs. State of Rajasthan & others,* AIR 1961 SC 1575 (Five Judges), held as under:

> "7. We may however point out that the production of evidence (documentary or oral) does not mean that the parties can produce any amount of evidence they like and prolong the proceedings inordinately and the State Government when giving the hearing would be powerless to check this. We need only point out that though evidence may have to be taken under S. 68-D (2) it does not follow that the evidence would be necessary in every case. It will therefore be for the State Government, or as in this case

> the officer concerned, to decide in case any party desires to lead evidence whether firstly the evidence is necessary and relevant to the inquiry before it. If it considers that evidence is necessary, it will give a reasonable opportunity to the party desiring to produce evidence to give evidence relevant to the enquiry and within reason and it would have all the powers of controlling the giving and the recording of evidence that any court has, Subject therefore to this overriding power of the State Government or the officer giving the hearing, the parties are entitled to give evidence either documentary or oral during a hearing under S. 68-D(2)." [Emphasis supplied]

45. In *Union of India & another vs. P. K. Roy & others,* AIR 1968 SC 850 (Five Judges), the Constitution Bench held that the extent and application of doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. Application of the doctrine is dependent upon the nature of jurisdiction conferred on the administrative authority; the character of the rights of the persons affected; the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.

46. In *A. K. Kraipak* (Supra), the Court observed that rules of natural justice operate in areas not covered by any law validly made, that is, they do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice.

It further held that:-

> "The concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that enquiries must be held in good faith and without bias, and not arbitrarily or unreasonably, is now included among the principles of natural justice." [Emphasis supplied]

47. In the *Government of Mysore & others vs. J. V. Bhat & others*, (1975) 1 SCC 110 (Three Judges), the Court further held that the nature of hearing, would vary according to the nature of functions, and what is a just and fair, is required to be exercised in the context of rights affected.

48. In *The Government of Mysore* (Supra), the Court has held as under:-

> "5. The *audi alteram partem* rule was held to be applicable by implication, to a case of deprivation of a right in property in *Daud Ahmed vs. District Magistrate Allahabad & others,* (1972) 1 SCC 655, where this Court held (SCC para 12):
>
> > "It is the nature of the power and the circumstances and conditions under which it is exercised that will occasion the invocation of the principle of natural justice. Deprivation of property affects rights of a person. If under the Requisition Act the petitioner was to be deprived of the occupation of the premises the District Magistrate had to hold an enquiry in order to arrive at an opinion that there existed alternative accommodation for the petitioner or the District Magistrate was to provide alternative accommodation." "

49. A Constitution Bench has laid down in *Krishna Swami vs. Union of India,* (1992) 4 SCC 605 (Five Judges) that if a statutory or public authority/functionary does not record reasons, its decision would be rendered arbitrary, unfair, unjust and violative of Articles 14 and 21 of the Constitution. Reasons are links between the material, the foundation for their erection and the actual conclusions, demonstrative of the mind of the maker, activated and actuated with the rational nexus and synthesis with the facts considered and the conclusions reached.

50. Significantly in *Cantonment Board & another vs. Mohanlal & another,* (1996) 2 SCC 23 (Two Judges), the Court was of the view that where the party admitted having breached the provisions of law qua the action sought to be rectified, there was no question of applicability of provisions of principles of natural justice.

51. While dealing with a case where the assessee himself had tampered and pilfered with the electricity connection, the Court in *M. P. Electricity Board, Jabalpur & others vs. Harsh Wood Products & another,* (1996) 4 SCC 522 (Two Judges) held non issuance of prior statutory notice for disconnecting the electricity supply by the authority not to be violative of Articles 20(1) & 14 of the Constitution of India or the principles of natural justice.

52. As to what is the meaning of the word 'natural justice", came up for consideration in *Canara Bank vs. V. K. Awasthy,* (2005) 6 SCC 321 (Two Judges), wherein disciplinary action taken against the employee was subject matter of challenge and the Court held that it is not easy to determine the term principle of natural justice as it would contextually depend upon given fact situation. The Court held that natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. It is the substance of justice which has to determine its form. The court further held that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. The intent being to prevent the authority from doing injustice. It observed that the concept of natural justice having undergone a great deal of change, such rules are not embodied, for they may be implied from the nature of duty to be performed under a statute.

53. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of each case, the framework of the statute under which the enquiry is held. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

54. What is "fair hearing" stands deliberated in *Natwar Singh vs. Director of Enforcement and another,* (2010) 13 SCC 255 (Two Judges) in the following terms:

> "30. The right to fair hearing is a guaranteed right. Every person before an Authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognized by this Court in *Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal*, AIR 1955 SC 65: (1955) 1 SCR 941. However,

disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future [See R vs. Secretary of State for Home Department, ex. p. H- (1995) QB 43: (1994) 3 WLR 1110: (1995) 1 All ER 479 (CA)].

31. The concept of fairness may require the Adjudicating Authority to furnish copies of those documents upon which reliance has been placed by him to issue show cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in built into the Rules. A noticee is always entitled to satisfy the Adjudicating Authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry." (Emphasis supplied)

55. In *Automotive Tyre Manufactures Association vs. Designated Authority & others,* (2011) 2 SCC 258 (Two Judges) the Court held that:-

"80. It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a strait-jacket nor is it a general rule of universal application.

81. Undoubtedly, there can be exceptions to the said doctrine. As stated above, the question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of these matters that the question of application of the said principle can be properly determined. (See: Union of India vs. Col. J.N. Sinha & Anr. (1970) 2 SCC 458.)"

[Emphasis supplied]

56. Further in *Ashwin S. Mehta & another vs. Union of India & others,* (2012) 1 SCC 83 (Two Judges) Court observed that the underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by any authority, irrespective of whether the power which is conferred on a statutory body or tribunal is administrative or quasi-judicial. The Court elaborated that discretion when applies to a court of justice means discretion guided by law. It must not be arbitrary, vague and fanciful, but legal and regular.

57. In *A. S. Motors Pvt. Ltd. vs. Union of India & others*, (2013) 10 SCC 114 (Two Judges) the Court had an occasion to deal with a case where on account of certain violations noticed by the National Highway Authority of India, right of a licensee to collect toll fee, on the basis of certain reports, stood forfeited. The court reiterated the principle that rules of natural justice are not embodied rules. The question whether requirements of natural justice stood met by the procedure adopted would, to a great extent, be dependent upon the facts and circumstances of the case in point, the constitution of the Tribunal and its governing rules. The court reiterated the principles laid down in *Keshav Mills Co. Ltd. vs. Union of India,* (1973) 1 SCC 380 (Three Judges) that the concept of natural justice could not be put into a strait-jacket. Hence it would be futile to look for definitions or standards of natural justice from various judicial pronouncements and then try to apply them to the facts of any given case. Primarily, what is essential, in all cases, is that the person concerned should have had reasonable opportunity of presenting his case and that the authority should have acted fairly, impartially and reasonably. Grievance with regard to correctness of the report resulting into forfeiture of right was turned down keeping in view earlier litigation and absence of any act of malafide, bias or prejudice on the part of the officers dealing with the issue. Eventually Hon'ble Mr. Justice T. S. Thakur, J, speaking for the Bench, observed that:-

> "8. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of *audi alteram partem* is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."

58. It be only observed that recently in *Union of India & others vs. Sanjay Jethi & another,* (2013) 16 SCC 116 (Two Judges), Hon'ble Mr. Justice Dipak Misra, J., speaking for the Bench, observed that:-

> "51. The principle that can be culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a Court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being *coram non-judice*. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that what is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a Court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition."

59. It is, thus, seen that the Commissioner is bound to comply with the principles of natural justice, not only by the mandate of the statute but also by the very nature of functions, which he is required to discharge. Rule of *audi alteram partem* is squarely applicable. His actions have to be reasonable, just, fair, impartial, reasoned, logical and honest. However the extent of applicability of principles of natural justice would be dependent upon given fact situation of each case. For example, if there is admission of breach of provision of law or action is palpably and *ex facie* illegal, there may not be any requirement to have an elaborate enquiry. Principles of natural justice would also be dependent upon the extent of the consequences which the action may have either on an individual or society at large. The concept of "natural justice" implies in itself, duty to act fairly and exercise of discretion, if any, has to be guided only by law. It cannot be capricious, fanciful, arbitrary or for extraneous purposes and reasons. There cannot be any strait-jacket formula and what is necessarily required would be equal and reasonable opportunity of full presentation of case and the Commissioner acting in a fair, impartial and a reasonable manner.

Does a party have a right of cross-examining a witness in the proceedings conducted by the Commissioner:

60. Noticeably on the issue of cross examining a witness, views expressed by Hon'ble the Supreme Court of India varies with different enactments and fact situations.

61. Right of a delinquent official to cross examine a witness, in a disciplinary proceeding initiated against him, stands recognized by Hon'ble the Supreme Court of India in its various judicial pronouncements. [*Khem Chand vs. Union of India & others,* AIR 1958 SC 300 (Five Judges); *State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan,* AIR 1961 SC 1623 (Five Judges); *Meenglass Tea Estate vs. The Workmen,* AIR 1963 SC 1719 (Three Judges); *M/s Kesoram Cotton Mills Ltd. vs. Gangadhar & others,* AIR 1964 SC 708 (Two Judges); *Union of India vs. H.C. Goel,* AIR 1964 SC 364 (Five Judges); *State of Uttar Pradesh vs. Om Prakash Gupta,* 1969 (3) SCC 775 (Two Judges); *Uttar Pradesh Government vs. Sabir Hussain,* (1975) 4 SCC 703 (Three Judges); *Mazharul Islam Hashmi vs. State of U.P. & another,* (1979) 4 SCC 537 (Two Judges); *K. L. Tripathi vs. State Bank of India & others,* (1984) 1 SCC 43 (Three Judges); *Union of India & others vs. Mohd. Ramzan Khan*, (1991) 1 SCC 588 (Three Judges); *S. C. Girotra vs. United Commercial Bank (UCO Bank) & others,* 1995 Supp (3) SCC 212 (Two Judges); *Kuldeep Singh vs. Commissioner of*

Police & others, (1999) 2 SCC 10 (Two Judges) ; *South Bengal State Transport Corpn. vs. Sapan Kumar Mitra & others,* (2006) 2 SCC 584 (Two Judges); and *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra & others,* (2013) 4 SCC 465 (Two Judges)]

62. However, a Constitution Bench in *T.R. Varma* (Supra), while dealing with the case of dismissal of an employee has also held that:-

> "10. Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law.
>
> Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.
>
> If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in *New Prakash Transport Co. v. New Suwarna Transport Co.*, 1957 SCR 98: ((S) AIR 1957 SC 232) (C) where this question is discussed."
>
> [Emphasis supplied]

63. A Constitution Bench in *The State of Jammu & Kashmir & others, vs. Bakshi Gulam Mohammad & another,* AIR 1967 SC 122 (Five Judges), while dealing with the provisions of Section 3 of the Commission of Inquiry Act, 1962, held that rules of natural justice require an opportunity of hearing being afforded to the party against whom allegation is being inquired into. However, such right of hearing would not include the right to cross examine, which is dependent upon the circumstances of each case as also the statute under which allegations are sought to be inquired. What prevailed upon the Court was the binding effect of the report of the Commission.

64. Right of a detenu, so detained under the provisions of the National Security Act, 1980, to cross examine a person whose statement led to such detention was turned down by a Constitution Bench in *A. K. Roy vs. Union of India and others,* (1982) 1 SCC 271 (Five Judges) in the following terms:

> "97. The principal question which arises is whether the right of cross examination is an integral and inseparable port of the principles of natural justice. Two fundamental principles of natural justice are commonly recognized, namely, that an adjudicator should be disinterested and un biased (*nemo judex in cause sua)* and that, the parties must be given adequate notice and opportunity to be heard (*audi alteram partem).* There is no fixed or certain standard of natural justice, substance or procedural, and in two English cases the expression 'natural justice' was described as one 'sadly lacking in precision' [*R. v. Local Government Board, Ex parte Arlidge,* (1914) 1 KB 160 at 199: (1914-15) All ER Rep at 21] and as 'vacuous' [*Local*

Government Board v. Arlidge, 1915 AC 120, 138: (1914-15) All ER Rep 1]. The principles of natural justice are, in fact, mostly evolved from case to case, according to the broad requirements of justice in the given case.

98. We do not suggest that the principles of natural justice, vague and variable as they may be, are not worthy of preservation. As observed by Lord Reid in *Ridge Versus Baldwin,* 1964 AC 40, 64-65: (1963) 2 All ER 66 (HL) the view that "natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". But the importance of the realization that the rules of natural justice are not rigid norms of unchanging content, consists in the fact that the ambit of those rules must vary according to the context, and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice. Judged by this test, it seems to us difficult to hold that detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross-examination of whom? The principle that witnesses must be confronted and offered for cross-examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is *guilty* of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a *lis* to adjudicate upon." [Emphasis supplied]

65. The decision of the Court in *Lakshman Exports Ltd. vs. Collector of Central Excise,* (2005) 10 SCC 634 (Three Judges), allowing the request of the party to cross-examine the witnesses, before the Tribunal, in proceedings initiated under the Central Excise Act, 1944, is in the given facts and circumstances and cannot be said to be *ratio decidendi*.

66. In *Transmission Corpn. Of A.P. Ltd. & others vs. Sri Rama Krishana Rice Mill,* (2006) 3 SCC 74 (Two Judges), the Court while dealing with a case where based on the report prepared by the officials of the electricity supplier, order of assessment was passed and demand raised and the assessee insisting upon cross examining the officials of the supplier, while repelling such right held that:

"9. In order to establish that the cross examination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilized for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to cross examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an

> adjudication being concluded, it shall be certainly open to the consumer to establish before the appellate authority as to how he has been prejudiced by the refusal to grant opportunity to cross-examine any official. As has been rightly noted by the High Court in the impugned judgment where the reliance is only on accounts prepared by a person, cross examination is not necessary. But where it is based on reports alleging tampering or pilferage, the fact situation may be different. Before asking for cross examination the consumer may be granted an opportunity to look into the documents on which the adjudication is proposed. In that event, he will be in a position to know as to the author of which statement is necessary to be cross-examined. The applications for cross-examination are not to be filed in routine manner and equally also not to be disposed of by adjudicator in casual or routine manner. There has to be application of mind by him. Similarly, as noted above, the consumer has to show as to why cross examination is necessary."
>
> [Emphasis supplied]

67. In *New India Assurance Company Ltd. Versus Nusli Neville Wadia and another,* (2008) 3 SCC 279 (Two Judges), Court had an occasion to deal with the case where composite notice of eviction and damages was issued against a person whose eviction was sought under the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971. In view of given facts and circumstances, Court upheld the contention of the tenant of the evidence firstly to be led by the landlord. Noticeably, Court gave purposive construction to the provisions of Sections 4 and 5 of the Act, making it obligatory for the landlord and the noticee to adduce evidence in support of its case.

68. However, subsequently, the Court in *Telstar Travels Private Ltd. & others vs. Enforcement Directorate,* (2013) 9 SCC 549 (Two Judges), speaking through Hon'ble Mr. Justice T. S. Thakur, J., observed that:-

> "25. There is, in our opinion, no merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in Surjeet Singh Chhabra v. Union of India and Ors. (1997) 1 SCC 508 before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed:
>
> > "3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and

converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross- examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross- examination by the petitioner."

26. We may also refer to the decision of this Court in M/s Kanungo & Company v. Collector of Customs and Ors. (1973) 2 SCC 438. The appellant in that case was carrying on business as a dealer, importer and repairer of watches in Calcutta. In the course of a search conducted by Customs Authorities on the appellant's premises, 280 wrist watches of foreign make were confiscated. When asked to show cause against the seizure of these wrist watches, the appellants produced vouchers to prove that the watches had been lawfully purchased by them between 1956 and 1957. However, upon certain enquiries, the Customs Authorities found the vouchers produced to be false and fictitious. The results of these enquiries were made known to the appellant, after which they were given a personal hearing before the adjudicating officer, the Additional Collector of Customs. Citing that the appellant made no attempt in the personal hearing to substantiate their claim of lawful importation, the Additional Collector passed an order confiscating the watches under Section 167(8), Sea Customs Act, read with Section 3(2) of the Imports and Exports (Control) Act, 1947. The writ petition filed by the appellant to set aside the said order was allowed by a Single Judge of the High Court on the ground that the burden of proof on the Customs Authorities had not been discharged by them. The Division Bench of the High Court reversed this order on appeal stating that the burden of proving lawful importation had shifted upon the firm after the Customs Authorities had informed them of the results of their enquiries.

27. In appeal before this Court, one of the four arguments advanced on behalf of the appellant was that the adjudicating officer had breached the principles of natural justice by denying them the opportunity to cross-examine the persons from whom enquiries were made by the Customs Authorities. The Supreme Court rejected this argument stating as follows (Kanungo & Company case):

> "12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the

material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our-opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

28. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected." [Emphasis supplied]

69. Applying the aforesaid principles, it is held that it is not a matter of rule that a party has a right of cross-examining a party or adducing evidence in the proceedings conducted by the Commissioner. Examination of a witness must precede cross-examination. Prejudice caused as a result of failure thereof, is imperatively required, to be shown by the agitating party. The Oaths Act, 1969 is also not applicable to the proceedings before the Commissioner. Hence there was no question of examining the J.E. on oath. Decision of the Commissioner has to be on the basis of material so placed on record by the parties.

What is the meaning of the word Reasonable Opportunity so used in the Act:

70. In *Sri Rama Krishana Rice Mill* (supra), the Court also held the word "reasonable" to mean as follows:-

"(i) "What is 'fair' and proper under the circumstances. ..."

(ii) "The expression "reasonable" is not susceptible of a clear and precise definition. A thing which is reasonable in one case may not be reasonable in another. Reasonable does not mean the best, it means most suitable in a given set of circumstances."

(iii) "There is no point on which a greater amount of decision is to be found in Courts of law and equity than as to what is reasonable : It is impossible a priori to state what is reasonable as such in all cases. You must have the

particular facts of each case established before you can ascertain what is meant by reasonable under the circumstances - Lord Romilly, M.R., Labouchere v. Dawson, (1872), LR 13 Eq. 322: 25 LT 894.""

71. In *The State of Bombay vs. Atma Ram Shridhar Vaidya,* AIR (38) 1951 SC 157 (Six Judges) the Court held that conferment of a right to make representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds including material on which order of detention is passed.

72. In *M/s. Fedco (P) Ltd. & another vs. S. N. Bilgrami & others*, AIR 1960 SC 415 (Five Judges), the Court had an occasion to deal with a case where for the reasons of fraud having been exercised by the licensee, the license stood cancelled by the licensor/licensing authority. On facts, the court found that the licensee was already aware of the fraud committed by him and the material so relied upon by the authority to cancel the license, as such, no breach of principles of natural justice stood committed, more so, in the light of the failure on the part of the licensee to highlight the prejudice so caused to him. The Court gave meaning to the expression "reasonable opportunity", in the following terms:-

"8. The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable. In the present case, a notice to show cause against the proposed order was given; it was stated in the notice that the ground on which the cancellation was proposed was that the licences has been obtained fraudulently; and later on a personal hearing was given. It must therefore be held that the requirement that an opportunity to be heard must be given was satisfied. What the petitioners Counsel strenuously contends however is that though an opportunity was given that opportunity was not reasonable. In making this argument he had laid special stress on the fact that particulars of the fraud alleged were not given and an opportunity to inspect the papers though repeatedly asked for was not given. It is now necessary to consider all the circumstances in order to arrive at a conclusion whether the omission to give particulars of fraud and inspection of papers deprived the petitioners of a reasonable opportunity to be heard.

9. There can be no invariable standard for "reasonableness" in such matters except that the Court's conscience must be satisfied, that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take action against him that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause against such proposed action, the nature of the plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and all other matters which help the mind in coming to a fair conclusion on the question." ... (Emphasis supplied)

73. Another Constitution Bench in *Fazal Bhai Dhala vs. The Custodian General Evacuee Property, New Delhi & another,* AIR 1961 SC 1397 (Five Judges), had an occasion to deal with the expression "reasonable opportunity of being heard", stipulated under the provisions of Section 26 of the Administration of Evacuee Property Act, 1950. The action taken by the authority was impugned on the ground that prior to passing of the order, no notice was issued, though opportunity of hearing afforded. The Court held that the proviso secures requirements of principles of natural justice as it provides that any order prejudicial to any person shall not be passed without giving such person a reasonable opportunity of being heard. The law only required the person concerned to be given a reasonable opportunity of being heard before passing of any prejudicial order. If this reasonable opportunity of being heard cannot be given without the service of the notice the omission to serve the notice would be fatal; where however proper hearing can be given without service of notice, it would not matter at all, and all that has to be seen is whether even though no notice was given, reasonable opportunity of being heard was given or not.

74. Thus reasonable opportunity only means hearing which is fair. Party must have known the issue, material relied upon and opportunity to present their case. In effect principles of *audi alteram partem* need to be complied with, with equal vigour.

Scope of interference Under Articles 226 & 227 of the Constitution of India:

75. A Constitution Bench in *T.R. Varma* (Supra) has held as under:-

> "6. ... ... It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566: (AIR 1950 SC 163) (A) "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs": Vide also K. S. Rashid and Son v. The Income-tax Investigation Commission, 1954 SCR 738 at p. 747: (AIR 1954 SC 207 at p. 210) (B). And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226, unless there are good grounds therefor. None such appears in the present case. On the other hand, the point for determination in this petition whether the respondent was denied a reasonable opportunity to present his case, turns mainly on the question whether he was prevented from cross examining the witnesses, who gave evidence in support of the charge.
>
> That is a question on which there is a serious dispute, which cannot be satisfactorily decided without taking evidence. It is not the practice of Courts to decide questions of that character in a writ petition, and it would have been a proper exercise of discretion in the present case if the learned Judges had referred the respondent to a suit." ... .

76. Scope of interference by this Court under Article 227 of the Constitution of India stands settled by the Constitution Bench in *Nagendra Nath Bora* (Supra). The power of interference is limited to seeing as to whether the Tribunal functions within the limits of its authority or not.

77. With the aforesaid enunciation of law and observations, factual matrix is examined.

78. Unlike Chapter II of the Act, which makes the procedure so prescribed under the provisions of the Code of Civil Procedure applicable, Chapter XIV of the Act does not provide for applicability of provisions of either the Civil Procedure Code or the Indian Evidence Act. The proceedings before the Commissioner are summary in nature. In discharge of his duties as a quasi judicial authority, he is bound to adhere to the principles of natural justice, but however provisions of the Evidence Act would not apply.

79. Record reveals that before the Commissioner, respondent never sought any opportunity of cross-examining the witness. Also denial of such opportunity or breach of procedural irregularity were not the grounds raised in the appeal. Grievance of violation of principles of natural justice was restricted to non association by the J.E. in the measurement of the property. What is "reasonable opportunity of showing cause" is not defined under the Act. Principles of natural justice cannot be earmarked in a strait-jacket formula. Extent of its applicability is dependent upon given facts and circumstances.

80. Now in the instant case, respondent was afforded adequate opportunity to show cause and put across her viewpoint on all counts. The Commissioner had only asked the J.E. to submit a status report. She never requested for measurement of the property in her presence. In fact it is not her case that the J.E. trespassed and measured the same. Shops in question were only in her possession and without her association or consent they could not have been measured. Significantly no challenge to the report was laid before the Commissioner. Not only that, opportunity was afforded to the respondent to take remedial measures which she failed to avail of. The report of the J.E. was only a document revealing the factum of construction existing on the spot. Whether authorized or not was for the Commissioner to consider on the basis of objective appreciation of the material placed before him. The respondent could have sought comparison of the sanctioned plan with the report submitted by the J.E. or requested for its re-verification. She could have also got her own report prepared and placed on record. Only in the event of conflicting views, Commissioner, if so requested, desired or required could have considered the possibility of resorting to statutory provisions with regard to physical verification of the property on the spot. Expression "reasonable opportunity" so used under Section 253 of the Act would not take in its sweep and import, right of the assessee to cross-examine a person, who was never examined as a witness. No procedural irregularities can be said to have been committed by the Commissioner in not affording any opportunity of cross-examination.

81. Expression "reasonable opportunity" would only mean fairness of procedure and hearing and compliance of principles of natural justice. It is not that in every case of violation of principles of natural justice, Court is bound to interfere. Prejudice caused is required to be shown which in the instant case is none.

82. While exercising his powers, under Section 253 of the Act, Commissioner is not performing ministerial act. Though Commissioner is not a Court, yet the very nature of functions he is discharging are quasi judicial. In view of the non-applicability of provisions of the Evidence Act, Commissioner is to be guided by the settled principles of natural justice. Admissibility of the report of the J.E. was never an issue and it is not that under all circumstances, Commissioner is bound to adduce evidence by first giving oath and have the witness examined or cross examined. Considering the nature of proceedings, on objective assessment**,** he has to form his opinion, based on the material placed on record by the parties. The report of the J.E. was a document relied upon by the parties and its non admissibility not a relevant issue in the proceedings before him.

83. Thus, for all the aforesaid reasons, order passed by the Appellate Authority cannot be said to be based on settled principles of law. It exceeded its authority and

jurisdiction in directing the Commissioner to examine the Officer(s), on oath, and also afford opportunity of cross-examination to the respondent.

84. No doubt, right to property being a constitutional right needs to be protected and zealously safeguarded and any act which is arbitrary, irrational or illegal, infringing such rights has to be struck down, but then it has to be within the settled and permissible legal sanctions. Ratio laid in *A.S. Motors Pvt. Ltd.* (supra) is squarely applicable to the given facts.

85. In view of the aforesaid, impugned order dated 28.12.2013 (Annexure P-5) is quashed and set aside, leaving the parties to take appropriate action in accordance with law.

In view of the above, present petition stands disposed of, so also pending application(s), if any.

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

Shri Narender Kumar ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 6849 of 2014
Reserved on: 05.10.2015
Decided on: 14.10.2015

Constitution of India, 1950- Article 226- Petitioner filed a writ petition for directing the respondent to carry out necessary repairs and to make the road functional- held, that petitioner has no right to file such petition – however, in view of public interest, State directed to do needful as per applicable rule. (Para-1 and 2)

For the petitioner: Mr. J.L. Bhardwaj, Advocate.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Tara Singh Chauhan, Advocate, for respondents No. 4 to 7 and 9.
Name of respondent No. 8 stands already deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The writ petitioner, who is one of the co-sharers of the land comprising in Khata/Khatauni No. 3/3, Khasra No. 304, measuring 00-57-29 situated in Mohal Harwan, Tehsil Baldwara, Disrict Mandi, subject matter of RSA No. 6 of 2014, has filed the instant writ petition for directing the writ respondents to carry out the necessary repairs and make the road from Harwan to Talwar functional.

2. The writ petitioner has no right to file the writ petition. However, in view of the public interest, we deem it proper to direct the writ respondents-State to do the needful as required, as per the Rules applicable.

3. The writ petition is disposed of accordingly alongwith all pending applications.

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

Naresh Rai son Sh. Prahlad Rai .....Petitioner.

Vs.

State of H.P and another. ...Non-petitioners.

Cr. MMO No. 13 of 2015.
Order reserved on:9.9.2015.
Date of Order: October 14 , 2015.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279, 337 and 338 of IPC- the matter was settled between the parties and, therefore, proceedings be quashed- held, that an offence punishable under Section 279 of IPC is against the society at large- therefore, any settlement will not result in quashing of the proceedings- petition dismissed. (Para-6)

Cases referred:

State of Madhya Pradesh Vs. Manish and others, 2015 (8) SCC 307
Gian Singh Vs. State of Punjab and another, 2012 (10) SCC 303

For the petitioner: Mr.Neel Kamal Sharma, Advocate.
For non-petitioner-1: Mr. M.L.Chauhan, Addl. Advocate General with Mr. J.S.Rana, Assistant Advocate General.
For non-petitoner-2. None.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India for quashing of FIR No.59 of 2013 registered in police station Dharampur District Solan H.P under sections 279,337 and 338 IPC and for quashing criminal proceedings in criminal case No. 38-2/2013 pending before Judicial Magistrate Ist Class Solan District Solan HP.

BRIEF FACTS OF THE CASE:

2. Amarjeet Markan son of Sh Ram Swaroop complainant filed FIR No. 59 dated 3.6.2013 under Sections 279,337 and 338 IPC. There is recital in FIR that on dated 3.6.2013 complainant namely Amarjeet Markan was driving his Car Alto K-10 No.CH-01AF-4187 and was approaching from Chandigarh to Solan and his driver was sitting in the back seat of Car. There is recital in FIR that at about 11.50 AM when he reached at bypass road

Kumar Hatti near Galyana then from Solan side car having registration No. Skoda No. HR-01AF-5416 came in a fast speed in wrong direction and struck with the vehicle of complainant. There is further recital in FIR that car was damaged from one side and complainant sustained grievous injuries in his chest, neck and other parts of body. Matter was investigated and thereafter challan was filed in the Court. Learned trial Court framed charges against accused person under Sections 279, 337 and 338 IPC on dated 9.9.2014 and thereafter learned trial Court listed the case for prosecution evidence on dated 30.5.2015. Thereafter out of Court settlement was executed inter se the parties Annexure P2 placed on record.

3. Response also filed on behalf of co-respondent No.1 i.e. State of Himachal Pradesh.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioner and also perused entire record carefully.

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

1. Whether petition filed under Section 482 Cr.PC read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final order.

Finding upon point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioner that out of court settlement has been executed inter se the parties Annexure P2 placed on record and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Allegations against the petitioner are that petitioner has committed criminal offence under Sections 279, 337 and 338 IPC. Section 279 IPC deals with rash driving or riding on a public way. It is held that offence under Section 279 IPC is not between two private parties simpliciter but offence under Section 279 IPC is offence against the society at large because offence under Section 279 IPC is always committed on public way and general society has legal right to use public way without injury to their body or any property. It is well settled law that criminal proceedings should be quashed where offence is between private parties simpliciter. It is well settled law that where the offence is against the society at large then criminal proceedings should not be quashed while exercising inherent powers under Section 482 Cr.PC. There are serious allegations against the petitioner that petitioner had caused grievous hurt to complainant upon public way on dated 3.6.2013. In view of the above stated facts it is not expedient in the ends of justice to quash criminal proceedings filed against petitioner under Sections 279, 337 and 338 IPC being criminal offence against society at large relating to rash driving upon public way. In criminal offence under Section 279 IPC word public way is mentioned in positive manner hence it is held that criminal offence under Section 279 IPC falls within the definition of offence against public at large because criminal offence under Section 279 IPC is always committed upon public way. As per Article 141 Constitution of India law laid down by Hon'ble Apex Court of India is binding upon all courts within the territory of India. See. 2015 (8) SCC 307 titled State of Madhya Pradesh Vs. Manish and others. Also see 2012 (10) SCC 303 titled Gian Singh Vs. State of Punjab and another. In view of above stated facts point No.1 is answered in negative against petitioner.

Point No.2 Final order.

7. In view of finding on point No.1 petition filed under Section 482 Cr. PC read with Article 227 of the Constitution of India is dismissed. Observation made hereinabove is

strictly for the purpose of deciding the present petition and shall not effect merits of the case in any manner. Record of learned trial Court along with certify copy of order be sent forthwith. Petitioner is directed to appear before learned trial Court on 6.11.2015. Petition filed under Section 482 Cr PC read with Article 227 of Constitution of India is disposed of. All pending application(s) if any also disposed of.

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

Pawan Kumar son of Lalman .....Petitioner.
Vs.
State of H.P. ....Non-petitioner.

Cr.MMO No. 194 of 2014.
Order reserved on: 23.9.2015.
Date of Order: October 14 ,2015.

Code of Criminal Procedure, 1973- Section 482- A criminal case was filed against the petitioner for the commission of offence punishable under Section 186 of IPC - it was contended that permission to investigate was wrongly granted to the police- held, that a public servant was obstructed in the discharge of his official duty- the offence was against the public and the permission was rightly granted to investigate into offence- merely, because record was summoned would not mean that subsequent proceedings conducted by the Magistrate after passing the order calling the record are without jurisdiction- petition dismissed. (Para-5 to 8)

Cases referred:
State of Madhya Pradesh Vs. Manish and others, 2015 (8) SCC 307
Gian Singh Vs. State of Punjab and another, 2012 (10) SCC 303

For the petitioner: Mr.G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.
For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 Cr.PC read with Article 227 of Constitution of India for quashing proceedings of case No. 89-4 of 2014 pending before learned Judicial Magistrate Court No.3 Ghumarwin District Bilaspur HP.

BRIEF FACTS OF THE CASE:

2. Sh. Lalman father of petitioner Pawan Kumar filed criminal cognizable complaint in Police Station Bharari Tehsil Ghumarwin and thereafter police official namely H.C Naresh Kumar while exercising investigative powers under Section 154 of the Code of Criminal Procedure 1974 went at place Padhyan on dated 19.8.2014 at about 2.30 PM thereafter petitioner obstructed H.C Naresh Kumar a public servant from discharging his

public function. Criminal case under Section 186 IPC was filed against Pawan Kumar and learned Judicial Magistrate Ist Class Court No.3 Ghumarwin issued notice of accusation to petitioner under Section 186 IPC on dated 23.12.2014. Accused did not plead guilty and claimed trial. Thereafter learned Judicial Magistrate Ist Class Ghumarwin listed present case for prosecution evidence. Thereafter learned trial Court recorded statements of six prosecution witnesses.

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

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

1. Whether petition filed under Section 482 Cr.PC read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final order.

Finding upon point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioner that learned Judicial Magistrate Ist Class Court No.3 Ghumarwin District Bilaspur H.P has illegally granted permission to investigate non-cognizable offence under Section 186 IPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that complaint under Section 186 IPC was filed by H.C Naresh Kumar with allegation that petitioner had obstructed H.C Naresh Kumar a public servant from discharging his public function . It is well settled law that offence under Section 186 IPC is an offence against public because word obstructing public servant in discharging of public function mentioned in positive manner in Section 186 IPC. Court is of the opinion that wherein the word 'public' is mentioned in any criminal offence under Indian Penal Code the same criminal offence comes within the domain of offence against public. In view of the fact that allegation against petitioner was that he had committed offence against public servant in discharge of his public duty court is of the opinion that learned Judicial Magistrate has rightly granted permission under Section 155(2) Cr.PC for investigation of non-cognizable case being offence against the public servant.

6. Submission of learned Advocate appearing on behalf of petitioner that High Court of HP vide order dated 11.9.2014 called records pertaining to proceedings Ext P1 to Ext.P3 from the Court of learned Judicial Magistrate Court No.3 Ghumarwin District Bilaspur H.P and in view of above stated facts thereafter entire proceedings initiated under Section 186 IPC against petitioner in compliance to the order of learned Judicial Magistrate Ghumarwin dated 25.8.2014 are illegal and null and void is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the order of High Court passed on 11.9.2014 in Cr. MMO No. 194 of 2014. Order of High court of HP dated 11.9.2014 is quoted in toto:

11.9.2014 Present: Mr.G.D.Verma, Sr. Advocate with

Mr.B.C.Verma Advocate for petitioner.

Mr. R.S.Verma, Addl. Advocate General and

Mr.H.K.S.Thakur Addl. Advocate General for

Respondent.

Notice. Mr.H.K.S Thakur learned Addl. Advocate General appears and waives service of notice on behalf of the respondent-State.

Entire records pertaining to the proceedings (Ext P1 to P-3) be immediately called from the Court of Judicial Magistrate, 2nd Class, Court No.3 Ghumarwin District Bilaspur HP.

List on 9th October, 2014.

Sd/-
Judge.

7. Hon'ble High Court of HP on dated 11.9.2014 did not suspend the execution of order dated 25.8.2014 passed by learned Judicial Magistrate Court No.3 Ghumarwin District Bilaspur H.P. High Court vide order dated 11.9.2014 simply called records pertaining to the proceedings Ext P1 to Ext P3. It is held that execution of order is suspended only when positive order of suspension of execution of order is passed by competent authority of law. It is held that simply summoning records did not mean that execution of order passed by learned Judicial Magistrate Ghumarwin was suspended automatically. It is held that there is wide difference between two concepts (1) Suspension of execution of order (2) Calling entire records pertaining to the proceedings. In view of the fact that execution of order of learned Judicial Magistrate Court No.3 Ghumarwin dated 25.8.2014 was not suspended by Hon'ble High Court of HP vide order dated 11.9.2014 it is held that all subsequent criminal proceedings conducted in compliance of order of learned Judicial Magistrate Ghumarwin dated 25.8.2014 are not null and void ab-initio.

8. Submission of learned Advocate appearing on behalf of petitioner that after perusal of entire evidence recorded by learned trial Court in criminal case no case is made out against the petitioner under Section 186 IPC on merits and on this ground present petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that court is not legally competent to appreciate the evidence upon merits at this stage of case because matter is sub-judice before learned Judicial Magistrate Ghumarwin for disposal. It is well settled law that proceedings of learned trial Court and proceedings under section 482 Cr.PC read with Article 227 of Constitution of India are independent proceedings. It is held that if any finding is given upon merits of case then same will adversely effect the trial of criminal case pending before learned Judicial Magistrate Ghumarwin at this stage. Learned trial Court will announce judgment upon criminal offence under Section 186 IPC after giving due opportunity to both parties to lead evidence in support of their case. In view of the fact that offence under Section 186 IPC is an offence against public servant and in view of the fact that word obstructing public servant in discharge of public function has been mentioned in positive manner in Section 186 IPC and in view of fact that learned trial Court recorded six prosecution witnesses and in view of fact that learned public prosecutor closed prosecution evidence in trial court on 13.04.2015 and in view of fact that case is in last stage of criminal proceedings and in view of fact that Hon'ble High Court of H.P did not suspend execution of order vide order dated 11.9.2014 it is not expedient in the ends of justice to allow the petition. As per Article 141 of Constitution of India law laid down by Hon'ble Apex Court of India is binding on all courts within the territory of India. See. 2015 (8) SCC 307 titled State of Madhya Pradesh Vs. Manish and others. Also see 2012 (10) SCC 303 titled Gian Singh Vs. State of Punjab and another. In view of above stated facts point No.1 is answered in negative against petitioner.

Point No.2 final order.

9. In view of finding upon point No.1 petition filed under Section 482 Cr.PC read with Article 227 of the Constitution of India is dismissed. Observation made hereinabove is strictly for the purpose of deciding the present petition and shall not effect merits of the case in any manner. Record of learned trial Court along with certify copy of order be sent forthwith. Petitioner is directed to appear before learned trial Court on

10.11.2015. Petition filed under Section 482 Cr.PC read with Article 227 of Constitution of India is disposed of. All pending application(s) if any also disposed of.

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

RSA No. 258 of 2012 and Cross-Objection No. 417 of 2012
Reserved on 1.10.2015
Date of decision: October 14, 2015

RSA No. 258 of 2012	
Roshan Lal	…Appellant
Versus	
Pritam Singh & others	…Respondents
Cross-Objection No. 417 of 2012	
Roshan Lal	…Non-objector/Appellant
Versus	
Pritam Singh & others	…Objector/Respondents

Hindu Succession Act, 1956- Section 22- Plaintiff sought declaration claiming his preferential rights to purchase the suit property– suit contested on the plea of maintainability – Trial Court dismissed the suit but the first Appellate Court partly decreed the same- in regular second appeal held, that some of the High Courts were of the view that the Hindu Succession Act cannot be made applicable to agricultural lands whereas some of the High Courts took the contrary view- Supreme Court in one case held that property was not qualified by agricultural use or otherwise- the interpretation was given by Hon'ble Apex Court while construing the provisions of Hindu Women's Rights to Property Act, 1937- further held that question involved is of great importance and is likely to come up repeatedly before the Courts; hence, the matter is required to be referred to larger bench- matter ordered to be placed before Hon'ble Chief Justice for consideration and Constitution of larger bench. (Para nos. 2, 3, 22, 23, 24 to 30)

Cases referred:

Prema Devi Vs. Joint Director of Consolidation AIR 1970 Allahabad 238
Basavant Gouda Vs. Channabasawwa and another AIR 1971 Mysore 151
Nahar Hirasingh Vs. Mst. Dukalhin AIR 1974 Madhya Pradesh 141
Nidhi Swain Vs. Khati Dibya, AIR 1974 Orissa 70
Jeewanram Vs. Lichmadevi, AIR 1981 Rajasthan 16
Venkatalakshmamma Vs. Lingamma 1984 (2) KarLJ 296
Tukaram Genba Jadhav Vs. Laxman Genba Jadhav AIR 1994 Bombay, 247
Baldev Parkash and others Vs. Dhlan Singh and others Latest HLJ 2008 (HP) 599
Subramaniya Gounder and others Vs. Easwara Gounder and others, 2011 (2) MadLJ 467
Anjali Kaul & Another Vs. Narendra Krishna Zutshi, 2014 (9) RCR (Civil) 2794
Vaijanath and others Vs. Guramma and another (1999) 1 SCC 292

For the Appellant: Mr. Vivek Singh Thakur, Advocate.
For the Respondents: Mr.Ajay Sharma, Advocate, for respondents No. 1 and 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The defendant No. 1/appellant has filed this appeal against the judgment and decree dated 13.1.2012 passed by learned District Judge, Kangra at Dharamshla, H.P. The facts of the case may be noticed as follows:-

The respondent No. 1/plaintiff filed a suit for declaration to the effect that he has preferential right to acquire/purchase the property qua 193/1380 share measuring 0-37-00 hectares from defendant No. 2 comprised in Khata No. 9 Khatauni No. 17 to 19, Khasra Nos. 298, 299, 300, 301, 308, 311, 312, 313, 314, 315, 317, 325, 374, 375, 376, 379, 380, 381, 382, 324, 297 measuring 2-64-58 hectares situated in Village Chandani, Mauja Bhali, Tehsil Jawali, District Kangra, H.P. as per jamabandi for the year 2000-01 (herein after referred to the suit land), subject to depositing of sale consideration of Rs.80,000/- along with other expenses of registration, being the heir in class 1st list of schedule as per Hindu Succession Act 1956. The sale deed bearing document No. 192 dated 14.3.2005 executed by defendant No. 2 in favour of defendant No. 1/appellant is the direct attack on the preferential rights of the plaintiff and the same is required to be declared as wrong, null and void, illegal with consequential relief by way of issuance of permanent injunction restraining the defendant No. 1/appellant permanently from alienating raising any sort of construction, selling, cutting and removing the tress standing over the suit land or in any manner whatsoever and in alternative suit for joint possession of the suit land.

2. The suit land was earlier owned and possessed by Sh. Machala, S/o Sh. Sukhia, i.e. father, husband and maternal grandfather of plaintiff and defendants No. 2 to 6. After the death of Machala the suit land was inherited by plaintiff and defendants No. 2 to 6 in equal shares being the heirs of class 1st of schedule as per Hindu Succession Act, 1956. It is averred that Smt. Vidya Devi died prior to the death of Machala and as such defendant No. 6 being the Machala's daughter's son (Dotas) inherited the suit land in equal shares with the plaintiff and defendants No. 2 to 5 in equal shares. Defendant No. 3 is the step brother of the plaintiff and others are legal heirs of deceased Machala. It is alleged that defendants' No. 5 and 6 have relinquished the land of their shares in favour of plaintiff being nearest relations, but they have also been impleaded as party in the suit in order to avoid any legal complications. On 14.3.2005 defendant No. 2 behind the back of the plaintiff, sold his share in the suit land to defendant No. 1/appellant for sale consideration of `80,000/- vide registered sale deed document No. 192 dated 14.3.2005. The said sale deed executed by defendant No. 2 in favour of defendant No. 1/appellant is wrong, null and void. Consequently, relief of injunction, restraining defendant No. 1/appellant from alienating, raising any sort of construction and cutting and removing trees from the suit land was sought.

3. The suit was resisted and contested by defendants No. 1 to 3 by filing written statement, wherein preliminary objections qua maintainability of the suit, cause of action, locus standi, estopple, mis-joinder of necessary parties and the plaintiff having not approached the Court with clean hands have been taken.

4. On merits, it is submitted that defendant/appellant No. 1 was bonafide purchaser of the suit land and the plaintiff never asked defendant No. 2 to sell the land to him. Further alleged that plaintiff asked defendant No. 2 to relinquish her share in his favour and as such plaintiff has got no preferential rights over the suit land and prayer for dismissal of the suit was made.

5. The learned trial Court vide orders dated 26.11.2005 framed the following issues:-

"1. Whether the plaintiff is having a preferential right to purchase the suit land? OPP

2. Whether the plaintiff is entitled for the purchase of the suit land for a consideration of Rs.80,000/- and other expenses of registration? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has no locus-standi to file the present suit? OPD

5. Whether the plaintiff is estopped from filing the present suit due to his act and conduct? OPD

6. Whether the suit is bad for mis-joinder of necessary party? OPD

7. Whether the plaintiff has not come to the court with clean hands and has suppressed the material facts from this court? OPD

8. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD

9. Relief."

6. After recording evidence, the learned trial Court dismissed the suit. Aggrieved by the judgment and decree passed by the learned trial Court, plaintiff preferred an appeal before the learned lower Appellate Court and the same was partly allowed. Aggrieved against the judgment and decree passed by the learned lower Appellate Court, defendant No. 1/appellant filed the instant appeal.

7. This Court admitted the appeal on the following substantial question of law:-

"*Whether the provisions of Section 22 of the Hindu Succession Act could be invoked in the present case, especially when the land was Banjar-Kadim and Gair Mumkin"*

8. Section 22 of the Hindu Succession Act (herein after referred to as the "Act" reads thus:-

"22. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

9. In so far as applicability of Section 22 of the Hindu Succession Act to agricultural land is concerned, the same been subject matter of interpretation from time to time before the various Courts of the country including this Court.

10. One the earliest view on the subject is a learned Division Bench judgment of Punjab and Haryana High Court in ***Jaswant Vs. Basanti Devi, 1970 P.L.J. 587.*** The Court therein framed two questions:

(i) Whether this provision (Section 22) applies to completed transfers,

(ii) whether it applies to agricultural land.

The first question was answered by holding that the correct way to interpret Section 22 of the Hindu Succession Act and to give its meaning is to hold that a completed transfer also falls within the ambit of sub-section (1) and the words "purposes to transfer" is thus include a completed transfer as well.

11. While answering question No. 2 regarding the applicability of the provisions of Section 22 of the Act to agricultural land, the Court fell back to entry No. 18 in List II and entries No. 5 and 6 in List III of VII Schedule of the Constitution to come to a conclusion that since the Parliament had no jurisdiction to legislate over agricultural lands beyond the power it had under entry No. 5 of List III, that is, regarding devolution, therefore, Section 22 did not apply to the case of agricultural lands. It was held:

*"**5**. In my opinion, the correct way to interpret the section and to give its meaning is to hold that a completed transfer also falls within the ambit of sub-section (1) and the words 'purposes to transfer' would thus include a completed transfer as well. As already said, otherwise this section would become wholly unworkable. It is well known canon of construction that Courts must give meaning to a legislative provision unless the Court is forced to a conclusion that it will in fact be legislating and not interpreting the same.*

***6**. The second question presents no difficulty. It is necessary to advert to entry No. 18 in List II and entries Nos. 5 and 6 in List III of the VII Schedule. For facility of reference, those entries are reproduced below:-*

List II. Entry No. 18.—I and, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

List III. Entry No. 5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Entry N. 6.—Transfer of property other than agricultural land; registration of deeds and documents.

> ***7***. *I had no occasion to deal with the question of the applicability of the Hindu Succession Act to agricultural lands in the matter of succession and I compared the language of entry No. 18 of List II of the Constitution of India with its counterpart in the Government of India Act, 1935, namely, entry No. 21. I pointed out that there was material differences in the language of these two entries because devolution had been taken out from the said entry and put in the concurrent entry No. 5 of List III which enabled the Central Parliament to legislate regarding succession. But that is not so in the case of agricultural land. Entry No. 6 of List III, when read, points out that the Central Parliament has no jurisdiction to legislate over agricultural lands beyond the power it has under entry No. 5 of List III, that is, regarding devolution. It is, therefore, clear that section 22 will not cover the case of agricultural lands.*
>
> ***8***. *Mr. Roop Chand, the learned counsel for the respondent, stressed that the words 'immovable property' used in section 22 will include agricultural lands. Undoubtedly, they do. But one cannot lose sight of the fact that when the Central Legislature used these words it did so knowing fully well that it had no power to legislate regarding agricultural lands excepting for the purposes of devolution. Section 22 does not provide for devolution of agricultural lands. It merely gives a sort of right of pre-emption. In fact, as already pointed out, entry No. 6 in List III, clearly takes out agricultural lands from the ambit of the concurrent list. Agricultural land is specifically dealt with in entry No. 18 of List II. The only exception being in the case of devolution. Therefore, it must be held that section 22 does not embrace agricultural lands.*
>
> ***9***. *The last argument of Mr. Roop Chand, the learned counsel for the respondent, was that section 22 is ultra vires the Constitution as the Central Legislature had no right to pass such a law regarding agricultural lands. This argument cannot be accepted because it cannot be presumed that the Legislature was passing law regarding matters which it had no power to pass particularly when with regard to immovable property other than agricultural land, it has the power to enact such a law. This view finds support from the decision of the Federal Court in re: Hindu Women's Rights to Property Act, AIR 1941 Federal Court 72, where in a similar situation their Lordships of the Federal Court refused to strike down the provisions of the Hindu Women's Rights to Property Act, 1937, on the precise arguments."*

12. In ***Prema Devi Vs. Joint Director of Consolidation AIR 1970 Allahabad 238***, it was held that under entry 5 of the list III of VII Schedule of the Constitution that the Parliament legislating with respect to the personal laws made under that entry, it cannot be said to apply to any particular property. That entry merely gives the power to determine the personal law. It was further observed that all laws relating to land and land tenures were within the exclusive jurisdiction of the State Legislature and even the personal law would apply to land tenures, if so provided in the State law, but it cannot override State legislation. It was observed:-

> "*5. In the first place, we are of the opinion that the Hindu Succession Act, 1956, cannot be made applicable to agricultural plots. This Act was passed by the Central Legislature in 1956 and the only entry under which the Central Legislature had the jurisdiction to pass the Act, was entry No. 5 in the third list of the Seventh Schedule of the Constitution. This entry is as*

follows:-- "5-Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." This entry obviously relates only to personal law and laws passed under this entry do not apply to any particular property. They merely determine the personal law. In List 2, Entry No. 18 is as follows:-- "Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." This entry which is in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State legislation.

It is noteworthy that in List 3 wherever the entry relates to rights in land 'agricultural land' has expressly been excluded. For instance, Entry No. 6 is as follows:

"Transfer of property other than agricultural land....." Entry No. 7 is as follows:--

"Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." No such exception was expressly mentioned in Entry No. 5 because this entry related only to matters personal to individuals and did not relate directly to any property. While legislating in respect of such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. Gwyer, C. J. while delivering the judgment of the Federal Court in a reference on the Hindu Women's Rights to Property Act, 1937, reported in AIR 1941 FC 72 observed as follows:--

> *"There is a general presumption that a Legislature does not intend to exceed its jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property", the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other....."*

The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindus. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies. Sub-section (2) of S. 14 of the Act runs as follows:--

> *"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being In force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."*

This Sub-section indicates that it was only for the removal of doubts that this provision had been included. Even without this provision, the Act could not apply to agricultural holdings."

13. In ***Basavant Gouda Vs. Channabasawwa and another AIR 1971 Mysore 151***, the Hon'ble Division Bench of Mysore High Court took a contrary view to the

one taken by the Punjab and Haryana High Court, by holding that since the Hindu Succession Act come within the ambit of Item No. 5 of List III of Schedule VII of the Constitution, therefore, its applicability to agricultural land cannot be excluded and it was held:

> *"11. Mr.Savanur lastly contended that the Hindu Succession Act itself is not applicable to agricultural lands because entry 18 in List II of the Seventh Schedule of the Constitution, confers power on the State Legislature to make legislation in respect of agricultural lands. Hence Hindu Succession Act passed by the Parliament could not applicable to succession to agricultural lands. This argument is merely to be stated for being rejected. Entry 5 of List III of the Seventh Schedule of the Constitution deals with the power to legislate in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law. It may be noticed here that the corresponding Entry 7 in the Government of India Act, 1935, List III read as follows:*
>
> *"Wills, intestacy; and succession, save as regards agricultural land."*
>
> *It is significant that in Entry 5 in the Constitution the words "save and regards agricultural land" have been omitted. The pith and substance of the Hindu Succession Act is to make a law relating to succession and not to deal with agricultural lands as such. That is the reason why the argument of Mr.Savanur requires no further consideration. The provisions of Section 14 of the Hindu Succession Act are matters which come within the ambit of Entry 5 in List III of the Seventh Schedule of the Constitution and their applicability to agricultural lands cannot be excluded. This view of ours finds support in the decision Amar Singh V. Baldev Singh AIR 1960 Punj. 666 (FB) and Shakuntala Devi v. Beni Madhav, AIR 1964 All. 165."*

14. However, the view of Allahabad High Court in Prema Devi did not find favour with the Hon'ble Full Bench of Madhya Pradesh High Court in ***Nahar Hirasingh Vs. Mst. Dukalhin AIR 1974 Madhya Pradesh 141***, wherein it was held that a law prescribing succession to any property (whether agricultural land or otherwise) falls under Entry 5 in Concurrent List III of the 7th Schedule of the Constitution. This entry not only deals with personal law but specifically deals with "wills, intestacy and succession." It was further held that exclusion of the words "save as regards agricultural land" from Entry 5 in the Concurrent List of the 7th Schedule of the Constitution is deliberate. The Entry 5 in the Concurrent List of 7th Schedule of the Constitution is to be given the widest construction as including all properties without any restriction unless for some reasons it is cut down by the terms of the Entry itself or by any other part of the Constitution. It is apt to reproduce paras 55 and 56, which reads thus:-

> *"**55**. In AIR 1970 All 238 it was held that under Entry 5 of the List III of the 7th Schedule when the Parliament legislated with respect to personal law, laws made under that Entry could not be said to apply to any particular property. That Entry merely gave the power to determine the personal law. It was further observed in that case that all laws relating to land and land tenures were within the exclusive jurisdiction of the State Legislature and even personal law becomes applicable to land tenures if so provided in the State law but it could not override State legislation. It was then observed:*

"The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindus. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies.....Sub-section (2) of Section 4 indicates that it was only for the removal of doubts that this provision had been included. Even without this provision, the Act could not apply to agricultural holdings."

***56**. With great respect, we are unable to agree with the above view in Prema Devi's case (supra). A law prescribing succession to any property (whether agricultural land or otherwise) falls under Entry 5 in Concurrent List III of the 7th Schedule of the Constitution. This entry not only deals with personal law but specifically deals with "wills, intestacy and succession." Under the Government of India Act, 1935, Entry 7 in List III covered "wills, intestacy and succession save as regards agricultural land" and, therefore law relating to succession of agricultural land was outside the power of Central legislature. Under the Constitution, the exception as to agricultural lands does not find place in Entry 5 in Concurrent List, hence legislative power on the topic of succession entirely falls under this Entry. The exclusion of the words, "save as regards agricultural land" from Entry 5 in the Concurrent List of the 7th Schedule of the Constitution is deliberate. The Entry 5 in Concurrent List of the 7th Schedule of the Constitution is to be given the widest construction as including all properties without any restriction unless for some reason it is cut down by the terms of the Entry itself or by any other parts of the Constitution reading it as a whole. It was pointed out in Megh Raj v. Allah Rakhia, AIR 1947 PC 72 while construing the scope of an Entry in the Government of India Act, 1935 that such an Entry was a part of the Constitution and it would, on ordinary principles receive the widest construction unless for some reason it was cut down either by the terms of the Entry itself or by other parts of the Constitution read as a whole. Thus, construing the Entry, it cannot be said that it did not apply to agricultural lands. Entry 18 in List II must be construed not to exclude topics specifically dealt in Entry 5 in Concurrent List III of the 7th Schedule of the Constitution. In case of repugnancy, Section 164 of the Code will prevail under Article 254 as it is a later law and as it received the assent of the President. The position has changed after the amendment of Section 164 by Act No. 38 of 1961. Under the amended Section 164, the rights of a Bhumiswami would be governed in matters of devolution by personal law. Thus, it now fully harmonises with the Hindu Succession Act."*

15. In ***Nidhi Swain Vs. Khati Dibya, AIR 1974 Orissa 70,*** learned Division Bench of Orissa High Court held that applicability of the Hindu Succession Act was not excluded to the agricultural land. The view taken by Allahabad High Court in Prema Devi's case was dissented in the following manner:-

"6. Contention No. 2-- Mr. Misra next contended that the Hindu Succession Act of 1956 did not apply to agricultural lands. In support of this contention reliance is placed on a Bench decision of the Allahabad High Court in the case of Smt. Prema Devi v. Joint Director of Consolidation (Headquarter) at Gorakhpur Camp, AIR 1970 All 238. The reasoning for the conclusion is that Entry No. 5 in the concurrent List of the Seventh Schedule of the Constitution which is the only entry under which the Central Legislature

has the jurisdiction to pass the Hindu Succession Act relates only to personal law. Laws passed under this entry do not apply to any particular property. They merely determine the personal law. Entry No. 18 in List II (State List) in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are, therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State Legislation. In List 3 wherever the entry relates to rights in land, agricultural land has been expressly excluded.

A Division Bench of this Court in the case of Sm. Laxmi Debi v. Surendra Kumar Panda, AIR 1957 Orissa 1, dealing with the point in paragraph 14 of the judgment stated-

"Mr. Jena further contended that the Act even if applies retrospectively, will not apply to agricultural lands, and for this, he relies upon the Federal Court decision reported in Hindu Women's Rights , to Property Act, 1937, in the matter of AIR 1941 PC 72 (K). That was a case which came up for decision by the Federal Court on a reference made by his Excellancy the Governor-General of India.

Gwyer, C. J., who delivered the judgment of the Court held that the Hindu Women's Rights to Property Act of 1937, and the Hindu Women's Rights to Property (Amendment) Act of 1938, do not operate to regulate succession to agricultural land in the Governor's Provinces; and do operate to regulate devolution by survivorship of property to other than agricultural lands.

This decision, in view of the changed position in law, no longer holds good. The Federal Court decision was based upon the law of legislative competency as it then stood, by the Government of India Act, 1935. In Schedule 7, Government of India Act, 1935, this subject appears in the Concurrent Legislative List (List 3) as Item No. 7. Item 7 was in the following terms :

'Wills, Intestacy and Succession, save as regards agricultural lands'. Now under the present Constitution of India the same subject has been dealt with in the Concurrent List (List 3) in Schedule 7 as Item No. 5. Item No. 5 runs as follows:--

'Marriage and divorce, infants and minors, Adoption, Wills, Intestacy and Succession, Joint Family and Partition, all matters in respect of which parties in judicial proceedings were, immediately before the commencement of this Constitution, subject to their Personal law.

'It is clear that the Parliament had omitted the phrase 'save as regards agricultural land' from Item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India, and accordingly, it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 PC 72 (K) would no longer hold good." The same reasoning has been advanced by a Division Bench of the Mysore High Court in the case of Basavant Gouda v. Smt. Channabasawwa, AIR 1971 Mys 151, to uphold the applicability of the Hindu Succession Act to agricultural lands. We prefer to follow our earlier decision on the point

which also appeals to us to be the appropriate decision on the matter. Accordingly the contention of Mr. Misra is rejected."

16. In ***Jeewanram Vs. Lichmadevi, AIR 1981 Rajasthan 16,*** a leaned Single Judge of Rajasthan High Court concurred with the view taken by Punjab and Haryana High Court and it was held as under:-

*"**14**. Section 22 of the Act came up for consideration in Jaswant's case (1970 Cur LJ 833) (Puni), in which, Entry No. 18, List II and Entries Nos. 5 and 6, List III were noticed and it was held that Section 22 of the Act does not embrace agricultural lands. I am in respectful agreement with this view and hold that the words "interest in any immoveable property of an intestate" do not include the interest in the agricultural land of an intestate and as such, after devolution of an interest upon two or more heirs specified in Class I of the Schedule appended to the Act and on transfer of his or her interest in the agricultural land, other heirs have no preferential right to acquire the interest of the transferor. I have come to the conclusion that transfer of interest in agricultural land is not covered by Section 22 of the Act."*

17. A similar issue came up for consideration before the learned Single Judge of Karnataka High Court in ***Venkatalakshmamma Vs. Lingamma 1984 (2) KarLJ 296***, wherein the Court dissented from the view taken by the Rajasthan High Court and chose to follow the view taken by the Mysore High Court and it was held:

*"**17**. In his submissions touching the scope of sec. 22 of the Act, the learned counsel for the respondents made a twofold submission. The first submission is that provision is not attracted to agricultural lands in view of the fact that the term "immovable property" referred to in subsection (1) of Section 22 cannot be said to include agricultural land. According to him, this is so for the reason that the Act, which is a Central Act, could not have dealt with the question of transfers of agricultural property which was exclusively a State subject. IN this connection the learned counsel places strong reliance on a decision of the Rajasthan High court in Jeewanram Vs. Lichadevi and another (AIR 1981 Rajasthan, page 16). His second submission is that Section 22 is not attracted to a case involving a concluded transfer, and the aggrieved, if at all, can only take recourse to a suit and cannot arise in this proceeding any objection to the sale deed executed by Lingamma in favour of Venkatamma.*

***18**. It is true that entry 18 in the State list-II of the Seventh Schedule to the Constitution of India, which enables the State legislature to make laws refers to, amongst others, the land and transfer and alienation of agricultural land. Entry 5 of list-3, the concurrent list, contains, amongst others, subjects joint family and partition, intestacy and succession and Entry-6 "transfer of property other than agricultural land". In Jeewanram's case the High Court of Rajasthan is of the view that in view of entry-6 of List III and Entry 18 of List II the parliament is not competent to deal with the transfer of agricultural land, the said subject falling within the exclusive domain of the State legislature and therefore the words immovable property used in Section 22 will have to be read as excluding agricultural lands. ON the other hand, it was argued by the learned counsel for the appellants that the parliament's power to legislate as to succession is covered by entry-5 of List III and in dealing with the question of succession, if incidentally the law*

provides for pre-emption in the case of proposed transfer of agricultural lands as has been provided under Section 22, it cannot be said that the parliament had dealt with the transfer of agricultural lands as such. IN this connection he submitted that in examining this question the pith and substance theory shall have to be kept in view. He places reliance on a Division Bench ruling of this Court in Basavant Gouda vs. Smt.Channabasawwa and another (AIR 1971 Mysore, page 151 at paragraph-11). He also places reliance on two decision of the Supreme Court (i) Smt. Surasaiba-Lini Debi Vs. Phanindra Mohan Majumdar (AIR 1965 SC 1364). (ii) Waman Shriniwaskini Vs. Ratilal Bhagwandas and Co. (AIR 1959 SC 689).

19. *As stated at para-13 above, on the death of her husband Venkataramanappa, having successes to his interest in the joint family, the first plaintiff was entitled to 1/6 share therein (in the entire joint family properties). As stated at para-17 above, having succeeded to his sons estate on his death, she was entitled to 1/33 share in the joint family properties. The interest thus she had acquired in the joint family properties had been transferred by her to her daughter, second plaintiff, during the pendency of this proceeding.*

20. *Is the transfer by the first plaintiff of her interest in the property to which she had succeeded void under Section 22 of the Act is the question now. Section 22 of the Act reads: "22 (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application. (3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred. The contention of the learned counsel for the appellants is that since the sale has come about without complying with the mandatory requirements of Section 22(1) the Court has to ignore that transfer declaring it as illegal and that on that footing the shares of the parties have to be worked out. If that is done, he contends, that to what the 2nd plaintiff would be entitled to in the suit is her own 1/6th share in the joint family properties, it being 1/3rd of her father's ½ share, and not her share plus the share she has obtained on transfer from her mother.*

21. *Before examining the aforesaid contention of the learned contention of the learned counsel for the appellants on its own merits, let us find out as to whether Section 22 of the Act is not at all attracted to the case of agricultural lands as is being contended by the learned counsel for the respondents. In my view, there is no merit in this submission. With great respect I am unable to agree with the views expressed in Jeewanram's*

case by the Rajasthan High Court. IN incorporating Section 22 in the Act the Parliament cannot be said to have encroached upon the rights of the State legislature in any manner. The Act does not deal with transfers pertaining to agricultural lands as such. It mainly provides rules and guidelines in the matter of succession amongst those governed by that law. This is the pith and substance of the Act. Only incidentally, in order to avoid certain complications that may arise by one of the co-heirs transferring his or her rights in the property to which she was entitled to succeed, this safeguard in the form of Section 22 is provided for. The main subject underlying the principle embedded in Section 22 is to provide for a smooth succession to the property of the intestate amongst the various heirs. This aspect is high-lighted, though slightly in a different context, in a Division Bench decision of this Court in Basavant Gouda Vs. Smt. Channabasawwa and another (AIR 1971 Mysore, page 151). There, the argument was that the Act itself was not applicable to agricultural lands. It was contended that under entry 18 in list II VII Schedule of the Constitution, it was only the State legislature that was competent to make a law in respect of agricultural lands and therefore, the Act even in the matter of succession can deal with agricultural lands. This argument was repelled by this Court and I may usefully extract para-11 of the judgment. "ft. Mr. Savanur lastly contended that the Hindu Succession Act itself is not applicable to agricultural land because entry 18 in List II of the Seventh Schedule of the Constitution, confers power on the State Legislature to make legislation in respect of agricultural lands. This argument is merely to be stated for being rejected. Entry 5 of List III of the Seventh Schedule of the Constitution deals with the power to legislate in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the constitution subject to their personal law. It may be noticed here that the corresponding entry 7 in the Government of India Act, 1935, List III read as follows: "Wills, intestacy, and succession, save as regards agricultural land. "It is significant that in Entry 5 in the Constitution the words "save as regards agricultural lands" have been omitted. The pith and substance of the Hindu Succession Act is to make a law relating to succession and not to deal with agricultural lands as such. That is the reason why the argument of Mr.Savanur requires no further consideration. The provisions of Section 14 of the Hindu Succession Act are matters which come within the ambit of Entry 5 in List III of the Seventh Schedule of the Constitution and their applicability to agricultural lands cannot be excluded. This view of ours finds support in the decision Amar Singh Vs. Baldev Singh, AIR 1960 Punjab 666 (FB) and Shakuntala Devi Vs. Beni Madhav, AIR 1964 Allahabad 165."

22. *Though Section 22 is attracted to the transfers involving agricultural lands or interest therein, the question that further arises for consideration is as to whether the transfer in question comes within the mischief of that provision. The answer to this question depends upon the ambit of Section 22. The section provides no bar to transfers as such. It only provides that if one of the heirs proposes to transfer his interest in the property or business he should give the fist option or a preferential right to other co-heirs to acquire the interest proposed to be transferred. It comes into play*

only where more than one heir succeeds to an estate. There is no bar to a single heir succeeding to the estate transferring his right. The intention behind this provision, it appears, is to prevent at that stage outsiders from meddling with the property left behind the deceased on the strength of that transfer. IN several instances where a male Hindu dies having at the time of his death an interest in a mitakshara co-parcenery property, his heirs, specified in the proviso to Section 6 who are entitled to succeed to his estate may continue to live jointly without causing any disruption in the family or management of the estate and this may be for various reasons. A stranger purchasing the interest of one of the heirs may not have the same sentiments and background and his interference may cause a lot of annoyance and hardship to the other members of the family. As a matter of caution to prevent such things happening the legislature, has reserved this preferential right to the other heirs to acquire the interests sought to be sold by one of the heirs. This provision, in my view, will not apply in the case of a transfer by one heir in favour of another co-heir as in this case. My view also finds support from the following observations of the learned Author of Mulla's Hindu Law, 15th Edition at page 1029: "this section appears to have been thought necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an outsider by a coheir of his or her interest in property simultaneously inherited along with other coheirs…..". "probably the operation of the rule was meant to apply to an out and out sale of the interest or a gift of the same to an outsider. Sub-Section (2) would seem to indicate that intention."

18. A learned Single of Bombay High Court when confronted with the same preposition in ***Tukaram Genba Jadhav Vs. Laxman Genba Jadhav AIR 1994 Bombay, 247***, held that the provisions of Hindu Succession Act applied to the agricultural land save and except, as provided under Section 4(2) of the Act. The judgments rendered by the Allahabad, Mysore and Rajasthan High Courts were discussed in the following manner:-

*"**8**. For sake of ready reference, and proper understanding of rival contention, it is necessary to extract Entry 7 of List III of Govt. of India Act, 1935 and Entries 5, 6 and 7 of List III of Seventh Schedule to the Constitution as well as Entry 21 from List III of Govt. of India Act, 1935 and Entry 18 from List III of the Constitution. The said entries read as under:--*

A. Entry 7, List III, Govt. of India Act, 1935:

"Wills, intestacy, and succession, save as regards agricultural land."

Entry 5, List III, VIIth Schedule of Constitution of India:

"Marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family and partition, all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

Entry 6, List III, Vllth Schedule of Constitution of India :

"Transfer of property other than agricultural land, registration of deeds and documents."

Entry 7, List III, Vllth Schedule pf Constitution of India:

"Contracts including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.".

B. Entry 21, List III, Government of India Act, 1935:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, colonization, Courts of Wards, encumbered and attached estates, treasure trove."

Entry 18, List III, Vllth Schedule of Constitution of India: "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents, transfer and alienation of agricultural land, land improvement and agricultural loans, colonization."

(Note: Subject matter of devolution of agricultural land is omitted from the scope of Entry 18).

9. *Let me now survey the decisions rendered by various Courts having some bearing on the question under consideration.*

10*. The learned counsel for the appellants relied on the opinion of the Federal Court in Special Reference No. 1 of 1941, in the matter of Hindu Women's Rights to Property, Act, 1937 reported in AIR 1941 FC 72. In this case the Federal Court interpreted Entry 7 of List III (the concurrent list) of the Govt. of India Act, 1935. The plain language of the said entry clearly excluded agricultural lands from the scope and ambit of the said entry. In its opinion rendered in the said special reference made to the Federal Court by the Governor General, the Federal Court opined that the expression "any property" used in S. 3 of the Hindu Women's Rights to Property Act, 1937 shall have to be interpreted to mean only such property in respect whereof the Central Legislature could enact law of succession by virtue of the provisions contained in Entry 7, List 111 of Govt. of India Act, 1935. The Federal Court answered the question referred to it by the Governor General by stating that the Hindu Women's Rights to Properly Act, 1937 and Hindu Women's Rights to Property. (Amendment). Act. 1938 did not operate to regulate succession to agricultural lands in the Governor's provinces.*

11*. In Laxmi Devi v. Surendra Kumar , the Division Bench of High Court of Orissa held that the framers of the Constitution had omitted the words "save as regards agricultural lands" from Item 5 of the concurrent list in Schedule VII of the Constitution of India in order to have a uniform Personal Law throughout India. The High Court of Orissa held that the scope and ambit of Entry 5 forming part of VIIth Schedule to the Constitution of India was enlarged by the framers of the Constitution by reason of exclusion of the words "save as regards agricultural lands therefrom. In the context of the change of entries and the object of the framers of the Constitution, the Court held that the decision of the Federal Court in the above referred reference could not be applied for purpose of interpretation of Entry 5 of the concurrent list in Schedule VII of the Constitution of India. In Nidhi Swami v. Khati Dibya, the Division Bench of the High Court of Orissa took the same view.*

12*. Sometime in the year 1960, the High Court of Punjab rendered two reported decisions having bearing on the question under consideration. In the case of Sant Ram Dass v. Gurdav Singh, AIR 1960 Punj 462, D. K. Mahajan, J. held that "succession to 'agricultural land was covered by Item*

5 of List III of the VIIth Schedule of the Constitution of India and the Hindu Succession Act regulated succession in respect of all properties of Hindus including in respect of agricultural land. Having regard to the change in the language and content of Entry 5 in List III of the Vllth Schedule to the Constitution as contrasted from Entry 7 in List III of Govt. of India Act, 1935, it was held by the Court that the Hindu Succession Act though applicable to regulate succession in respect of agricultural lands was not ultra vires.

***13**. In Amar Singh v. Baldev Singh, a Full Bench of the High Court of Punjab took the same view. In this case the Full Bench of the High Court of Punjab held that S. 14 of the Hindu Succession Act, 1956 was valid and the legislation though providing for succession in relation to agricultural land fell within Entry 5 of List III of the Constitution. The Full Bench referred to the constitutional scheme and also referred to the provisions contained in Arts. 246(2) and 246(3) of the Constitution. The Court held that the subject matter of Wills, intestacy and succession was not within the exclusive competence of the State Legislature. In this case, the Full Bench of the High Court of Punjab also relied upon doctrine of "Pith and Substance" and observed that the alleged encroachment of the Entry 18 in the State List, if any, was incidental. If the subject legislated upon falls directly and substantially within the scope and ambit of entry in concurrent list, the question of alleged encroachment in the State List does not arise.*

***14**. In Baswant Gauda v. Smt. Channabasawwa reported in AIR 1971 Mysore 151, the High Court of Mysore held that the Hindu Succession Act, 1956 came within the ambit of Item 5 of List II of Schedule 7 of the Constitution and that the applicability of the Act to agricultural lands could not be excluded. The High Court of Mysore followed the ratio of the judgment of the Full Bench of High Court of Punjab referred to hereinabove.*

***15**. 1 shall now refer to the judgments of High Court of Allahabad having bearing on the question under consideration.*

***16**. In Shakuntala Devi v. Beni Madhav , the High Court of Allahabad in terms held that provisions of S. 14 of the Hindu Succession Act dealt with matters which came within ambit of Entry 5, List III of Schedule VII of the Constitution. Entry 5 of List III on VIIth Schedule to the Constitution when contrasted with Entries 6 and 7 also provides a definite clue for purpose of understanding the constitutional scheme. Entry 5 of List III in the Vllth Schedule does not exclude agricultural lands from the purview of Entry 5. Entries 6 and 7 dealing with the subject of transfer of property and contracts specifically exclude agricultural lands from the purview of the said entries. Non-exclusion of subject of agricultural lands from Entry 5 and specific exclusion thereof from Entries 6 and 7 is not accidental or incidental but is deliberate in view of intended change in the constitutional scheme.*

***17**. The learned counsel for the appellant heavily relied upon the ratio of the judgment of the Division Bench of Allahabad High Court in the case of Smt. Prema Devi v. Joint Director of Consolidation at Gorakhpur . In this case the Division Bench of High Court of Allahabad was concerned with interpretation of U. P. Zamindari Abolition and Land Reforms Act, which regulated devolution of the tenancy rights a subject specifically referred to in S. 4(2) of Hindu Succession Act. Section 4(2) of the Hindu Succession Act, 1956, specifically provides that the Hindu Succession Act, 1956, shall not*

affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. To my mind it is clear from reading of S. 4(2) of the Act that only such laws which fall within the category of laws specified in S. 4(2) of the Act are excluded from the purview of the Hindu Succession Act, 1956 and S. 4(2) of the Act cannot be interpreted to mean that the Hindu Succession Act, 1956 is not at all applicable to regulate succession in respect of agricultural lands. In the above referred case, the Division Bench of the High Court of Allahabad held that having regard to the subject of U.P. Zamindari Abolition and Land Reforms Act, S. 4(2) of the Act shall be applicable and the Hindu Succession Act, 1956 shall not affect the above referred local law under consideration. If understood in proper perspective having regard to the context in which the problem was discussed by the High Court of Allahabad in the above referred case, this judgment of the High Court of Allahabad does not appear to take a view different from the view taken by other High Courts of the country. It is of considerable significance that in this case the Division Bench of High Court of Allahabad in terms approved the ratio of the Full Bench judgment of the High Court of Punjab . It is however, true that in this case the Division Bench of High Court of Allahabad observed that it did not agree with the ratio of the judgment of S. N. Katju, J. . If the ratio of the judgment is interpreted in conjunction with the ratio of the Full Bench judgment of High Court of Punjab referred to hereinabove and is restricted in its applicability to the cases falling under S. 4(2) of the Hindu Succession Act, 1956, it does not strike a different note. If it is interpreted to mean that Hindu Succession Act, 1956 is not at all applicable to regulate succession in respect of agricultural lands, I shall have no hesitation in dissenting with the view taken by the Court in the above referred case.

***18**. In Rudra Pratap v. Board of Revenue, U.P. , the Division Bench of High Court of Allahabad agreed with the ratio of earlier judgment of Allahabad rendered in the case of Smt. Prema Devi v. Joint Director of Consolidation at Gorakhpur . It is some what interesting to refer to the editorial note of All India Reporter appended to the Head Note of this judgment. The said editorial note reads as under :--*

> *"The unqualified proposition that the Hindu Succession Act does not apply to agricultural lands does not seem to be correct as it leads to the result that succession to the agricultural land of a Hindu will in no case be governed by the Hindu Succession Act, 1956. Such a result, clearly does not follow from S. 4(2) of the Hindu Succession Act, 1956. Section 4(2) refers only to certain specific matters e.g. the fragmentation of agricultural holdings and provides that if there be any law providing for the prevention of such fragmentation, the operation of such law shall not be affected by the Hindu Succession Act."*

***19**. The learned counsel for the appellant at one stage invited attention of the Court to the judgment of High Court of Rajasthan in the case of Jeewanram v. Lichmadevi reported in AIR 1981 Raj 16.. The said judgment, with respect, is not relevant as it deals with S. 22 of the Hindu Succession Act, 1956. As a matter of fact in his rejoinder, the learned counsel for the appellant himself submitted that reference to S.22 of Hindu Succession Act,*

1956 or the decisions based therein were not relevant for purpose of deciding the controversy which is subject matter of this appeal.

***20**. I shall now refer to the judgment of this Court in the case of Dhananjaya v. Mst. Gajra . This judgement deals with the subject of interpretation and applicability of S. 151 of M.P. Land Revenue Code, 1954. The said provision provided for devolution of tenancy rights in respect of agricultural holdings. The subject matter is clearly covered under S. 4(2) of Hindu Succession Act, 1956. With respect, the ratio of this judgment is not relevant for deciding this appeal.*

***21**. The learned counsel Shri Kumbhakoni invited the attention of the Court to several judgments of the Hon'ble Supreme Court interpreting and applying the doctrine of "Pith and Substance". Some of the judgments relied upon by the learned counsel are listed herein for the sake of ready reference:--*

(1) Synthetics & Chemicals Ltd. v. State of U.P.,

(2) M/s Ujagar Prints v. Union of India.

I have already referred to the judgment of the Hon'ble Supreme Court in the case of Accountants & Secretarial Services Pvt. Ltd. v. Union of India. On application of doctrine of Pith and Substance to Hindu Succession Act, 1956, I hold that the subject legislated upon falls under Entry 5 of List III of Seventh Schedule of Constitution and S.8 of the Act is applicable also to agricultural lands without affecting Ideal law concerning prevention of fragmentation, law fixing ceiling and law concerning tenancy rights in agricultural lands.

***22**. At the initial stage when the matter was first argued, I felt that there was a difference of opinion between several High Courts on the subject as to whether the Hindu Succession Act, 1956 was not applicable to regulate succession in respect of agricultural lands. After going through all the decisions cited at the bar with the assistance of learned counsel for the appellant and the learned counsel who appeared as Amicus Curiae to assist the Court, I have reached the conclusion that there is no real conflict between the various decisions of the High Courts in the country. It may be stated in the passing that our Court has decided hundreds and thousands of matters during all these years on the footing that the Hindu Succession Act, 1956 is applicable to agricultural lands save and except to the extent provided in Section 4(2) of the Act. I am happy to conclude that after due scrutiny of all the relevant case-law on the subject, the conclusion of the Court is the same. In my opinion, there is no merit in the appeal. The appeal fails."*

19. Similar issue came up before the coordinate Bench of this Court in ***Baldev Parkash and others Vs. Dhlan Singh and others Latest HLJ 2008 (HP) 599,*** wherein his Lordship chose to follow the view taken by the Punjab and Haryana and Rajasthan High Courts and it was held:

*"**7**. The Court will consider the first submission made by Mr. Bhupender Gupta with regard to the maintainability of the suit under section 22 of the Hindu Succession Act, 1956 since according to him the land in question is agricultural land. I have carefully gone through the plaint as well as written statement filed by defendants No.1 to 3. A specific averment has been made by defendants No.1 to 3 in paras 4, 7 and that the land in question*

has been purchased by them for agriculture purposes and they have sown crop on the same. This averment made in the written statement has not been denied at all in the replication filed by the plaintiffs.

***8**. Mr. Bhupender Gupta has strongly relied upon Jaswant and others versus Basanti Devi, 1970 PLJ 587 to buttress his submission that section 22 of the Hindu Succession Act, 1956 will not be applicable to the agricultural land. Their Lordships of the Punjab and Haryana High Court have held as under:-*

> *"Mr. Roop Chand, the learned counsel for the respondent, stressed that the words 'immovable property' used in section 22 will include agricultural lands. Undoubtedly, they do. But one cannot lose sight of the fact that when the Central Legislature used these words it did so knowing fully well that it had no power to legislate regarding agricultural lands excepting for the purpose of devolution. Section 22 does not provide for devolution of agricultural lands. It merely gives a sort of right of preemption. In fact, as already pointed out, entry No.6 in List III, clearly takes out agricultural lands from the ambit of the concurrent list. Agricultural land is specifically dealt with in entry No.18 of List II. The only exception being in the case of devolution. Therefore, it must be held that section 22 does not embrace agricultural lands."*

***9**. The Hon'ble High Court of Rajasthan has relied upon the principles laid down by the Hon'ble Punjab and Haryana High Court in Jeewanram versus Lichmadev and anotherAIR 1981 Rajasthan 16 that Section 22 of the Hindu Succession Act, 1956 will not be applicable to the agricultural land. The Hon'ble Single Jude has held as under:-*

> *"The contention raised by the learned counsel for the appellant is that the learned Additional District Judge has committed a serious error of law when he held that Section 22 of the Act does not apply to the agricultural lands whereby denying a preferential right which he has under Section 22 of the Act. Undoubtedly this raises an important question regarding its interpretation and scope. In other words, the question that I am called upon to determine in this appeal is whether the words "immoveable property of an intestate" include agricultural land of an intestate or not. To examine this question, it will be useful to read Section 22 (1) of the Act and Entries Nos. 5 and 6 contained in List III (Concurrent List) and Entry No.18 mentioned in List II (State List) of the Seventh Schedule of the Constitution. Section 22 (1) of the Act is as under:-*
>
> *"22. Preferential right to acquire property in certain cases: (1) Where, after the commencement of this Act, an interest in any immoveable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.*

(2) to (3) ……..

Explanation:- In this Section, 'court' means the court within the limits of whose jurisdiction the immoveable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf." The aforesaid Entries read is under:-

"List III:

Entry No.5: Marriage and divorce; infants and minors; adoption; will, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Entry No.6: Transfer of property other than agricultural land; registration of deeds and documents.

List II.

Entry No.18: Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

Section 22 (1) of the Act occurs in Chapter II dealing with intestate succession which provides for a preferential right to acquire the interest proposed to be transferred. The word 'immoveable property' has not been defined in Section 3 of the Act. The Act was enacted by the Parliament for amending the law relating to intestate succession among Hindus. According to Entry No.5, List III the Parliament and subject to clause (1) of Article 246 of the Constitution, the legislature of the State have power to make laws in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution, subject to their personal law. So also Parliament and subject to clause (1) of Article 246 of the Constitution, the legislature of the State have power to make laws in regard to transfer of property other than agricultural land; registration of deeds and documents. Subject to clauses (1) and (2) of Article 246 of the Constitution, the Legislature of the State has been empowered to make laws in respect of land, that is to say, right or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural lands; colonization.

Mr. Rajendra Mehta, learned counsel for the respondent contended that Entry No.6, List III makes it abundantly clear that the Parliament does not possess jurisdiction to legislate over agricultural lands beyond the power it has under Entry No.5, List III, that is regarding "devolution". He, therefore, submitted that Section 22 of the Act will not over the case of agricultural lands. On the basis of Sukhdeo Singh's case (1980 WLN 212) (Raj), Mr. M.L. Shreemali, learned counsel for the appellant urged that a Khatedar tenant is not an owner of a holding and, therefore, there cannot be any transfer of his or her interest in the property and when there is no

question of transfer of his or her interest in the property, Entry No.5, List III is not attracted.

In Nagammal's case (1970) 1 Mad L.J. 358), it was observed by a learned single Judge of the Madras High Court as follows:

> *"When interpreting the Section, one can properly assume that Parliament had in mind the practice of preemption present in the country and the several pre-emption laws. A Legislature may be deemed to be conversant with the laws, current within its territory. But that will not permit the adoption of the incidents of preemption recognised or provided for in other pre-emption laws and in the Muslim law of pre-emption.*
>
> *Parliament must have had in mind the two-fold aspect of the right n the pre-emption laws current in the country: (1) the primary or substantive right to have an offer made and (2) the secondary or remedial right of the co-heirs if the property is sold without being first offered to them to take it from the purchaser. Thus Parliament has emphasized upon the primary right of pre-emption and left the remedial right to the common law for the Courts to mould it according to the circumstances".*

It was held In re Hindu Women's Right to Property Act, AIR 1941 FC 72 while considering Section 3 of the Hindu Women's Rights to Property Act, 1937 as follows:

> *"No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not seek to divide the Act into two parts' viz.' the part which the Legislature was competent, and the part which it was competent, to enact. It holds that, on the true construction of the 'act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers. There is a general presumption that a Legislature does not intend to exceed its jurisdiction.*
>
> *The question arose in Jothi Timber Mart v. Calicut Municipality, AIR 1970 SC 264 whether Section 126 of the Calicut*

City Municipal Act (Kerala Act No. XXX of 1961) is ultra vires. Entry No.52, List II, Schedule VII. It was observed by their Lordships of the Supreme Court as under:

> *"When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other; and that the Legislature did not intend to transgress the limits imposed by the Constitution".*

In Joshi Timber Mart's case, their Lordships relied on it re Hindu Women's Rights to Property Act and held that the expression 'brought into the city' as used in Section 126 was, therefore, rightly interpreted by the High Court as meaning brought into the Municipal limits for purposes of consumption, use or sale and not for any other purpose. The principles enunciated in the above mentioned decisions of the Federal Court and the Supreme Court, in my humble opinion, afford useful guide for interpreting the words "immoveable" used in Section 22 of the Act. Entry No.6, List III takes out agricultural land from the ambit of immoveable property."

In view of the specific stand taken by defendants No.1 to 3 in their written statement coupled with the law laid down by the Rajasthan High Court and Punjab and Haryana High Court, I am of the considered opinion that suit under section 22 of the Hindu Succession Act, 1956 was not maintainable seeking preferential right to purchase the agriculture land."

20. In ***Subramaniya Gounder and others Vs. Easwara Gounder and others, 2011 (2) MadLJ 467,*** a learned Single Judge of Madras High Court after following the view taken by the Punjab and Haryana High Court followed by Rajasthan High Court held as follows:-

> *"11. In the instant case, the appellants/plaintiffs have exercised their pre-emptive right from other legal heirs. But admittedly, the subject property was only an agricultural land. A careful reading of the provision of the Constitution of India and the dictum laid down in the above judgments would show that the agricultural lands will not cover under Section 22 of the Hindu Succession Act, because the transfer of agricultural land in the subject matter of state list. Under such circumstances, I am of the opinion that the prayer sought for by the appellants/plaintiffs is not legally sustainable. Though a submission is made by the learned Counsel appearing for the Respondents that if the third parties are allowed to enter into the suit property, the easementary right would be affected, I am of the opinion that the Appellants are always at liberty to file a partition suit to divide the suit property with metes and bounds. Hence, I do not find any merit in the second appeal, much less any substantial question of law that arises for consideration in the second appeal."*

21. A Learned Division Bench of Allahabad High Court in ***Anjali Kaul & Another Vs. Narendra Krishna Zutshi, 2014 (9) RCR (Civil) 2794*** was again confronted

with the same preposition and this time again while dissenting from the view taken by Rajasthan and Orissa High Courts, the Court chose to follow the view taken by it earlier in Prema Devi's case supra and it was held:-

> *"12. Learned counsel for opposite parties relied upon a case law of Smt.Prema Devi v. Joint Director of Consolidation, 1970 AIR (All) 238. In this case a Division Bench of this Court has categorically held that:*
>
> > *"5. In the first place, we are of the opinion that the Hindu Succession Act, 1956, cannot be made applicable to agricultural plots. This Act was passed by the Central Legislature in 1956 and the only entry under which the Central Legislature had the jurisdiction to pass the Act, was entry No. 5 in the third list of the Seventh Schedule of the Constitution. This entry is as follows:--*
> >
> > *5-Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." This entry obviously relates only to personal law and laws passed under this entry do not apply to any particular property. They merely determine the personal law. In List 2, Entry No. 18 is as follows:--*
> >
> > *Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." This entry which is in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State legislation.*
> >
> > *It is noteworthy that in List 3 wherever the entry relates to rights in land 'agricultural land' has expressly been excluded. For instance, Entry No. 6 is as follows:*
> >
> > *"Transfer of property other than agricultural land.....Entry No. 7 is as follows:--*
> >
> > *Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.*
> >
> > *No such exception was expressly mentioned in Entry No. 5 because this entry related only to matters personal to individuals and did not relate directly to any property. While legislating in respect of such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. Gwyer, C. J. while delivering the judgment of the Federal Court in a reference on the Hindu Women's Rights to Property Act, 1937, reported in AIR 1941 FC 72 observed as follows:--*

> *"There is a general presumption that a Legislature does not intend to exceed its jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property", the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other....."*

The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindus. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies. Sub-section (2) of S. 14 of the Act runs as follows:--

> *"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being In force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."*
>
> *This Sub-section indicates that it was only for the removal of doubts that this provision had been included. Even without this provision, the Act could not apply to agricultural holdings."*
>
> *6. Under the U. P. Zamindari Abolition and Land Reforms Act which regulated the tenancy rights, there is no provision applying personal law to any of the tenures created under that Act and thus the provisions of the Hindu Succession Act are wholly inapplicable to the land tenures under the U. P. Zamindari Abolition and Land Reforms Act.*

12-A Learned counsel for the appellants and petitioners argued that in the case of Gandharb Misra v. Taramoni Devi and Ors., 1974 AIR (Ori) 70, as Division Bench of Orissa High Court has while dissenting from the decision of Prema Devi, 1970 AIR (All) 238 has held that:

"6. Contention No. 2-- Mr. Misra next contended that the Hindu Succession Act of 1956 did not apply to agricultural lands. In support of this contention reliance is placed on a Bench decision of the Allahabad High Court in the case of Smt. Prema Devi v. Joint Director of Consolidation (Headquarter) at Gorakhpur Camp, AIR 1970 All 238. The reasoning for the conclusion is that Entry No. 5 in the concurrent List of the Seventh Schedule of the Constitution which is the only entry under which the Central Legislature has the jurisdiction to pass the Hindu Succession Act relates only to personal law. Laws passed under this entry do not apply to any particular property. They merely determine the personal law. Entry No. 18 in List II (State List) in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are, therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State Legislation. In List 3 wherever the entry relates to rights in land, agricultural land has been expressly excluded.

A Division Bench of this Court in the case of Sm. Laxmi Debi v. Surendra Kumar Panda, AIR 1957 Orissa 1, dealing with the point in paragraph 14 of the judgment stated-

"Mr. Jena further contended that the Act even if applies retrospectively, will not apply to agricultural lands, and for this, he relies upon the Federal Court decision reported in Hindu Women's Rights , to Property Act, 1937, in the matter of AIR 1941 PC 72 (K). That was a case which came up for decision by the Federal Court on a reference made by his Excellancy the Governor-General of India.

Gwyer, C. J., who delivered the judgment of the Court held that the Hindu Women's Rights to Property Act of 1937, and the Hindu Women's Rights to Property (Amendment) Act of 1938, do not operate to regulate succession to agricultural land in the Governor's Provinces; and do operate to regulate devolution by survivorship of property to other than agricultural lands.

This decision, in view of the changed position in law, no longer holds good. The Federal Court decision was based upon the law of legislative competency as it then stood, by the Government of India Act, 1935. In Schedule 7, Government of India Act, 1935, this subject appears in the Concurrent Legislative List (List 3) as Item No. 7. Item 7 was in the following terms :

'Wills, Intestacy and Succession, save as regards agricultural lands'. Now under the present Constitution of India the same subject has been dealt with in the Concurrent List (List 3) in Schedule 7 as Item No. 5. Item No. 5 runs as follows:--

'Marriage and divorce, infants and minors, Adoption, Wills, Intestacy and Succession, Joint Family and Partition, all matters in respect of which parties in judicial proceedings were, immediately before the commencement of this Constitution, subject to their Personal law.

'It is clear that the Parliament had omitted the phrase 'save as regards agricultural land' from Item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India, and accordingly, it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 PC 72 (K) would no longer hold good." The same reasoning has been advanced by a Division Bench of the Mysore High Court in the case of Basavant Gouda v. Smt. Channabasawwa, AIR 1971 Mys 151, to uphold the applicability of the Hindu Succession Act to agricultural lands. We prefer to follow our earlier decision on the point which also appeals to us to be the appropriate decision on the matter. Accordingly the contention of Mr. Misra is rejected."

22. An analysis of the aforesaid judgments would clearly go to indicate that in so far as the High Courts of Punjab and Haryana, Allahabad, Rajasthan, Madras and learned Single Judge of this Court are concerned, it has categorically been held that the provisions of Hindu Succession Act, more particularly Section 22 thereof do not apply to agricultural lands in the matter of succession, as it was beyond the competence of Parliament to legislate over the agricultural lands beyond the power it had under Entry 5 of List III of Seventh Schedule of the Constitution, i.e. devolution and therefore, Section 22 of the Act do not apply to the cases of the agricultural lands.

23. While on the other hand, the High Courts of Mysore, Madhya Pradesh, Orissa and Karnataka have not agreed with the aforesaid view and have categorically held that the provisions of Section 22 of the Act are applicable to agricultural lands. In so far as

the Bombay High Court is concerned, it has also held that the provisions of Act of 1956 is applicable to agricultural land save and except to the extent provided in Section 4(2) of the Act and further this Court did not find any conflict in the judgments rendered by the High Courts of Punjab, Mysore, Allahabad and Rajasthan.

24. From the aforesaid, it would be noticed that certain High Courts have rendered judgments as late in the year 2014, but did not notice the judgment rendered by the Hon'ble Supreme Court in ***Vaijanath and others Vs. Guramma and another (1999) 1 SCC 292.*** The Court therein was dealing with the preposition as to whether the term "property" would include agricultural lands. This interpretation was rendered in reference to the Hindu Women's Right to Property Act, 1937 along with amendments carried out therein by Hadrabad Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1954. The Hon'ble Supreme Court in no uncertain terms held that though there is no definition of 'property' under the Act of 1937, but the term 'property' has to be given its ordinary meaning which would include agricultural land also. The decision rendered by the Federal Court in Hindu Women's Rights to Property Act, 1937 in re (supra) was distinguished in the following terms:-

> *"6. However, the appellants rely upon a decision of the Federal Court Hindu Women's Right to Property Act. 1937, In re AIR 1941 Federal Court page 72 under which the validity of the said Original Act which had been enacted by the Central Legislature was considered by the Federal Court, Examining the question of legislative competence of the Central Legislature to enact in 1937 the Hindu Women's Right to Property Act the Federal Court examined the legislative entries under the Government of India Act, 1935. It held that under Entry 21 of List II which applied to the Provincial Legislatures, laws with respect to devolution of agricultural land could be enacted only by the Provincial Legislature. It also noted that in List III,that is to say, the Concurrent List, Entry 7 was wills, intestacy and succession save and except agricultural land'. The Federal Court observe that while the Act purports to deal in quite general terms with property' or 'separate property' of a Hindu dying intestate or his interest in joint family property, it does not distinguish between agricultural land and other property and. therefore, is not limited in terms to the latter. <u>However, looking to the competence of the Central Legislature to enact such a law the word 'property' will have to be suitable construed. 'When legislature with limited and restricted powers makes use of such a word of such a wide and general import, the presumption must surely be that it is using it with reference to that kind or property with respect to which it is competent to legislate and to no other</u>. The Federal Court, therefore, restricted the application of the Hindu Women's Rights to Property Act, 1937 by excluding agricultural lands from its purview."*

25. Apart from the above, even Entry 5 of the concurrent list being List III of Seventh Schedule also came up for consideration and it was held that there was no exclusion of agricultural land from Entry 5, which covers Wills, intestacy and succession, as also joint family and partition. It is apt to reproduce paras 7 and 8 of the judgment, which read thus:-

> *"**7**. The same constraint do not apply to the said Hyderabad Act of 1952 passed by the Legislature of the State of Hyderabad, which has received the assent of the President on 22-7-1953. The relevant Legislative entries under the Constitution of India are somewhat different. Entry 5 in the*

Concurrent List, being List III in the 7th Schedule of the Constitution, is as follows:

> *"Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."*

8. *There is no exclusion of agricultural lands from Entry 5 which covers wills, intestacy and succession as also joint family and partition. Although Entry 6 of the Concurrent List refers to transfer of property other than agricultural land, agriculture as well as land including transfer and alienation of agricultural land are placed under Entries 14 and 18 of the State List. Therefore, it is quite apparent that the Legislature of the State of Hyderabad was competent to enact a Legislation which dealt with intestacy and succession relating to Joint Family Property including agricultural land. The language of the Hindu Women's Right to Property Act, 1937 as enacted in the State of Hyderabad is as general as the Original Act. The words 'property' as well as 'interest in Joint Family Property' are wide enough to cover agricultural lands also. Therefore, on an interpretation of the Hindu Women's Right to Property Act, 1937 as enacted by the State of Hyderabad, the Act covers agricultural lands. As the Federal Court has noted in the above judgment, the Hindu Women's Right to Property Act is a remedial Act seeking to mitigate hardships of a widow regarding inheritance under the Hindu Law prior to the enactment of the 1937 Act; and it ought to receive a beneficial interpretation. The beneficial interpretation in the present context would clearly cover agricultural lands under the word 'property'. This Act also received the assent of the President under Article 254(2) and, therefore, it will prevail."*

26. It is evident from the aforesaid judgment of the Hon'ble Supreme Court the word "property" as well as the interest in joint family property are wide enough cover agricultural land also. Though, this interpretation was given while construing the provisions of the Hindu Women's Rights to Property Act, 1937, but the same would be equally applicable while construing the words "interest on immoveable property of an intestate" as appearing in the Hindu Succession Act.

27. The Hon'ble Supreme Court has categorically held that in the entire Hindu Women's Rights to Property Act, 1937, there is nothing which would indicate that the Act does not apply to agricultural land and it was held that the words "property" in general term, covers all kind of properties including agricultural land. Thereafter it was further held that a restricted interpretation was given to the original Hindu Women's Rights to Property Act, 1937 enacted by the then Central Legislature, entirely because of the legislative entries in the Government of India Act, 1935, which excludes the legislative competence of the Central Legislature over agricultural land.

28. It is evident from the judgment rendered by the Hon'ble Supreme Court that the view taken by the High Courts of Mysore, Madhya Pradesh, Orissa and Karnataka are more in tune with the judgment of the Hon'ble Supreme Court, meaning thereby that the view taken by the Punjab, Allahabad, Rajasthan, Madras and even this Court requires to be revisited and relooked, more particularly in light of the interpretation given by the Hon'ble Supreme Court to Entry 5 in the concurrent List, being List III in the Seventh Schedule of the Constitution, which according to it did not exclude agricultural land and also in light of

the fact that the Hon'ble Supreme Court has also distinguished the judgment rendered by the Hon'ble Federal Court in Hindu Women's Rights to Property Act, 1937 in re (AIR 1941 FC 72).

29. The question involved in the appeal is of great importance and is likely to come up repeatedly not only before this Court but also in the Subordinate Courts and therefore, looking into the importance of the question raised, it was desirable that there should be an authoritative pronouncement on the issue by a Larger Bench.

30. Accordingly, let the Registry place the matter before Hon'ble the Chief Justice for consideration and constitution of a Larger Bench for decision on the following point:-

"Whether the provisions of Hindu Succession Act apply to agricultural lands?"

****

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

State of H.P. and others ...Appellants.

Versus

Baldev and others ...Respondents.

RSA No. 6 of 2014
Reserved on: 05.10.2015
Decided on: 14.10.2015

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking permanent prohibitory injunction pleading that they are joint owners in possession of the suit land- defendants are strangers and they had started construction of a link road on the suit land - suit was dismissed by the trial Court- however, judgment was modified in appeal and the defendants were directed to pay compensation after making an assessment within a period of 6 months from the date of the judgment and in default, to hand over the possession of the suit land- held, that plaintiffs could have sought injunction only if they were in possession- plaintiffs have concealed the facts that possession was taken in the year 2000- they are not entitled for discretionary relief of injunction and the civil suit for injunction could not have been filed after five years from the date of taking over possession- the discretionary relief of injunction should not have been granted to the plaintiffs when they had not come to the Court with clean hands - it was not permissible for the Court to grant the relief which was not sought by the parties. (Para-4 to 47)

Cases referred:

Ramji Rai & Anr. versus Jagdish Mallah (Dead) through L.Rs. & Anr., 2007 AIR SCW 599

Thimmaiah versus Shabira and others, (2008) 4 Supreme Court Cases 182

Anathula Sudhakar versus P. Buchi Reddy (Dead) By L.Rs. & Ors., 2008 AIR SCW 2692

A. Shanmugam versus Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, Represented by its President, 2012 AIR SCW 3017

Kanchusthabam Satyanarayana and others versus Namuduri Atchutaramayya and others, (2005) 11 Supreme Court Cases 109

Vellakutty versus Karthyayani and another, AIR 1968 Kerala 179
Shajuddin and others versus Nagar Palika Parishad and another, AIR 1985 Madhya Pradesh 252
Faqir Chand (through L.Rs.) versus Lila Ram (through L.Rs.), AIR 1994 Delhi 161
Food Corporation of India and others versus Babulal Agrawal with Babulal Agrawal versus Food Corporation of India and others, (2004) 2 Supreme Court Cases 712
Ajab Enterprises versus Jayant Vegoiles and Chemicals Pvt. Ltd., AIR 1991 Bombay 35
M/s. Craft Centre and others versus The Koncherry Coir Factories, Cherthala, AIR 1991 Kerala 83
State of Orissa & Anr. versus Mamata Mohanty, reported in 2011 AIR SCW 1332
Hari Chand versus Daulat Ram, AIR 1987 Supreme Court 94
Bachhaj Nahar versus Nilima Mandal & Ors., 2009 AIR SCW 287
National Textile Corporation Ltd. versus Nareshkumar Badrikumar Jagad & Ors., 2011 AIR SCW 6180

For the appellants: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for the respondents.

The following judgment of the Court was delivered;

Mansoor Ahmad Mir, Chief Justice.

Challenge in this Regular Second Appeal is to the judgment and decree, dated 19.03.2013, made by the District Judge, Mandi, District Mandi, H.P. (for short "the First Appellate Court") in Civil Appeal No. 5 of 2012, titled as Baldev and others versus State of H.P. and others (for short "the impugned judgment") on the grounds taken in the memo of appeal.

2. Mr. T.S. Chauhan, Advocate, appeared on behalf of the respondents on 01.01.2014 and the following substantial questions of law came to be framed:

> "1. Whether the findings of First Appellate Court below are vitiated and are illegal for want of proper pleadings and proof?
>
> 2. Whether the Ld. First Appellate Court below has failed in error of law in entertaining the suit beyond the period of limitation?
>
> 3. Whether the findings given by Ld. Court below is both against the case as well as documentary evidence on record?
>
> 4. Whether without pleadings and evidence relief for compensation could have been granted by the Ld. First Appellate Court?
>
> 5. Whether the findings of Appellate Court below is liable to be set aside in view of common judgment dated 2-3-2013 passed by Full Bench of Hon'ble High Court of HP in CWP No. 1966 of 2012-C titled Shankar Dass alias Shankru and others, 85 connected cases. Hence the same on limitation grounds is liable to be set aside."

3. It is necessary to give a flashback of the case, the womb of which has given birth to the appeal in hand.

4. Plaintiffs-respondents, i.e. Dile Ram and Sanehru, filed Civil Suit No. 173 of 2005 before the Civil Judge (Senior Division), Sarkaghat, District Mandi, H.P. (for short "the

trial Court") against the defendants-appellants for grant of decree of permanent prohibitory injunction and mandatory injunction in terms of the mandate of Sections 38 and 39 of the Specific Relief Act on the grounds taken in the plaint, which can aptly and precisely be enumerated as under:

5. Plaintiffs-respondents have pleaded that they are in joint ownership and possession of the land comprising in Khata No. 3 min, Khatauni No. 3 min, Khasra No. 304, land measuring 0-57-29 hectares situated in Mauza Harwan/514, Illaqua Hatli, Tehsil Sarkaghat, District Mandi, H.P. (for short "the suit land") alongwith other co-sharers and the defendants-appellants are strangers, have started to construct Talwar-Harwan link road over the suit land. Further pleaded that the survey was conducted and the defendants-appellants are bent upon to construct the road upon the land of the plaintiffs-respondents and other co-sharers, i.e. subject matter of the suit, thereby causing damage. Requests were made to the defendants-appellants not to construct the said road, but they continued with the construction work. The plaintiffs-respondents are in possession to the extent of their share and in case, the defendants-appellants are not restrained, the plaintiffs-respondents will suffer irreparable loss.

6. It has further been pleaded that the cause of action had accrued to the plaintiffs-respondents on 05.07.2005, when the defendants-appellants started construction of the road.

7. The plaintiffs-respondents have prayed that decree of permanent prohibitory injunction be granted restraining the defendants-appellants permanently from constructing the road over the suit land or changing the nature of the same in any manner and have also prayed that in case, during the pendency of the suit, the defendants-appellants forcibly take the possession or change the nature of the suit land, decree of mandatory injunction be passed commanding the defendants-appellants to hand over the possession of the suit land to the plaintiffs-respondents.

8. The suit was resisted by the defendants-appellants by the medium of the written statement and the plaintiffs-respondents have also filed replica/rejoinder.

9. Following issues were framed by the trial Court on 21.09.2007:

> "1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as prayed for? OPP
>
> 2. Whether the plaintiffs are entitled to the relief of mandatory injunction as prayed for? OPP
>
> 3. Whether the suit is not maintainable in the present form as alleged? OPD
>
> 4. Whether the plaintiffs have no legal cause of action to file the present suit against the defendants as alleged? OPD
>
> 5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD
>
> 6. Whether this Court has no jurisdiction to entertain and try the present suit as alleged? OPD
>
> 7. Whether the plaintiffs have served the replying defendants with legal and valid notice under section 80 CPC as alleged? OPD
>
> 8. Whether the suit is bad for non joinder of necessary parties as alleged? OPD

9. Whether the plaintiffs have no locus standi to file the present suit as alleged? OPD

10. Relief."

10. Parties have led evidence before the trial Court.

11. After hearing the learned counsel for the parties and scanning the evidence and the pleadings, the trial Court dismissed the suit vide judgment and order, dated 28.11.2011, constraining the plaintiffs-respondents to file Civil Appeal No. 5 of 2012 in terms of the mandate of Section 96 of the Code of Civil Procedure (for short "CPC") before the District Judge, Mandi, which was partly allowed vide impugned judgment, the judgment and decree, dated 28.11.2011, made by the trial Court was partly modified and it was held that the plaintiffs-respondents are entitled to possession, but instead of granting the decree of possession, directed the defendants-appellants to pay the compensation after making the assessment within six months from the date of the impugned judgment, in default, to hand over the possession of the suit land to the plaintiffs-respondents.

12. Heard.

13. We are of the considered view that the impugned judgment is illegal and the First Appellate Court has fallen in an error for the following reasons:

14. The plaintiffs had to prove that they were in possession of the suit land, have failed to prove the same. Both the Courts below have held that the road was constructed in the year 2000 and the plaintiffs were not in possession on the date of the filing of the suit, i.e. 10.08.2005.

15. It is apt to reproduce relevant portion of para 25 of the impugned judgment and decree herein:

> "25. In such a situation, this Court has no hesitation to hold that the plaintiffs are not entitled for the relief for permanent prohibitory injunction as the road has already been constructed by the defendants in this case over the suit land. PW-1 Dile Ram himself admitted the fact that the road was constructed in the year 2000. The plaintiffs have not been able to prove the fact that the construction was raised during the pendency of the suit....."

16. It is beaten law of land that when the plaintiff fails to prove possession in a suit for permanent prohibitory injunction or mandatory injunction, the suit is to be dismissed.

17. Our this view is fortified by the decision of the Apex Court in the case titled as **Ramji Rai & Anr. versus Jagdish Mallah (Dead) through L.Rs. & Anr.,** reported in **2007 AIR SCW 599.** It is apt to reproduce paras 10 and 11 of the judgment herein:

> "10. On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in

> which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See: Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815]
>
> 11. In the case of A.L.V.R. Ct. Veerappa Chettiar v. Arunachalam Chetti and others, AIR 1936 Madras 200, it has been held that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction. There can be a suit only for an injunction. The present suit is only for permanent injunction and, therefore, the lower appellate court should have, on the facts and circumstances of this case, confined itself to its dismissal only on the ground that the appellants have failed to show that they were in possession. This has been done but the declaration that the appellants are not the owners, was not necessary."

18. The Apex Court in the case titled as **Thimmaiah versus Shabira and others,** reported in **(2008) 4 Supreme Court Cases 182,** held that if plaintiff is not in possession, he is not entitled to relief of permanent injunction without claiming recovery of possession. It is apt to reproduce para 10 of the judgment herein:

> "10. Undisputedly, the suit was one for permanent injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession."

19. It would also be profitable to reproduce para 11 of the judgment rendered by the Apex Court in the case titled as **Anathula Sudhakar versus P. Buchi Reddy (Dead) By L.Rs. & Ors.,** reported in **2008 AIR SCW 2692,** herein:

> "11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.
>
> 11.1 Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.
>
> 11.2 Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

> 11.3 Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

20. Applying the test to the instant case, the plaintiffs-respondents have not proved the possession and the findings to this effect have not been questioned by them, the suit was to be dismissed.

21. The averments contained in the plaint are contradictory for the following reasons:

22. The plaintiffs-respondents have stated in para 2 of the plaint that the defendants-appellants have started to construct the road and in para 4 have stated that they have not acceded to their requests, but continued with the construction work of the road. In para 5 of the plaint, it has been pleaded that the plaintiffs-respondents are in possession of the suit land and in para 8 they have stated that cause of action accrued to them on 05.07.2005 when the defendants-appellants started the construction work of the road.

23. The plaintiffs-respondents have also not approached the Court with clean hands. It was for them to plead that road was constructed in the year 2000, were out of possession at the time of filing of the suit, had to file suit for recovery of possession and to explain the delay for not filing the suit till 10.08.2005. Virtually, they have played hide and seek.

24. Our this view is fortified by the judgment rendered by the Apex Court in the case titled as **A. Shanmugam versus Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, Represented by its President,** reported in **2012 AIR SCW 3017**. It is apt to reproduce paras 23 and 27 of the judgment herein:

> "23. We reiterate the immense importance and relevance of purity of pleadings. The pleadings need to be critically examined by the judicial officers or judges both before issuing the ad interim injunction and/or framing of issues.
>
> 24. to 26. .....
>
> 27. The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands."

25. It is beaten law of land that a party, which seeks equity, must do equity and should come to the Court with clean hands. In a civil suit, granting of permanent prohibitory injunction or restraint order is discretionary one, based on equity. A person, whose conduct is blameworthy, cannot claim equity. In the instant case, as discussed hereinabove, the plaintiffs have taken contradictory stand in the plaint and have concealed the fact that in the year 2000, the possession was taken by the defendants-appellants,

which is held by both the Courts below. The impugned judgment and decree has not been questioned by the plaintiffs-respondents, thus, has attained finality so far it relates to them.

26. The Apex Court in the case titled as **Kanchusthabam Satyanarayana and others versus Namuduri Atchutaramayya and others,** reported in **(2005) 11 Supreme Court Cases 109,** held that discretionary relief such as injunction being equitable in nature must be granted on considerations of equity and justice. It is apt to reproduce relevant portion of para 11 herein:

> "11. .....The grant of discretionary relief such as injunction being in the nature of equitable relief must be granted inter-alia on considerations of equity and justice, and the Appellant who is himself guilty of inequitable conduct cannot claim such relief. Therefore, we find that in the facts and circumstances of the case, assuming for the sake of argument that the Civil Court had jurisdiction to entertain the suit, and even going to the extent of assuming that the tenancy courts had no jurisdiction to entertain the eviction petition filed by appellant himself, this was an appropriate case in which injunction ought not to have been granted. Having obtained an advantage by invoking the jurisdiction of the authorities under the Tenancy Act, the Appellant cannot be allowed to retain that advantage by turning around and challenging the jurisdiction of the same authorities under the tenancy Act. Even under the Code of Civil procedure an order of Restitution is stayed only in exceptional circumstances. We, therefore, concur with the view of the High Court and dismiss these appeals."
>
> (Emphasis added)

27. The Kerala High Court in the case titled as **Vellakutty versus Karthyayani and another,** reported in **AIR 1968 Kerala 179,** and the Madhya Pradesh High Court in the case titled as **Shajuddin and others versus Nagar Palika Parishad and another,** reported in **AIR 1985 Madhya Pradesh 252,** held that if plaintiff has acted in unfair or unequitable manner with his opponent, he is not entitled to injunction.

28. In terms of the mandate of the Limitation Act, 1963, the suit was to be filed within three years, but the suit came to be filed after five years. There is concurrent finding to this effect that the road was constructed in the year 2000 and the plaintiffs-respondents were out of possession and the suit came to be filed in the year 2005. Thus, the suit was barred by time.

29. The Delhi High Court in the case titled as **Faqir Chand (through L.Rs.) versus Lila Ram (through L.Rs.),** reported in **AIR 1994 Delhi 161,** held that the suit for injunction has to be filed within three years. It is apt to reproduce para 26 of the judgment herein:

> "26. Facts of the present case are in pari materia with the facts of the case decided by the Lahore High Court in the Full Bench judgment. So,following the Full Bench judgment of the Lahore High Court which stands approved by the Supreme Court. I hold that in the present case the construction of the tin-shed in the common passage amounted to complete ouster of the right of common use to that portion of the joint passage where the tin-shed stood constructed. Hence, the injury was complete when the tin-shed was

constructed and limitation was three years for filing the suit for seeking the relief of mandatory injunction."

30. The question is - whether the defendants-appellants can press the ground of limitation at the appellate stage when they have not raised the issue before the trial Court or the First Appellate Court? The answer is in affirmative for the following reasons:

31. It is a fact that the defendants-appellants have not raised the issue of limitation before the Courts below, but have taken this ground in the memo of appeal and substantial question of law No. 5 has been framed.

32. It is the duty of the Court to pose the question, at the first instance, as to whether the suit is within limitation in terms of Section 3 of the Limitation Act, 1963.

33. It is apt to reproduce Section 3 of the Limitation Act, 1963 herein:

"**3. Bar of limitation. -** (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act -

(a) a suit is instituted -

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted -

(i) in the case of a set off, on the same date as the suit in whichthe set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

34. A bare reading of the said Section mandates that it is the duty of the Court to determine whether the suit is within time or otherwise.

35. The Apex Court in the case titled as **Food Corporation of India and others versus Babulal Agrawal with Babulal Agrawal versus Food Corporation of India and others,** reported in **(2004) 2 Supreme Court Cases 712,** held that such issue can be raised at any stage, even at appellate stage. It is apt to reproduce relevant portion of para 12 herein:

"12. .....Learned counsel for the defendant-appellant, however, relying upon Section 3 of the Limitation Act submits that it was the duty of the Court to see as to whether the suit was within limitation or not. A suit filed beyond limitation is liable to be dismissed even though limitation may not be set up as a

> defence. The above position as provided under the law cannot be disputed nor it has been disputed before us....."

36. The Bombay High Court in the case titled as **Ajab Enterprises versus Jayant Vegoiles and Chemicals Pvt. Ltd.,** reported in **AIR 1991 Bombay 35,** has laid down the same principle. It is apt to reproduce relevant portion of para 7 herein:

> "7. .....Apart from this, there is catena of decisions on the basis of which it could be said that there can be no waiver of ground of limitation even if it is assumed that in fact the said consent terms could be considered as waiver. Under Section 3 of the Limitation Act it is the duty of the Court to also consider as to whether the suit is barred by limitation or not even if no such defence is taken by the defendants in a suit. Therefore, there cannot be such waiver against the provisions of limitation. Reliance could be placed on the ruling reported in AIR 1920 PC 139 which has been followed in (1968) ILR 47 Pat. 262. In view of this, there also cannot be any estoppel which could be pleaded by the plaintiffs successfully. The defendants cannot be said to be estopped from pleading that the suit is barred by limitation when in fact the claim of the plaintiffs clearly appears to be barred by limitation taking into consideration Article 15 of the Limitation Act."

37. The Kerala High Court in the case titled as **M/s. Craft Centre and others versus The Koncherry Coir Factories, Cherthala,** reported in **AIR 1991 Kerala 83,** held that a suit can be dismissed even at appellate stage, though issue of limitation was not raised before the Court of first instance. It is apt to reproduce para 4 of the judgment herein:

> "4. What S. 3 of the Limitation Act says is that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is the duty of the plaintiff to convince the Court that his suit is within time. If it is out of time and the plaintiff relies on any acknowledgment or acknowledgments in order to save limitation, he must plead them or prove, if denied. An acknowledgment not pleaded in the plaint, atleast by way of amendment, cannot be relied on. The plaint must appear on the face of it to be within time. If not, the court can reject it on the ground of limitation even without issuing summons to the defendant and waiting for his plea of limitation. In this case, the only acknowledgment pleaded is Ext.A1 dated 23-10-1978. If the Court finds that the acknowledgment was only on 23-10-1976, the suit filed beyond three years, on 20-3-1981, could be dismissed on that ground itself. The provision in Section 3 is absolute and mandatory. The Court can claim no choice except to obey it in full. It is the duty of the Court to dismiss a suit which on the face of it is barred by time even at the appellate stage despite the fact that the issue was not at all raised."

38. While deciding a civil suit, the pleadings are the foundation of the case. The pleadings play an important role in making the judgment and decree and that is why it is said that the pleadings are the heart, soul and essential foundation of a judicial verdict. It is the bedrock of the judicial disposal.

39. In the instant case, at the cost of repetition, the plaintiffs-respondents have not prayed for relief of compensation or recovery of possession, no such foundation was laid.

40. The Apex Court in the case titled as **State of Orissa & Anr. versus Mamata Mohanty, reported in 2011 AIR SCW 1332,** held that the relief, not founded on pleadings, cannot be granted. It is apt to reproduce para 35 of the judgment herein:

> "35. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Sita Ram Kesho, (1898) 25 Ind. App. 195; M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165 : (2005 AIR SCW 578); and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518 : (2010 AIR SCW 2265)) "

41. The parties, the Courts of first instance, the Appellate Courts or the Revisional Courts cannot travel beyond the pleadings in view of the mechanism provided in CPC, which provides as to what procedure is to be followed after trial stage, i.e. after framing the issues, in terms of Order XIV CPC and how it has to be taken to its logical end after framing the issues.

42. The Apex Court in the case titled as **Hari Chand versus Daulat Ram,** reported in **AIR 1987 Supreme Court 94,** held that when the plaintiff fails to prove his case as pleaded in the plaint, the relief cannot be granted by the Court, which is neither pleaded nor prayed. It is apt to reproduce para 11 of the judgment herein:

> "11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not recent constructions as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiffs vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint."

43. The Apex Court in the case titled as **Bachhaj Nahar versus Nilima Mandal & Ors.,** reported in **2009 AIR SCW 287,** held that the Court cannot, on finding that the plaintiff has not made out the case put-forth by him, grant some other relief. It is apt to reproduce para 12 of the judgment herein:

> "12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."

44. The pleadings and particulars are necessary to enable the Court to decide the rights of the parties in the trial.

45. The Apex Court in the case titled as **National Textile Corporation Ltd. versus Nareshkumar Badrikumar Jagad & Ors.,** reported in **2011 AIR SCW 6180,** has laid down the same principle. It is apt to reproduce para 7 of the judgment herein:

> "7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar, AIR 1953 AIR 235; State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299; and Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127)."

46. As discussed hereinabove, the plaintiffs have specifically averred that the cause of action accrued to them in the year 2005, which is not factually and legally correct.

47. Keeping in view the discussions made hereinabove, the substantial questions of law are answered accordingly and the impugned judgment and decree is to be set aside.

48. Viewed thus, the impugned judgment and decree is set aside, the appeal is allowed and the suit is dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sunny ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.311 of 2015
Reserved on : 2.9.2015
Date of Decision : October 14, 2015

Indian Penal Code, 1860- Section 342 and 376- **Prevention of Children from Sexual Offences Act, 2012 -** Section 4- Accused allured the prosecutrix from Sarkaghat to Hamirpur on the pretext of purchasing cheaper school bags and raped her in his room- prosecutrix narrated the incident to her mother on return- prosecutrix was aged 16 years 8 month on the date of incident - Medical Officer found abrasion and did not rule out the possibility of sexual assault – mere absence of injuries on the person of the victim is no reason to disbelieve her testimony- consent of minor is immaterial – testimony of prosecutrix was satisfactory- there is no major contradiction in her testimony- held, that in all these circumstances, prosecution has proved its case beyond reasonable doubt- accused convicted. (Para-2 to 43)

Cases referred:
Raj kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254
Datta v. State of Maharashtra, (2013) 14 SCC 588
Prithi Chand v. State of H.P., (1989) 1 SCC 432
Ravindra v. State of Madhya Pradesh, (2015) 4 SCC 491
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550)
Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Ranjeet Goswami v. State of Jharkhand and another, (2014) 1 SCC 588
Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192
Vishnu alias Undrya v. State of Maharashtra, (2006) 1 SCC 283

Mst. Aqeela and another v. State of U.P., (1998) 9 SCC 526)
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Narender Kumar v. State (NCT of Delh), (2012) 7 SCC 171
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Satwantin Bai v. Sunil Kumar and another, (2015) 8 SCC 478
State of Madhya Pradesh v. Madanlal, (2015) 7 SCC 681
K. Anbazhagan v. State of Karnataka, (2015) 6 SCC 158
Mohd. Ali alias Guddu v. State of Uttar Pradesh, (2015) 7 SCC 272
Devinder Kumar alias Pinku v. State of H.P., 2000 (3) SLC 166
Deepak v. State of Haryana, (2015) 4 SCC 762

For the Appellant : Mr. Manohar Lal Sharma, Senior Advocate, with Mr. Aman Parth Sharma, Advocate.
For the Respondent : Mr. R.S.Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sunny, hereinafter referred to as the accused, has assailed the judgment dated 24.6.2015, passed by Special Judge, Mandi, District Mandi, Himachal Pradesh, in Sessions Trial No.14/2014, titled as *State of Himachal Pradesh v. Sunny*, whereby he stands convicted of the offence punishable under the provisions of Section 342 of the Indian Penal Code (hereinafter referred to as IPC) and Section 4 of the Prevention of Children from Sexual Offences Act, 2012 (hereinafter referred to as the Act) read with Section 376 IPC, and sentenced as under:

Offence	Sentence
Section 342 IPC	Rigorous Imprisonment for a period of one month and fine of Rs.1,000/- and in default thereof to further undergo simple imprisonment for a period of seven days.
Section 4 of the Act, read with Section 376 IPC	Rigorous imprisonment for a period of seven years and fine of Rs.10,000/- and in default thereof to further undergo simple imprisonment for a period of six months.

The prosecutrix has also been held entitled for a sum of Rs.25,000/- under Victim Compensation Scheme, and on realization the fine amount of Rs.10,000/- has also been ordered to be paid to her.

2. It is the case of prosecution that prosecutrix (PW-1), who was a student of 10+1, Government Senior Secondary School, Maseran, was born on 15.3.1997. On 2.12.2013, on the pretext of purchasing cheaper school bag at Hamirpur, accused allured her and from Sarkaghat, took her to Hamirpur, where he made her stay in his room and forcibly subjected her to sexual intercourse. The following morning, i.e. 4.12.2013, he made her meet his mother, where she was assured that upon attaining the age of majority, he would solemnize marriage with her. Mother of the accused disclosed the whereabouts of the

prosecutrix to Smt. Rajni Devi (PW-2), mother of the prosecutrix, who took her back home. Having reached home, prosecutrix narrated the entire incident to her mother, which led to the lodging of a complaint (Ex.PW-1/A), on the basis of which FIR No.301, dated 7.12.2013 (Ex.PW-11/A), for commission of offence punishable under the provisions of Section 366A/376 of the Indian Penal Code, was registered by SI Satish Kumar (PW-11) at Police Station Sarkaghat, District Mandi, Himachal Pradesh. Prosecutrix was got medically examined from Dr. Anita Thakur (PW-7), who issued MLC (Ex.PW-1/B). Inspector Purshotam Dhiman (PW-14) to whom investigation was handed over by SI Satish Kumar, recovered incriminating articles, i.e. bed sheet (P-7) and clothes (Ex.P-2 to P-5) etc. vide Memo (Ex.PW-1/C and Ex.PW-9/A), from the tenanted premises owned by Shri Pradeep Sharma (PW-9). Statement of the prosecutrix (Ex.PW-1/F) was got recorded before Additional Chief Judicial Magistrate, Sarkaghat, under the provisions of Section 164 of the Code of Criminal Procedure. Record pertaining to the date of birth of the prosecutrix, i.e. Birth Certificate and Age Certificate from the School (Ex.PW-4/B and Ex.PW-5/B) as also report of the FSL (Ex.PW-7/B) were taken on record. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Section 342 IPC and Section 4 of the Act read with Section 376 IPC, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 14 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication. Accused did not lead any evidence in defence.

5. Based on the testimonies of the witnesses and the material on record, trial Court convicted the accused of the charged offences, and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. I have heard learned counsel for the parties as also perused the record.

7. Neither before the trial Court nor this Court, age of the prosecutrix was ever disputed. Birth certificates issued by the Panchayat (Ex.PW-4/B), issued by the school (Ex.PW-5/B) and Pariwar Register (Ex.PW-3/B), so proved on record by Shri Manohar Lal (PW-3), Shri Narender Pal (PW-4), Shri Rajni Kant (PW-5) and Shri Guru Dutt Sharma (PW-6), establish the prosecutrix to have been born on 15.3.1997. This is apart from the testimony of the prosecutrix as also her mother (PW-2). Thus, as on the date of commission of alleged crime, age of the prosecutrix was 16 years 8 months.

8. With the statutory amendment having come into force, w.e.f. 3.2.2013, as on the date of crime, prosecutrix was below 18 years of age and as such minor.

9. Dr. Anita Thakur (PW-7), who medically examined on 7.12.2013, found no injury marks on the body of the prosecutrix, save and except that there was abrasion, measuring 5cm x 4cm, brown in colour, on the right side of the neck. The hymen was torn in different positions. It was tender on touch and there was redness on the labia minora. One finger could be easily inserted inside the vagina as also there was tenderness. With the receipt of report of the Chemical Examiner, which did not report presence of any blood or semen, doctor still reiterated her opinion of the possibility of sexual assault not to be ruled out.

10. It is a settled principle of law that even in the absence of medical opinion, corroborating the statement of prosecutrix, which is otherwise found to be fully inspiring in confidence, Court can proceed to convict the accused. However, in the present case, medical evidence is corroborative of sexual intercourse.

11. No substantial defence, save and except, false implication stands taken by the accused in his statement, recorded under the provisions of Section 313 of the Code of Criminal Procedure. Also, no witnesses in defence stand examined.

12. It is argued on behalf of the accused that prosecutrix is a wholly unreliable witness, as her statement is full of improbabilities, rendering her version to be extremely shaky and doubtful, if not false. Much emphasis is laid on the fact that no marks of injury, indicating forcible sexual intercourse were found on the body of the prosecutrix; accused made the prosecutrix meet his mother, who assured the girl of getting her married to the accused but in accordance with law; it was the mother of the accused who disclosed the whereabouts of the prosecutrix to her mother; before the Magistrate, prosecutrix got recorded her statement under pressure and coercion from her parents; prosecutrix did not disclose the factum of sexual assault in her statement (Ex. PW-1/F), as is so admitted by Shri Purshotam Dhiman (PW-14).

13. On the other hand, learned Additional has supported the judgment of conviction and sentence, rendered by the trial Court, for the reasons so assigned therein.

14. In support, learned counsel have referred to and relied upon the following decisions rendered by the Hon'ble Supreme Court of India and various High Courts.

15. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

16. The Apex Court has highlighted the need for prompt disposal of cases of crime against women and children. (*Rajkumar v. State of Madhya Pradesh,* (2014) 5 SCC 353).

17. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a

> woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

18. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

19. The Apex Court in *Munna v. State of Madhya Pradesh,* (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

20. Even in the absence of categorical opinion about rape, opinion of the doctor about such act not being totally ruled out is relevant. Mere absence of spermatozoa would not cast doubt on correctness of the prosecution case. (See: *Datta v. State of Maharashtra,* (2013) 14 SCC 588; and *Prithi Chand v. State of H.P.,* (1989) 1 SCC 432).

21. In *Ravindra v. State of Madhya Pradesh,* (2015) 4 SCC 491, the Hon'ble Supreme Court of India held that absence of semen/spermatozoa on the clothes/vaginal smear would not render the testimony of the prosecutrix to be doubtful.

22. The Apex Court had the occasion to deal with the case where there was a conflict between medical evidence and ocular evidence of the prosecution. There the Court held as under:

> "23. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of *Dayal Singh v State of Uttaranchal*, (2012) 8 SCC 263 (SCC p.283, paras 35036)
>
> > "35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a

deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab*, (2003) 12 SCC 155, the Court, while dealing with discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> '8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.'

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

> '34. ....The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court.'

23. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held as under:

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.
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> 35. Nariman, J. in *Queen v. Ahmed Ally,* (1989) 11 Sutherland WR Cr 25, while expressing his view a on medical evidence has observed as follows:
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> > "THE evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."
>
> 36. Fazal Ali, J. in *Pratap Misra v. State of Orissa*, (1977 3 SCC 41, has stated thus:
>
> > "... [l]t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads thus:

> "THUS to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. "

38. In Parikh 's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "SEXUAL intercourse. In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4 at page 1356, it is stated:

> "... [E]ven slight penetration is sufficient and emission is unnecessary."

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:

> "RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:

> "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High courts have taken a consistent view that even the slightest penetration is sufficient to make out

> an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor,* (1925) 26 CrLJ 1185, *(2) Abdul Majid v. Emperor*, AIR 1927 Lah 735(2), *(3) Mst. Jantan v. Emperor,* (1934) 36 Punj LR 35, *(4) Ghanashyam Misra v. State,* 1957 CriLJ 469, *(5) Das Bernard v. State*, 1974 CriLJ 1098. In *re Anthony,* AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape." ”

24. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

25. The Apex Court in *Puran Chand v. State of Himachal Pradesh,* (2014) 5 SCC 689, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

26. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (*Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688).

27. The Apex Court in *Ranjeet Goswami v. State of Jharkhand and another,* (2014) 1 SCC 588, held as under:

> “8. We are of the view that no cogent reasons have been stated by the High court to discard the school leaving certificate which was issued on 10.04.2004 by the then Principal of the school. The certificate reveals the date of birth of the accused as 10.05.1991. The school leaving certificate was proved by examining the Headmistress of the school. She has recognized the signatures of the Principal who issued the school leaving certificate. The evidence adduced by the Headmistress was not challenged.....”

28. The Apex Court in *Mohd. Imran Khan v. State Government (NCT of Delhi)*, (2011) 10 SCC 192, had the occasion to deal with the case, even though the birth certificate issued under the Registration of Births and Deaths Act, 1969, reveals the age of the child to be below 16 years, but the medical report of the Radiologist reveals the age to be between 16 and 17 years, the Court, relying upon its earlier decisions in *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir and others,* (1982) 2 SCC 538, gave primacy not to the medical report but to the statutory record, hold that the medical report only gives an idea with a margin of 1-2 years on either side. (Also see: *Vishnu alias Undrya v. State of Maharashtra,* (2006) 1 SCC 283; and *Mst. Aqeela and another v. State of U.P.,* (1998) 9 SCC 526).

29. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delh),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

30. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> "33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
>
> > "17. ..... '16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.
>
> 18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:
>
> > '19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction

> in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.' "

31. In *Satwantin Bai v. Sunil Kumar and another,* (2015) 8 SCC 478, it is held that if the testimony of the prosecutrix is found to be cogent and that she rightly identifies the accused in the Court, prosecution case cannot be faulted for not holding the Test Identification Parade, for it not being a rule of law but that of prudence.

32. The Hon'ble Supreme Court of India in *State of Madhya Pradesh v. Madanlal,* (2015) 7 SCC 681, reiterated the principles laid down in *K. Anbazhagan v. State of Karnataka,* (2015) 6 SCC 158, to the following effect:

> "The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

33. In *Mohd. Ali alias Guddu v. State of Uttar Pradesh,* (2015) 7 SCC 272, the Court, while dealing with the unamended provisions of Section 376 of the Indian Penal Code, has held that consent for sexual intercourse of a victim, who is minor (less than 16 years of age) was irrelevant, for if consent of minor is treated as a mitigating circumstance, it will lead to disastrous circumstances. Sexual assault on a minor is a heinous crime, which needs to be abhorred.

34. In the light of the aforesaid enunciation of law, testimony of the prosecutrix, her mother (PW-2) and Shri Hem Singh (PW-12), being relevant, needs to be examined.

35. Prosecutrix states that on 3.12.2013, at Sarkaghat, she was purchasing a school bag, when accused told her that cheaper are available at Hamirpur. As such, accused took her to Hamirpur, where the bag was purchased. However, on the pretext of taking meals, accused took her to his room and subjected her to sexual intercourse. On 4.12.2013, he made her meet his mother, who assured her that upon attaining the age of majority, accused would marry her. On 4.12.2013, she slept with the mother of the accused. On 5.12.2013, accused contacted her mother on telephone. She also spoke with her. Thereafter, her mother took her back and the following day, matter was reported to the police, vide complaint (Ex.PW-1/A). She was got medically examined and her clothes taken into possession by the doctor. She identified the place where sexual assault took place,

from where bed sheet (Ex.P-7) was also recovered. She also made statement (Ex.PW-1/F) before the Magistrate, which was so recorded as per version narrated by her.

36. Having perused the cross-examination part of her testimony, one does not find the credit of this witness to have been impeached in any manner. It cannot be said that the witness has either deposed falsely or her version is shaky or unbelievable. The witness cannot be said to be unworthy of credit; deposed falsely with the motive of falsely implicating the accused; or her testimony to be contradictory, inconsistent, false or improbable.

37. It is true that prosecutrix openly travelled with the accused by way of public transport and passed through different public places, but then it was he who took her to Hamirpur, on the pretext of buying a cheaper bag. After all she is a child and was unaware of the evil designs of the accused. In her complaint dated 6.12.2013 (Ex.PW-1/A), prosecutrix is categorical about the alleged act, though she uses the expression "*Sunny ne mere saath raat ko jabardasti galat kaam kiya*" states that accused forcibly committed sexual intercourse, which colloquially means the same. Noticeably, in her statement (Ex.PW-1/F), she has used the word "*Batamizi*", which, in common parlance also means the very same thing. [*Devinder Kumar alias Pinku v. State of H.P.,* 2000 (3) SLC 166; and Criminal Appeal No.370 of 2007, titled as *Manohar Lal v. State of Himachal Pradesh,* decided on 23.5.2014].

38. There is no contradiction in her initial version, so disclosed to the police; Magistrate or deposition in Court. The only contradiction, which the Court finds in her statement, is of having telephonically informed her mother of being in the company of the accused. But then she satisfactorily explains such fact to have been written out of fear.

39. Version of the prosecutrix stands materially corroborated by her mother (PW-2), on all counts, who has further deposed that having learnt about the whereabouts of the prosecutrix, she spoke with the mother of the accused and then, from a place known as Gutkar, brought her back. At that time her brothers Shri Rajiv and Shri Hem Singh were with her. Such version also stands corroborated by Shri Hem Singh (PW-12).

40. Parties do not belong to the same caste. Submission made on behalf of the accused that marriage was not acceptable to the parents of the girl and as such she was forced to lodge false report, is not supported by any material on record. Neither was this defence, nor the defence of consent ever taken by the accused.

41. It is a settled principle of law that once the prosecution is able to establish commission of sexual intercourse, without consent, which fact can be proven through the sole testimony of prosecutrix, the Court is entitled to draw presumption against the accused, under the provisions of Section 114-A of the Evidence Act. (*Deepak v. State of Haryana,* (2015) 4 SCC 762).

42. In the instant case, no such presumption stands rebutted. It is not the case of the accused that prosecutrix was in love with him. As already observed, there is nothing on record to establish that the complaint was lodged by the prosecutrix under compulsion. The family could not have put the honour of the daughter at stake, only for falsely implicating the accused. Also, there was no animosity inter see the parties/families.

43. Hence, in my 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 incriminating articles that the accused wrongfully confined the prosecutrix, a minor, below 18 years of age in a room and also committed penetrative sexual assault upon her.

44. For all the aforesaid reasons, the Court finds no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Cr. Appeal No. 660 of 2008 with
Cr. Appeal No. 757 of 2008.
Reserved on: 28.07.2015
Date of Decision: October 14, 2015

1.Cr. Appeal No. 660 of 2008

Vipan Kumar ...Appellant.

Versus

The State of Himachal Pradesh. ...Respondent.

2.Cr. Appeal No. 757 of 2008

State of Himachal Pradesh ...Appellant.

Versus

Jagat Ram ...Respondent.

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- Accused 'V' had quarreled with the deceased - dead body was found on the next day, when the police went to his house - Accused 'V' fled away but accused 'J' was apprehended - room was found splattered with blood- accused 'J' led the police to the place where he had concealed his blood stained Kurta and Paijama- accused 'V' was arrested and he got recovered spring leaf, mattress and Karchhi- chappals of the deceased were recovered from the house of the accused- post mortem examination found multiple injuries- death was caused due to the injuries sustained on the head, which could have been caused by Kamani-patta- deceased had given beating to accused 'V' which was duly proved on record- PW-8 had heard cries coming from the house of the accused- signs of dragging of the body from the house of the accused to the road were found- it was duly established on record that accused 'V' had committed murder and accused 'J' had assisted him in destroying the dead body- appeal dismissed. (Para-3 to 36)

Cases referred:

Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196

Madhu Versus State of Kerala, (2012) 2 SCC 399

Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622

Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43

Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116

Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259

Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436

State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286

For the Appellant(s): Mr. Ajay Sharma, Advocate, for the appellant in Cr. Appeal No.660 of 2008 and for the respondent in Cr.Appeal No.757 of 2008.

For the Respondent: M/s Ashok Chaudhary, V.S. Chauhan, Addl. AGs., and J.S. Guleria, Asstt. AG., for the respondent-State in Cr.Appeal No.660 of 2008 and for the appellant-State in Cr.Appeal No.757 of 2008.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In the Jail appeal (Cr.Appeal No.660 of 2008) filed under Section 374 Cr.P.C., convict Vipan Kumar has assailed the judgment dated 30.08.3008, passed by Presiding Officer / Additional Sessions Judge, Fast Track Court, Hamirpur (H.P)., in Sessions Trial No.2 of 2008, titled as *State Versus Vipan Kumar & another,* whereby he stands convicted for having committed offences punishable under the provisions of Sections 302 and 201/34 of the Indian Penal Code and accused Jagat Ram stands convicted for having committed offence punishable under the provisions of Section 201 read with Section 34 IPC. Convict Vipan Kumar stands sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs.10,000/-, under the provisions of Section 302 IPC and in default thereof, to further undergo rigorous imprisonment for a period of one year. He is further sentenced to undergo rigorous imprisonment for a period of three years and pay fine of Rs.5000/-, for commission of offences punishable under the provisions of Section 201/34 IPC and in default thereof, to further undergo rigorous imprisonment for a period of six months. Whereas, convict Jagat Ram is sentenced to undergo rigorous imprisonment for three years and pay fine of Rs.5000/-, under the provisions of Section 201 read with Section 34 IPC and in default thereof, to further undergo rigorous imprisonment for a period of six months.

2. Also, assailing the aforesaid judgment, State has filed Cr. Appeal No.757 of 2008, under the provisions of Section 378 of the Code of Criminal Procedure, 1973, against the judgment of acquittal of accused Jagat Ram, for offence under the provisions of Section 302 IPC.

3. It is the case of prosecution that on 13.09.2007, Member of Zila Parishad Sandesh Kumar (PW.1) learnt that a dead body was lying on the road near the water supply pipes of village Galot Kalan. After recording entry (Ex.PW.20/B), police party headed by SHO Anjani Jaswal (PW.21) proceeded to the spot. Smt. Kesari Devi (PW.2) mother of the deceased identified the dead body to be that of her son Sudesh Kumar. She disclosed to the police, that since previous day accused Vipan Kumar had quarrelled with the deceased she apprehended him to have killed him. On the basis of Statement (Ex.PW.2/A), FIR No.391/07, dated 13.09.2007 (Ex.PW.15/A) was registered at Police Station, Sadar Hamirpur, H.P., under the provisions of Section 302/34 of the Indian Penal Code. Spot was got photographed and blood stained mud and stones (Ex.P-2) taken into possession vide memos (Ex.PW.1/B, Ex.PW/1/C & Ex.PW.1/D)) in the presence of Sandesh Kumar (PW.1) and Brahma Dass (not examined). Inquest report (Ex.PW.21/B) was prepared. Dead body was taken into possession and sent for postmortem, which was conducted by Dr. S.K. Kashmiri (PW.14). Investigation revealed that the previous day, i.e. on 11.09.2007 deceased Sudesh Kumar had fought with Vipan Kumar who had lodged a complaint. Also police got the spot photographed. When police went to the house of Vipan Kumar, by breaking open

the window of the first floor of his house, he fled away. However, accused Jagat Ram was sitting in one of the rooms of the ground floor. At that time, he was under the influence of alcohol. Police found the room occupied by Vipan Kumar to be splattered with blood, from where blood stained plaster of the wall (Ex.P-7) was recovered vide memo (Ex.PW.1/F). Empty glasses (Ex.P-11 to P-13) and bottles of alcohol (Ex.P-9 & P-10) were taken into possession vide recovery memo (Ex.PW.1/H). Also calendars (Ex.P-5 and P-6) hanging on the wall, which were also splattered with blood, were taken into possession vide memo (Ex.PW.1/E). Accused Jagat Ram led the police to the place where he had concealed his blood stained Kurta and Paijama (Ex.P-14 & P-15), which were taken into possession vide memo (Ex.PW.1/J). Kassi (Ex.P.16) used for digging the pit for concealing the same was recovered vide memo (Ex.PW.1/K).

4. When arrested, Vipan Kumar made a disclosure statement (Ex.PW.7/A) to the effect that he could get recovered the weapon of offence and blood stained mattress, which he had concealed. Such statement was recorded in the presence of Dina Nath (PW.7) and Angat Ram (not examined). He also got recovered weapon of offence i.e. Kamani-Patta (spring leaf) (Ex.P-98) vide memo (Ex.PW.7/C) and mattress (Ex.P-100) vide memo (Ex.PW.7/D). Police also took into possession Karchhi (Ex.P-26) used by accused Vipan Kumar to break open the window vide recovery memo (Ex.PW.1/P). Chappals (Ex.P-27) of the deceased, so found in the room of Vipan Kumar, were recovered vide memo (Ex.PW.1/Q). Seized articles were sent for forensic analysis and report of FSL, Junga (Ex.PW.19/A) taken on record.

5. Investigation revealed that on 12.09.2007, deceased had gone to the house of accused Vipan Kumar for enquiring as to why he had lodged a complaint pertaining to the incident which took place on 11.09.2007. At that time, accused who were under the influence of liquor, gave beatings to the deceased with Kamani-Patta (spring leaf) resulting into his death. Thereafter both the accused dragged the dead body and dumped it on the road. Also they concealed the weapon of offence and other incriminating articles. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

6. Both the accused were charged for having committed offences punishable under the provisions of Sections 302 and 201 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

7. In order to establish its case, in all, prosecution examined as many as twenty one witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took the defence of innocence. No evidence in defence was led.

8. Trial Court, based on the testimony of the prosecution witnesses, convicted accused Vipan Kumar for having committed offences punishable under the provisions of Sections 302, 201/34 IPC, whereas accused Jagat Ram stands acquitted of the charge of murder, but however, stands convicted for offence punishable under the provisions of Section 201/34 IPC and sentenced as aforesaid. Hence the present appeals.

9. We have heard, Mr. Ajay Sharma, learned counsel, on behalf of the appellant (in Cr.Appeal No.660 of 2008) and on behalf of the respondent (in Cr.Appeal No.757 of 2008) and M/s Ashok Chaudhary and V.S. Chauhan, learned Addl. AGs., and J.S. Guleria, learned Asstt. AG., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at

all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convicts.

10. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Law on circumstantial evidence

11. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [*Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.].

12. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> (See: *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259; and *Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436).

13. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

14. The apex Court in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 286, while cautioning the Courts in evaluating circumstantial evidence, held that if the

evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilt of the accused.

15. Undisputedly it is not a case of direct evidence. Trial Court has not separately culled out the circumstances. Broadly prosecution case rests upon the following circumstances:-

(1) On 11.09.2007, scuffle took place between accused Vipan Kumar and deceased Sudesh Kumar.

(2) On 12.09.2007, deceased was last seen going towards the house of the accused.

(3) Same day, late in the night, cries were heard coming from the house of the accused.

(4) Recovery of dead body from a place which was approximately 30 meters away from the house of the accused. Deceased died as a result of head injuries.

(5) Dragging marks of dead body found near the house of the accused.

(6) Disclosure statement (Ex.PW.7/A) made by accused Vipan Kumar, which led to recovery of weapon of offence.

(7) Recovery of blood stained clothes and other incriminating articles belonging to both accused Vipin Kumar and Jagat Ram, from the pits dug by them.

Circumstance No.4

16. The identity of the accused and the deceased is not in dispute. Sandesh Kumar (PW.1) has deposed that on 13.09.2007, on information furnished by one Ravi Kant, he informed the police that dead body of a person was lying near the water supply pipes. Accordingly he informed the police at Police Station, Hamirpur. Anjani Jaswal (PW.21) states that after recording entry (Ex.PW.20/B), he alongwith the police party went to the spot, where Kesari Devi (PW.2), mother of the deceased identified the body to be that of her son Sudesh Kumar.

17. Postmortem of the dead body was conducted by Dr.S.K. Kashmiri (PW.14), who found the following external injuries on the body of the deceased:-

> "1. One incised looking wound on the left eye brow measuring 1 ¼" x ½", muscle deep.
>
> 2. One incised looking wound on the right eye brows, measuring 2" x ½", muscle deep.
>
> 3. One incised looking wound on the right temporal region measuring 2 ½" x ½" underlying bone torn fractured into pieces and pieces of brain matter coming out through the wound.
>
> 4. One incised looking wound below the right eye measuring 1" x ½", muscle deep.
>
> 5. One incised looking wound on the right parietal region measuring ¾" x ½". The underlying bone torn into multiple pieces.
>
> 6. One incised looking wound below the right lower lip measuring 1" x ½" muscle deep.
>
> 7. One incised looking wound near right ear, measuring 1" x ½". The underlying bone torn into multiple pieces.

8. One incised looking wound on the left side occipital region measuring 2 ½" x ½", muscle deep.

9. One abrasion on the posterior surface of left forearm measuring 2" x 1" dark brown in colour.

10. One abrasion on the posterior surface of left wrist joint measuring 1" x 0.3 cm, dark brown in colour."

According to the witness, who also issued postmortem report (Ex.PW.14/B), deceased died on account of ante mortem injury sustained on the head. Such injuries could have been caused with the weapon of offence i.e. Patta (Ex.P-98).

18. Thus recovery of dead body and cause of death stand proved on record.

Circumstance No.1 & 2

19. The fact that on 11.09.2007, accused Vipan Kumar had lodged a report pertaining to the altercation which took place between him and the deceased is not disputed. Allegedly deceased had given beatings to Vipan Kumar.

20. Through the testimonies of Sandesh Kumar (PW.1) and Azad Singh (PW.6), it is clear that altercation, which took place in the bazaar at Galot Kalan, was witnessed by Azad Singh. Also Vipan Kumar had complained to Sandesh Kumar about the conduct of the deceased, on which, Sandesh Kumar had told him that it takes two to make a quarrel, at which Vipan Kumar got annoyed and left with his father to his house.

21. Seema Devi (PW.4) wife of the deceased has deposed that on 12.09.2007, her husband learnt about the complaint lodged by Vipan Kumar. Same day at about 4.30 PM, he went to purchase Beeris, making inquiries from Vipan Kumar by visiting his house.

22. Daman Singh (PW.3) states that on 12.09.2007 at about 6.30-7.00 PM he saw the deceased going towards the house of Vipan Kumar in connection with quarrel. Significantly none of the witnesses has deposed that deceased was annoyed/agitated with Vipan Kumar for having reported the matter with regard to the incident which took place on 11.09.2007. Also he was not in anger. It has also not come on record that deceased went armed to the house of the accused. He had just gone alone and empty handed, without having an intent of picking up a quarrel with Vipan Kumar. Thus, these circumstances also stand established on record by the prosecution.

Circumstances No.3, 5 to 7

23. According to medical evidence, deceased would have died late in the evening of 12.09.2007. Soma Devi (PW.8), who is immediate neighbour of the accused, states that on 12.09.2007, at about 9.00-9.30 PM, she heard cries coming from the house of Vipan Kumar. However she did not go there, as no male member was present in her house. Next day she learnt about the dead body lying on the road near the house of the accused. Witness admits that she is not in talking terms with the accused, for they are not good persons, but then this fact alone would not render her version to be false or doubtful.

24. Through the testimony of Satish Kumar (PW.10), it has also come on record that on 12.09.2007 both accused Vipan Kumar and Jagat Ram had consumed liquor with this witness and at about 6.30-7.00 PM parted company when the accused left for their house.

25. Thus far, prosecution has been able to establish, beyond reasonable doubt, that at the time when deceased went to the house of the accused, they were under the influence of liquor.

26. It has come on record through the testimony of Kesari Devi (PW.2), mother, as also Seema Devi (PW.4) wife of the deceased, that from the evening of 12.09.2007 deceased was found to be missing from his house. Both the mother and the wife made enquiries about his whereabouts who was not to be found anywhere. It was only in the morning of 13.09.2007, that they learnt about his death. On 13.09.2007 itself, Kesari Devi expressed her apprehension to the police about the involvement of the accused in the crime. Her statement (Ex.PW.2/A) is on record to such effect, which made the police, reach their house.

27. In the statement of Anjani Jaswal (PW.21), it has come that seeing the police party, accused Vipan Kumar fled away by breaking open the window. It has also come in the testimony of Sandesh Kumar and Anjani Jaswal that signs of dragging of the body from the house of the accused to the road were found on the spot. Anjani Jaswal prepared the necessary documents. On the first floor of the house, under occupation of accused Vipan Kumar, police found blood splattered all over. Also chappals (Ex.P-27), so identified by Kesari Devi to be that of her son (deceased) were found, which were taken into possession vide recovery memo (Ex.PW.1/Q). Inside the room, two blood stained calendars (Ex.P-5 & Ex.P-6) hung on the wall were taken into possession vide recovery memo (Ex.PW.1/E). Also blood stained plaster of the wall (Ex.P-7) was taken into possession vide memos (Ex.PW.1/F & Ex.PW.1/G). The bottles of alcohol and empty glasses (Ex.P-9 to P-13) were taken into possession vide recovery memo (Ex.PW.1/H). Also Karchhi (Ex.P-26) with which accused Vipan Kumar broke open the window, was recovered vide memo (Ex.PW.1/P).

28. With the accused Vipan Kumar having fled away from the spot, police noticed accused Jagat Ram, under the influence of alcohol, sitting inside the room on the ground floor. Accused Jagat Ram, who was arrested was got medically examined from Dr.Lokender Sharma (PW.18), who issued MLC (Ex.PW.18/B). No signs of injury were found on his body, but he was under the influence of liquor.

29. Record reveals that same day, accused Vipan Kumar was also arrested by the police and got medically examined from the very same doctor, who issued MLC (Ex.PW.18/D). Minor abrasion on his finger was found. According to the doctor, such injury could have been caused, if a person were to break open the window.

30. Record further reveals, as has come in the testimony of Sandesh Kumar (PW.1), Sunil Kumar (PW.5) and Anjani Jaswal (PW.21) that police recovered incriminating articles i.e. blood stained Kurta & Paijama of accused Jagat Ram vide memo (Ex.PW.1/J), which was so concealed in a pit dug by Kassi (Ex.P.16) recovered vide memo (Ex.PW.1/K). Also in a pit just near the house of the accused clothes wrapped in a cloth were recovered vide memo (Ex.PW.1/L). Blood stained pants of accused Vipan Kumar was also recovered vide recovery memo (Ex.PW.1/M). Also blood stained clothes were recovered vide memo (Ex.PW.1/N). Recovered clothes belonged to the accused who have so identified them to be so in the presence of independent witnesses Sandesh Kumar (PW.1) and Sunil Kumar (PW.5).

31. Record reveals that during the course of investigation on 16.09.2007, in the presence of Dina Nath (PW.7) and Angat Ram, accused Vipan Kumar made a disclosure statement that he could get recovered the weapon of offence which he had concealed. Also he could get recovered the mattress concealed by him in the backyard of his house. Testimony of Dina Nath establishes such fact, beyond reasonable doubt. Anjani Jaswal (PW.21) after associating independent witnesses, went with accused Vipan Kumar to the place where such articles were concealed in his house. Weapon of offence i.e. Kamani-Patta was concealed under the log of wood, which was taken into possession vide recovery memo

(Ex.PW.7/C) and mattress as also pieces thereof which were stained with blood were taken into possession vide recovery memo (Ex.PW.7/D).

32. With regard to recovery of the incriminating articles, testimony of Sandesh Kumar (PW.1), Sunil Kumar (PW.5) and Dina Nath (PW.7) as also that of police official Anjani Jaswal (PW.21) is absolutely inspiring in confidence. It stands established that articles recovered were sealed and kept in a safe custody. Statement of MHC Vijay Prakash (PW.20) as also Rakesh Kumar (PW.16), who took the sample to the FSL, Junga is evidently clear on this aspect. So long as the sealed samples remained with the police officials none tampered with the same. Report of FSL (Ex.PW.19/A) does reveal that blood found on the soil and the stones, where dead body was lying was the same. Also the blood found on the clothes of accused Jagat Ram, Kassi, bed sheet, towel, clothes of Vipan Kumar and Sudesh Kumar (deceased) was of the very same group i.e. 'A'. Report to this effect stands proved by Dr. Gian Thakur (PW.19). Thus, prosecution has been able to establish even these circumstances, beyond reasonable doubt.

33. Trial Court has acquitted accused Jagat Ram of the offence of murder, on the ground that his intention in killing the deceased was not unfurling from the prosecution evidence. Also he took no part in the murder. Undisputedly Jagat Ram, father of Vipan Kumar, had no prior animosity with the deceased. Quarrel had taken place only between accused Vipan Kumar and the deceased. On the day immediately prior to the occurrence, accused had consumed alcohol. We are in agreement with the findings returned by the trial court that only after Vipan Kumar committed murder of the deceased, did Jagat Ram help him to destroy the evidence. It has also come on record that Jagat Ram and Vipan Kumar were only residing in the house and none else was with them. In the middle of night, Vipan Kumar alone could not have destroyed the evidence. After the offence was committed by Vipan Kumar by giving a blow with the Kamani-Patta, Jagat Ram helped his son in destroying/concealing the evidence. The dead body was dragged and kept on the road. Blood stained clothes were concealed in the pits dug near the house. Quite apparently, both the accused with the common intent of causing disappearance of evidence, in order to screen Vipan Kumar further committed the offence. Bed sheets, towel, mattress, all stained with blood were also concealed.

34. The ocular version as also the documentary evidence clearly establishes complicity of convict Vipan Kumar in the alleged crime of murder. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

35. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that appellant Vipan Kuamr is guilty of having committed the offences charged for and Jagat Ram helped him in concealing the evidence. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of convict Vipan Kumar stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the convict. Circumstances when cumulatively considered, fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that convict is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

36. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convict Vipan Kumar committed murder of deceased Sudesh Kumar and after causing his death, he alongwith Jagat Ram, with an intent of screening themselves from legal punishment, tried to destroy the evidence.

37. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner.

38. Hence, appeal filed by convict Vipan Kumar against his conviction under the provisions of Sections 302 and 201/34 IPC (being Cr.Appeal No.660 of 2008) as also appeal filed by the State against the acquittal of Jagat Ram for commission of offences punishable under the provisions of Section 302 IPC (being Cr.Appeal No.757 of 2008), are dismissed. Bail bonds, if any, furnished by accused Jagat Ram are discharged. Records of the Court below be immediately sent back.

****

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

Banti Devi & others ....Appellants.

Versus

Pohlo Ram & others ....Respondents.

LPA No. 192 of 2014
Reserved on: 8.10.2015
Decided on : 15.10.2015

H.P. Land Revenue Act, 1954- Section 16- An application for partition was filed which was allowed- land was being partitioned by metes and bounds- application was filed stating that the valuable land located adjacent to the road was not partitioned- Assistant Collector First Grade ordered that undivided land be also distributed in accordance with the share holding in the undivided estate – Finance Commissioner held that the order directing the inclusion of undivided road side land amounted to the review of the order which could not have been carried out without obtaining sanction from higher officials, however, he directed Assistant Collector First Grade to afford opportunity to all affected parties and to carry out the amendment in the mode of partition- Assistant Collector First Grade refused to carry out partition on the ground that he had no power of review- held, that when the order was passed by the Financial Commissioner directing the Assistant Collector First Grade to carry out partition of the un-partitioned land after hearing all the parties, a permission was granted to review the order and Assistant collector First Grade had wrongly held that he had no jurisdiction to review the order. (Para-4 to 12)

For the Appellants Mr. N.S Chandel, Advocate.

For the Respondents: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate for respondents No. 1 and 4 to 6.

Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, with Mr. J.K Verma, Deputy Advocate General, for the respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This Letters Patent Appeal has been instituted before this Court at the instance of the respondents No. 3 to 8 in CWP No. 11145 of 2011 titled as Pholo Ram versus Financial Commissioner (Appeals) and others, who feeling aggrieved by the judgment made by the learned Single Judge of this Court in CWP aforesaid, hereinafter referred to as "the impugned judgment for short, on the grounds taken in the memo of appeal.

2. Shorn of verbosity the facts germane for rendering an adjudication on the present appeal are of the respondent No.1 herein and the predecessor-in-interest of the appellants herein, namely, Jindu Ram besides the predecessor-in-interest of respondents No. 4 to 6 herein, namely, Sant Ram, jointly owning as co-sharers the undivided and un-partitioned holdings comprised in Khasra Nos. 555, 392, 393, 395, 396, 398 and 402 Kita 7, Khata Khautaui No. 164/249, situated in Revenue village Berthin, Pargana Sunhani, Tehsil Jhanduta, District Bilaspur, H.P. Respondent No.1 herein Pohlo Ram for begetting severance by metes and bounds of the un-partitioned/undivided holding constituted in Khasra Nos. aforesaid by its partition, instituted an apposite application before the Assistant Collector, Ist Grade, Ghumarwain, District Bilaspur. The Assistant Collector, Ist Grade, Ghumarwin, on receiving the application instituted before him by respondent No.1 herein seeking partition by metes and bounds of the joint holdings aforesaid, prepared under his order dated 4.6.1992 (Annexure P-1) an apposite mode of partition qua it. However, the mode of partition prepared by the Assistant Collector, Ist Grade, Ghumarwin vide order dated 4.6.1992, supra, omitted to take within its ambit, the undivided holdings of the parties at lis abutting the road side. The mode of partition, as prepared by the Assistant Collector, Ist Grade Ghumarwin was transmitted to the field staff for execution. On the mode of partition as devised by the Assistant Collector, Ist Grade Ghumarwin being transmitted for execution to the field staff, the respondents herein had appeared before the field Kanungo on 6.1.1993 proclaiming before him that for begetting or ensuring parity of distribution amongst the co-owners even of the undivided holding abutting the road side while it carrying a high market value necessitated its being also incorporated in the mode of partition. Given the objections hence preferred by the respondents herein to the mode of partition prepared by the Assistant Collector, Ist Grade, Ghumarwin under his aforesaid order, the field Kanungo, to whom, the relevant papers had been transmitted by the former for execution, prepared a report and dispatched it to the Assistant Collector, Ist Grade, Ghumarwin. The latter summoned the parties herein on 18.3.1993 and proceeded to order that the undivided land abutting the road side be also distributed amongst them in consonance with their share holdings in the undivided estate.

3. Against the aforesaid order dated 18.3.1993, an appeal was preferred therefrom by the predecessor-in-interest of the appellants herein before the Collector, Sub Division Ghumarwin. The Collector, Sub Division Ghumarwin dismissed the appeal on 13.12.1994.

4. The predecessor-in-interest of the appellants herein instituted a Revision Petition before the Divisional Commissioner, Mandi. The Divisional Commissioner set aside

the order dated 18.3.1993 made by the Assistant Collector and made commensurate recommendations to the Financial Commissioner (Appeals). The Financial Commissioner (Appeals) while being seized of the Revision Petition, instituted before him, at the instance of the predecessor-in-interest of the appellants herein, concluded therein that when the Assistant Collector, Ist Grade, Ghumarwin devised a mode of partition qua the undivided estate of the parties at lis vide order dated 4.6.1992, yet omitted to incorporate therein for distribution amongst co-owners their joint estate abutting the road side rather his having therein only proposed, that their respective exclusive possession held by the co-owners in the undivided holdings be revered while partitioning it by metes and bounds, constituted an adoption by him of an unjustifiable mechanism to beget severance of the joint estate. Besides, it was also concluded by the Financial Commissioner (Appeals) that with the Assistant Collector Ist grade, Ghumarwin proceeding to under order dated 18.3.1993 include in the mode of partition previously devised by him qua the joint estate vide order dated 4.6.1992 even the undivided holdings inter-se the co-owners abutting the road side for its distribution amongst the co-owners in consonance with their share in the dismembered holdings, manifestly constituted a review of his earlier order dated 4.6.1992 whereas with the exercise of a power of Review by the Assistant Collector Ist Grade, Ghumarwin standing statutory interdiction or its exercise being statutorily barred unless preceding its exercise by him he had obtained the sanction of the Revenue Officer higher to him in the echelons of the revenue hierarchy. Naturally, when palpably no sanction within the domain of clause (a) of Sub Section (1) of Section 16 of the H.P land Revenue Act, for short "the Act" was obtained by the Assistant Collector Ist Grade before proceeding to include in his order dated 18.3.1993, the undivided holdings of the co-shares abutting the road side which, had remained un-included in his earlier order dated 4.6.1992 and which subsequent inclusion by him in the mode of partition was construed vide Annexure P-3 to be tantamounting to an untenable exercise by him of jurisdiction of Review of his earlier order dated 4.6.1992. Concomitantly, for reinforced reiteration with the exercise of jurisdiction of Review by him standing not preceded by his obtaining sanction from the officer higher to him in the echelons of the revenue hierarchy, its exercise by him was concluded therein to be jurisdictionally impermissible besides legally untenable. Consequently, vide Annexure P-3, the Financial Commissioner (Appeals) Himachal Pradesh accepted the recommendations made by the Divisional Commissioner, Mandi, in his order dated 19.11.1999, wherein the latter had proposed for the setting aside of order of the Collector Sub Division, Ghumarwin who in his order dated 13.12.1994 had upheld the findings recorded vide order dated 18.3.1993 of the Assistant Collector, Ist Grade, Ghumarwin. Besides a direction was rendered in Annexure P-3 to the Assistant Collector, Ist Grade, Ghumarwin, after affording an opportunity to all affected on the issue of allotment of undivided holding of the parties at lis abutting the road side, proceed to carry out an amendment in the mode of partition prepared by the former vide order dated 4.6.1992.

5. The Assistant Collector, Ist Grade, Ghumarwin, however refused to carry out the mandate of the Financial Commissioner (Appeals) constituted in Annexure P-3 by affording therein the reason that he has no power to review his orders. Respondent No.1 herein feeling aggrieved by the order made by the Assistant Collector, Ist Grade, Ghumarwin comprised in Annexure P-4 was constrained to institute an appeal before the Collector, Sub Division, Ghumarwin, who vide order dated 5.5.2007,Annexure P-5, set aside the impugned order Annexure P-4, made by the Assistant Collector, Ist Grade, Ghumarwin. The predecessor-in-interest of the appellants herein assailed the order Annexure P-5, made by the Collector Sub Division, Ghumarwin by preferring an appeal before the Divisional Commissioner, Mandi. The Divisional Commissioner, vide order dated 9.10.2009, Annexure P-6, reversed the order of the Collector Sub Division, Ghumarwin comprised in Annexure P-5. Respondent No. 1 herein besides the predecessor-in-interest of the proforma respondents

No. 4 to 6 instituted a Revision Petition before the Financial Commissioner (Appeals) assailing therein the order of the Divisional Commissioner, Mandi comprised in Annexure P-6. The Financial Commissioner (Appeals) vide order dated 29.10.2011, Annexure P-8, upheld the order of the Divisional Commissioner, Mandi comprised in Annexure P-6. Respondent No.1 herein standing aggrieved by the aforesaid order constituted in Annexure P-8, assailed the same by way of preferring Civil Writ Petition bearing No. 11145 of 2011 before this Court. The learned Single Judge of this Court allowed the writ petition whereby the impugned orders were quashed and set aside.

6. The learned counsel for the appellants herein has with vehemence and fervor canvassed before this Court that the order rendered by the Assistant Collector, Ist Grade constituted in Annexure P-4 stands on a secure legal pedestal as the reasons drawn therein by the Assistant Collector, Ist Grade of his being constrained to carry out the mandate of the Financial Commissioner (Appeals) constituted in Annexure P-3 are within and not beyond the domain of Section 16 of the Act, whose provisions stand extracted hereinafter. He has with all persuasion at his command on anvil thereof concerted to sway this Court that the Assistant Collector, Ist Grade having not, within the ambit of Clause (a) of sub Section (1) of Section 16 of the Act, enjoining upon him to before proceeding to review his order obtain sanction of the Officer higher to him in the echelons of the revenue hierarchy, obtained the apposite statutory sanction from the officer higher to him in the echelons of the revenue hierarchy want thereof imposed a legal fetter upon him to exercise the power of review.

> "16. **Review by Revenue Officers**-(1) {Where there is a mistake or error apparent on the face of record or where some new and important fact or evidence is discovered, a Revenue Officer} may, either his own motion or on the application of any party interested, review, and on so reviewing modify, reverse or confirm, any order passed by himself or by any of his processors in office:
>
> Provided as follows:-
>
> (a) When a Commissioner or Collector thinks it necessary to review any order which he has not himself passed, when a Revenue Officer of class below that of Collector proposes to review any order whether passed by himself or by any of his predecessors in office, he shall first obtain the sanction of the Revenue Officer to whose control he is immediately subject;
>
> (b) an application for review of an order shall not be entertained unless it is made within ninety days from the passing of the order, or unless the applicant satisfies the Revenue Officer that he had sufficient cause for not making the application within that period;
>
> (c) an order shall not be modified or reversed unless reasonable notice has been given to the parties affected thereby to appear and be heard in support of the order;
>
> (d) an order against which an appeal has been preferred shall not be reviewed.
>
> (2) For the purpose of this section, the Collector shall be deemed to be the successor in office of any Revenue Officer of a lower class who has left the district or has ceased to exercise powers as a Revenue officer, and to whom there is no successor in office.
>
> (3) An appeal shall not lie from an order refusing to review or confirming on review a previous order.

(4) Save in the cases of clerical or arithmetical mistakes arising from any accidental slip or omission , no application for review shall lie under this section against an order passed by the Financial Commissioner under Section 17 of this Act."

7. For testing the tenacity of the aforesaid submission addressed by the learned counsel for the appellants herein, it is apt to advert to the factum that the Financial Commissioner (Appeals) had for grave and weighty reasons assigned in his order Annexure P-3, concluded that the Assistant Collector, Ist Grade while his not having included in the mode of partition constituted in his order dated 4.6.1992, the undivided holdings of the co-sharers abutting the road side, he could not proceed to in his subsequent order dated 18.3.1993, include in the mode of partition the aforesaid undivided holdings abutting the road side, for its distribution amongst the co-owners in consonance with their shares in the undivided holdings, as the inclusion thereof in the order dated 18.3.1993 tantamounted to a review at his instance, of his earlier order dated 4.6.1992 which was un-exercisable at his instance, besides was jurisdictionally void, unless within the ambit and scope of clause (a) of sub Section (1) of Section 16 of the Act he had obtained sanction from the officer higher to him in the echelons of the Revenue hierarchy. However, with there being no palpable material on record demonstrating that the Assistant Collector, Ist Grade, Ghumarwin while proceeding to by his order dated 18.3.1993 review his earlier order dated 4.6.1992, had obtained any sanction of the officer higher to him in the echelons of the revenue hierarchy lack thereof hence rendered the subsequent order dated 18.3.1993 to be afflicted with the malady of jurisdictional incompetence. Consequently, vide Annexure P-3, the Financial Commissioner (Appeals) remanded the matter to the Assistant Collector, Ist Grade, Ghumarwin, with a direction therein to the latter to after affording an opportunity to all the affected persons of their being heard, amend the mode of partition qua the undivided holdings constituted vide order dated 4.6.1992.

8. The Assistant Collector, Ist Grade, Ghumarwin omitted to carry out the mandate of the Financial Commissioner (Appeals) constituted in Annexure P-4 on the mere pretext of his being asked to exercise the power to review his earlier order dated 4.6.1992 which was legally un-exercisable at his instance. The reason assigned by the Assistant Collector, Ist Grade, Ghumarwin in Annexure P-4 is shorn of legal tenacity besides suffers emasculation on the score that with the Financial Commissioner (Appeals) having under Annexure P-3 after his having set aside the findings returned by the Assistant Collector, Ist Grade dated 18.3.1993 on the score of its tantamounting to an exercise of jurisdiction of review by him of his earlier order dated 6.4.1992, which exercise of jurisdiction of review by him for the reasons aforesaid, fell within the domain of the legal embargo constituted in clause (a) of sub Section 1 of Section 16 of the Act, rendering its exercise to be grossly impermissible, had also proceeded to therein permit the Assistant Collector, Ist Grade, Ghumarwin to modify the mode of partition prepared by the him qua the undivided holdings of the co-sharers as stood constituted vide order dated 4.6.1992. The order made by the Financial Commissioner (Appeals) dated 5.9.2005 whereby he permitted the Assistant Collector, Ist Grade, Ghumarwin to after affording hearing to all the affected parties amend the mode of partition qua the undivided holdings of the co-sharers prepared by him vide order dated 4.6.1992 tantamounted to a sanction to him by an Officer higher to him in the echelons of the revenue hierarchy, to proceed to review the order dated 4.6.1992.

9. In other words, the peremptory direction of the Financial Commissioner meted to the Assistant Collector Ist Grade, Ghumarwin for amending/modifying the order dated 4.6.1992 whereunder he while preparing the mode of partition qua the undivided holdings of the co-sharers had omitted to incorporate therein the undivided holdings of the

co-owners abutting the road side which, yet were distributable amongst them to beget parity of allotment to each of them of the land bearing a higher market value, is to be construable to be a sanction to the latter to exercise the power of review within the ambit of clause (a) of Sub Section (1) of Section 16 of the Act. Therefore, in view of the order made by the Financial commissioner (Appeals) vide Annexure P-3, the Assistant Collector committed a legal fallibility in his not carrying out the mandate of Financial Commissioner (Appeals) on the frail legal pretext of his not enjoying the power to review his order dated 14.6.1992. Further more, even the order made by the Collector, Sub Division, Ghumarwin, comprised in Annexure P-5 arising out of the order of the Assistant Collector, Ist Grade constituted in Annexure P-4 whereby the latter for the reasons aforesaid portrayed a constraint in not carrying ahead the mandate of the Financial Commissioner (Appeals) comprised in Annexure P-3, on its incisive reading unveils the factum of its while reversing the order comprised in Annexure P-4 its also according with his being an officer higher to the Assistant Collector, Ist Grade, Ghumarwin in the echelons of the revenue hierarchy, sanction within the domain of clause (a) of sub Section 1 of Section 16 of the Act to the latter to review his earlier order. Even the aforesaid order of the Collector, Sub Division Ghumarwin, constituted in Annexure P-5 remained unimplemented by the Assistant Collector, Ist Grade, Ghumarwin. At this stage it is to be determined whether the subsequent order made by the Divisional Commissioner, Mandi and of the Financial Commissioner (Appeals) H.P constituted respectively in Annexures P-6 and P-8 whereby both set aside the order made by the Collector Sub Division, Ghumarwin constituted in Annexure P-5 are embedded upon a firm legal footing. The short reason as occurs in the orders aforesaid of the Divisional Commissioner, Mandi and the Financial Commissioner (Appeals) HP existing respectively in Annexures P-6 and P-8 for reversing the order made by the Collector, Sub Division, Ghumarwin in Annexure P-5, is of the Collector, Sub Division, Ghumarwin, while permitting the Assistant Collector, Ist Grade to review his order dated 4.6.1992 having proceeded to do so, on an appeal preferred before him under Section 14 of the Act whereas with sub Section 3 of Section 16 of the Act barring/interdicting preferment of an appeal at the instance of the aggrieved before the Collector of the Sub Division, Ghumarwin when arising out of an “order refusing to review” as encapsulated in Sub Section 3 of Section 16 of the Act, as was the legal mantel purportedly donned by the findings recorded by the Assistant Collector, Ist Grade comprised in Annexure P-4, hence, the availment by the aggrieved of the provisions of Section 14 of the Act prescribing therein the institution of an appeal by a person aggrieved by an appealable order whereas with the legal garb donned by the order of the Assistant Collector, Ist Grade Ghumarwin comprised in Annexure P-4 was of its falling within the ambit of the parlance “order refusing to review”, necessarily then an appeal therefrom was statutorily barred. Concomitantly the preferment of an appeal therefrom was rendered to be legally mis-constituted besides the findings thereupon were as such devoid of any jurisdictional force. However the reasons as attributed both in Annexures P-6 and P-8 by the Divisional Commissioner, Mandi and the Financial Commissioner, (Appeals), respectively are unworthy of both legal succor necessarily then they stand to be discountenanced. The reason which prevailed upon the authorities aforesaid to construe the orders in Annexure P-5 to be legally oustable stand spurred from the factum of both having misread, the text and tenor besides the phraseology of the findings recorded by the Assistant Collector Ist Grade in Annexure P-4, in coagulation with the prescription in clause (a) of sub Section 1 of Section 16 of the Act, obviously both then fallaciously construed that the Assistant Collector, Ist Grade, Ghumarwin in his order Annexure P-4 while his omitting to carry out the mandate of the Financial Commissioner (Appeals) had therein tenably refused to review his order dated 4.6.1992, as such the order made by the Assistant Collector, Ist Grade tantamounted to refusal on his part to review his earlier order. Hence the bar embedded in subsection 3 of Section 16 of the Act against no

appeal being preferable against an order refusing to review stood attracted rendering the appeal as preferred therefrom before the Collector, Sub Division, Ghumarwin to be neither maintainable nor any exercise of powers thereupon was legally sustainable. However, the aforesaid construction as placed thereupon by both the authorities aforesaid, is ir-revereble as the tone, tenor besides the phraseology of Annexure P-4 does not portray that the Assistant Collector, Ist Grade has refused to review his order dated 4.6.1992, rather its incisive reading unfolds the factum that he had refused to exercise the jurisdiction of review though it stood bestowed upon him vide Annexure P-3.

10. The sublime and subtle distinctivity embedded in the phraseology of sub section 3 of Section 16 of the Act wherein a refusal by the officer concerned to review an order manifestly interdicts the institution of an appeal therefrom by an aggrieved under Section 14 of the Act vis-à-vis the refusal on his part to exercise the tenable bestowment upon him of the jurisdiction of review, has to be unfolded besides disinterred. The refusal on the part of the Assistant Collector, Ist Grade concerned to review his earlier order would emerge only in the event of his, within the ambit of the legally permissible limits permitting him to exercise the jurisdiction to review his previous orders having on a keen discernment of the material on record unearthed therefrom that the legal parameters within which power of review is exercisable by him were unavailable, constraining him to refuse to review his previous orders. Nonetheless in the instant case on a plain reading of Annexure P-4 it does not manifestly portray that the earlier order dated 4.6.1992 is not reviewable by the Assistant Collector, Ist Grade, Ghumarwin for want of the respondents herein begetting satiation of the legal parameters on whose sprouting alone he could proceed to review his earlier orders. Moreover, there is no unfoldment therein that his previous order while not suffering from any error apparent on the face of the record at the stage when he proceeded to render Annexure P-4 or the respondent herein having placed before him the apposite material warranting on its anvil the review by him of his earlier order, which when despite exercise of due diligence at his instance was yet then discoverable by him hence also available for adduction before the Assistant Collector, Ist Grade at a time preceding his making the order comprised in Annexure P-4, necessarily then his earlier order not falling within the legal frontiers entailing its review at his instance, his being constrained to refuse to review it. For non-occurrence of the aforesaid communication in the order of the Assistant Collector, Ist Grade, Ghumarwin, in Annexure P-4 necessarily constrains this Court to construe that Annexure P-4 tantamounted to not a refusal on the part of the Assistant Collector, Ist Grade to review his earlier order dated 4.6.1992, rather a refusal on his part to exercise jurisdiction of review conferred upon him under Annexure P-3 by an Officer higher to him in the echelons of the revenue hierarchy besides his abdicating to exercise the tenable bestowment of jurisdiction upon him within the domain of clause (a) of sub Section 1 of Section 16 of the Act by the officer higher to him in the echelons of the revenue hierarchy, of review. Moreover, especially when the orders comprised in Annexure P-3 stood un-assailed hence the preemptory directions comprised therein permitting the Assistant Collector, Ist Grade to review his earlier order dated 6.4.1992, as a corollary acquired an aura of conclusivity and finality besides constituted an uninfractable fiat to the Assistant Collector, Ist Grade to act in consonance thereto. However, in the latter taking to infract the mandate of an officer higher to him in the echelons of the revenue hierarchy comprised in Annexure P-3 whereas its falling within the legal domain of clause (a) of Sub Section 1 of Section 16 of the Act, gave no latitude to the Assistant Collector, Ist Grade, Ghumarwin to abdicate the jurisdiction of review as conferred thereunder upon him, necessarily then also the orders made by both the Divisional Commissioner and the Financial commissioner (Appeals) comprised in Annexures P-6 and P-8 respectively can be construed to be not standing on a firm legal footing. Both clause (a) of Sub Section 1 of Section 16 of the Act and Sub Section 3 of the Section 16 of the H.P Land Revenue Act as

stands extracted hereinabove are to be interpreted harmoniously and rhythmically so as to render both workable. Apart therefrom the interpretation which is to be afforded to both the provisions aforesaid is the one which does not render both to be redundant. While adopting the aforesaid manner of harmoniously construing the provisions aforesaid of the Act with the factual matrix of the instant case when permission to the Assistant Collector, Ist Grade, Ghumarwin was accorded by an officer higher to him in the echelons of the Revenue Hierarchy under order Annexure P-3 of the Financial **co**mmissioner (Appeals), concomitantly then with the Assistant Collector, Ist Grade, Ghumarwin abdicating jurisdiction to review his earlier order though stood bestowed upon him within the domain of clause (a) of Sub Section (1) of the Act, cannot be construable to be bearing any affinity in parlance to the sublime phraseology tenor or text carried by the phrase "refusal to review" occurring in Sub Section (3) of Section 16 of the Act. The refusal on the part of the Assistant Collector, Ist Grade, Ghumarwin to review his earlier order when has been concluded to be emanating only on the officer concerned unearthing from the material adduced before him, the non-existence of the apposite material within whose permissible parameters power of review is exercisable, hence his being constrained to refuse to review his earlier order. Yet with the communication manifested in Annexure P-4 not on its incisive reading up- surging the preeminent fact that the Revenue Officer concerned was constrained to refuse to review his earlier order for non-existence of the apposite preeminent factors or non-existence of the permissible legal parameters , as a corollary, an apt construction to be placed thereon is of it tantamounting not to a refusal on the part of Revenue Officer concerned to review his earlier order and change the revenue entries rather is to be construable to be tantamounting to abdication on his part of jurisdiction to review though stood for the reasons aforesaid tenably bestowed upon him. Hence, for the reasons aforesaid refusal on the part of the Revenue Officer concerned to exercise the tenably bestowed jurisdiction upon him to review his earlier order is contradistinctive to refusal on his part to review his earlier order. Unless the subtle marked distinctivity inter-se the refusal or abdication on the part of the Revenue Officer concerned to exercise a tenably bestowed jurisdiction of review upon him vis-à-vis the refusal on his part to review his earlier order which latter refusal would sprout only when the aforesaid parameters are explicitly pronounced in the order of a Revenue Officer concerned for the non-existence whereof his being constrained to review his earlier order, is not comprehended, then both clause (a) of Sub Section (1) of Section 16 of the Act and Sub Section (3) of Section 16 of the Act would be rendered unworkable besides militative of each other as also redundant. If any, interpretation than the one as placed thereupon by this Court to the afore-referred provisions of the Act stands afforded, then the outcome thereof would be of even a conclusive fiat of an officer higher to the Revenue Officer concerned in the echelons of the revenue hierarchy would be shown levity of regard besides would stand infracted though enjoined to be carried into effect. Apart therefrom when such bestowment of jurisdiction of review stands abdicated or stands un-exercised as in the instant case, it would then beget an attraction to it of an interpretation of its not falling within the domain of the parlance "Refusal to Review" couched in Sub Section (3) of Section 16 of the Act any appeal wherefrom alone stands statutorily barred or interdicted. Necessarily then, the appeal preferred by the aggrieved under Section 14 of the Act against the order made by the Revenue Officer concerned refusing to exercise the tenably bestowed jurisdiction upon him of review would be maintainable thereunder.

11. In sequel, when want of exercise jurisdiction of review or abdication of jurisdiction of review on the part of the Assistant Collector, Ist Grade, Ghumarwin as emanable on a reading of his order comprised in Annexure P-4 does not fall within the domain of the phraseology "refusal to review" as enshrined in Sub Section 3 of Section 16 of the Act, any conclusion that hence its provisions are available to be drawn succor by the appellants herein for sustaining a propagation that the order made by the Assistant

Collector, Ist Grade was un-appealable before the Collector, Sub Division, Ghumarwin, remains un-fostered. In face thereof obviously, the orders made by both the Divisional Commissioner, Mandi and the Financial Commissioner (Appeals) existing in Annexures P-6 and P-8 were interfereable as tenably done by the learned Single Judge of this Court. Also, the order made by the Collector, Sub Division, Ghumarwin, as exists in Annexure P-5 was vindicable as has been aptly done by the learned Single Judge of this Court.

12. The Learned counsel for the appellants herein has contended with force that the power to review is not delegable by a superior officer for its exercise by his subordinate. Though the learned counsel for the appellants concerted to persuade this Court that the order made by the Collector Sub Division, Ghumarwin comprised in Annexure P-5 whereby he permitted the Assistant Collector, Ist Grade, Ghumarwin to review the order dated 4.6.1992 manifests a delegation of the power of review by the former to the latter which was only exercisable at the instance of the Revenue Officer concerned rendering the aforesaid delegation to be impermissible, hence rendering the order of the Collector, Sub Division, Ghumarwin comprised in Annexure P-5 to be interfereable. However, the aforesaid argument staggers and falters in the face of the Collector, Sub Division, Ghumarwin in his pronouncement constituted in Annexure P-5 having within the legal domain besides with the purview of the mandate of clause (a) of Section 16 of the Act accorded sanction besides permission, his being the officer higher in the echelons of the revenue hierarchy to the Assistant Collector, Ist Grade, Ghumarwin, to the latter to exercise the power of review which however, the Assistant Collector, Ist grade abdicated to exercise which abdication of or want of exercise of jurisdiction has been construed by this Court to be not falling within the phraseology "refusal to review" as embedded in sub Section 3 of Section 16 of the Act, so as to accept the contention of the learned counsel for the appellants herein that the said order was not appealable.

13. Consequently, the impugned judgment is upheld and the appeal is dismissed alongwith pending applications, if any.

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

M/s Arsh Casting Pvt. Ltd. .....Appellants.

Versus

H.P. State Electricity Board and others .....Respondents.

LPA No.15 of 2005
Decided on: 15.10.2015.

Constitution of India, 1950- Article 226- Writ Court had quashed the decision passed by Secretary (MPP & Power) and had relegated the parties to the Civil Court, which is also seized of the matter- no findings were recorded regarding the validity or otherwise of the order made by the Board Level Disputes Settlement Committee- a civil suit is pending between the parties and Civil Court had to determine all the issues- appeal dismissed.

(Para-4 to 6)

For the appellant: Mr.R.L. Sood, Senior Advocate, with Mr.Arjun Lal, Advocate.

For the respondents: Mr.K.D. Sood, Senior Advocate, with Mr.Sanjeev Sood, Advocate, for respondent No.1.
Mr.Romesh Verma, Mr.Anup Rattan,
Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral)

This Letters Patent Appeal is directed against the judgment, dated 29th July, 2005, passed by a learned Single Judge of this Court in CWP No.1386 of 2002, titled H.P. State Electricity Board vs. M/s Arsh Casting Pvt. Ltd. and Ors., whereby the order, dated 11th June, 2002 (Annexure P-12 with the writ petition), made by the Secretary (MPP & Power), to the Government of Himachal Pradesh, was quashed, with clarification that any observation made in the judgment would not have any bearing on the merits of the civil suit, (for short, the impugned judgment).

2. Feeling aggrieved, the appellant (respondent No.1 before the Writ Court), filed the instant appeal.

3. We have heard the learned counsel for the parties and have gone through the impugned judgment.

4. On perusal of the impugned judgment, it becomes emphatically clear that the learned Single Judge, while setting aside the order, dated 11th June, 2002, made by the Secretary (MPP & Power), to the Government of Himachal Pradesh, has virtually relegated the parties to the Civil Court, who has seized off the matter in a civil suit.

5. It is apt to reproduce relevant portion of the impugned judgment hereunder (page 26):

> *".....Issues No.6 and 7 reads as under:*
>
> > *"6. Whether the defendant Company committed theft/pilferage of energy on 11.8.1995 and therefore, is liable to pay the sum of Rs.1,69,13,533/- determined by the Board Level Disputes Redressal Committee by its decision dated 12.3.1999? OPP*
> >
> > *7. Whether the provisional as also the final assessment made by the Board Level Disputes Redressal Committee is illegal and void, as alleged? OPD."*
>
> *On plain reading of the above-said two issues, the dispute whether the respondent-Company has committed theft/pilferage of energy on 11.8.1995 and also whether the respondent-Company is liable to pay the amount determined by B.L.D.S.C. by its decision dated 12.3.1999 is the subject matter of the said suit before this Court. Similarly, the provisional as well as the final assessment made by the Sub Divisional Officer and approved by the Superintending Engineer as well as the final order of B.L.D.S.C. are also the subject matter of the civil suit covered under issue No.7 above raised by the respondent-Company in the written statement. The parties have to lead their evidence in support of their claim and counter claim involved in the suit. If the order of the appellant authority is allowed to sustain, the same shall have direct bearing on the suit pending in this Court filed by the petitioner-Board for the recovery of the amount determined by B.L.D.S.C. by its decision on 12.3.1999 which order has been set aside by the appellant authority. In these circumstances, it was desirable and appreciated in the interest of justice from the appellant authority to have stayed its hand from proceeding further in the appeal and could have waited for the final*

decision of the suit. Thus, the impugned order of the appellant authority is not sustainable and tenable and deserves to be set aside. The contention raised by the learned senior counsel for the respondent-Company supporting and justifying the findings recorded and the conclusion arrived at in the impugned order cannot be accepted.

No other point was urged by the learned counsel for the parties.

For the reasons stated above, the writ petition is allowed. Order dated June 11, 2002 Annexure P-12 recorded by Secretary (MPP & Power) to the Government of Himachal Pradesh exercising the power of appellate authority is quashed and set aside. However, the parties are left to bear their own costs.

Order dated 4.3.2003 passed by this Court in CMP No.1991/2002 staying further proceeding in Civil Suit No.68 of 2000 pending in this Court stands vacated. I may clarify that any observation made in this order is meant for limited purpose of disposal of this writ petition and shall not be construed as an expression of opinion in support of the correctness and validity of order dated 12.3.1999 (Annexure P-8) recorded by B.L.D.S.C. against the respondent-Company or on the merits of the Civil Suit pending in this Court which has to be decided in accordance with law when the contesting parties will lead their evidence on the issues settled in the Suit."

Emphasis Applied

6. The learned Single Judge has clearly directed that the observations made in the impugned judgment would not cause any prejudice to the parties and would not have any bearing on the merits of the civil suit. It is also emphatically clear that the learned Single Judge has not returned any finding regarding the validity or otherwise of the order made by the Board Level Disputes Settlement Committee. A Civil Suit is pending between the parties, issues have been framed, parties have to lead evidence and the Civil Court has to determine all the issues.

7. With the above observation, the appeal is dismissed, alongwith pending CMPs, if any.

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

Ritu Kumari. ...Petitioner.

Versus

Rajveer Singh. ...Respondent.

CMPMO No. 63 of 2015
Reserved on: 12.10.2015
Decided on: 15.10.2015

Code of Civil Procedure, 1908- Section 24- Petitioner, a wife, filed a petition for maintenance under Section 125 of Cr.P.C and Sections 2, 18, 19, 20, 21 and 22 of the Protection of Women from Domestic Violence Act before the Court at Kasauli – respondent filed an application for restitution of conjugal rights in the Court of Civil Judge (Senior Division), Dehra- petitioner sought the transfer of proceedings pending before the Court at Dehra to the Court of Civil Judge (Senior Division), Kasauli- held, that in matrimonial proceedings, the convenience of wife should be considered - it would be difficult for the petitioner to travel to Dehra to defend the case pending before the Civil Judge (Senior

Division), Dehra- studies of child would also be affected adversely- two proceedings are already pending at Kasauli- therefore, petition at Dehra ordered to be withdrawn and transferred to the court of Civil Judge (Senior Division), Kasauli. (Para-5 to 10)

Cases referred:
Guda Vijayalakshi vs. Guda Ramachandra Sekhara Sastry, AIR 1981 SC 1143
Pritikona Banerjee vs. Rabi Shankar Banerjee, AIR 1987 Calcutta 269
Deepa vs. Anil Panicker, (2000) 9 SCC 441
Baby Chitra vs. K. Radhakrishnan, 2005 (1) Hindu Law Reporter 51
Kiran Bala vs. Ram Phal, 2005 (2) Hindu Law Reporter 410

For the Petitioner : Mr. Anirudh Sharma, Advocate.
For the Respondent : Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Notice was issued to the respondent. There is no representation on his behalf.

2. "Key facts" necessary for the adjudication of this petition are that marriage between the parties was solemnized on 20.4.2008. Petitioner gave birth to baby Kashish on 31.1.2010. Petitioner was harassed by the respondent as well as by his parents for bringing insufficient dowry. Respondent has not provided maintenance either to the petitioner or her baby. Kashish is studying in St. Mary's Convent School, Kasauli. Petitioner is also working in the school. The amount earned by her is not sufficient to meet the expenditure. She has to give monthly rent of accommodation. She has to bear the monthly expenditure of her daughter. Respondent is working in Merchant Navy. He is owner of three bed rooms flat at Bhayander, Meera Road, Mumbai.

3. Petitioner was constrained to move an application under section 125 of the Code of Criminal Procedure and also an application under sections 12, 18, 19, 20, 21 and 22 of the Protection of Women from Domestic Violence Act, 2005. These proceedings are pending before the courts at Kasauli against the respondent. Respondent has filed petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights against the petitioner in the court of Civil Judge (Senior Division), Dehra bearing Petition No.10/2014.

4. Petitioner has sought transfer of the proceedings pending before the Civil Judge (Senior Division), Dehra under section 9 of the Hindu Marriage Act to the court of Civil Judge (Senior Division), Kasauli.

5. Their Lordships of the Hon'ble Supreme court in ***Guda Vijayalakshi*** vs. ***Guda Ramachandra Sekhara Sastry***, AIR 1981 SC 1143 have held that it cannot be said that the substantive provision contained in section 25, Civil P.C. is excluded by reason of section 21 of the Hindu Marriage Act, 1955. Their Lordships have held as under:

> **"[3] In our view, on proper construction of the relevant provisions it is not possible to uphold the preliminary objection. In the first place it is difficult to accept the contention that the substantive provision contained in Section 25 C. P. C. is excluded by reason of Section 21 of the Hindu Marriage. Act, 1955. Section 21 of the Hindu Marriage Act merely provides: "Subject to the other provisions contained in this Act**

and to such rules as the High Court may make in that behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". In terms Section 21 does not make any distinction between procedural and substantive provisions of C. P. C. and all that it provides is that the Code as far as may be shall apply to all proceedings under the Act and the phrase "as far as may be" means, and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Act. It is impossible to say that such provisions of the Code as partake of the character of substantive law are excluded by implication as no such implication can be read into S. 21 and a particular provision of the Code irrespective of whether it is procedural or substantive will not apply only if it is inconsistent with any provisions of the Act. For instance, it is difficult to countenance the suggestion that the doctrine of res judicata contained in Section 11 of the Code which partakes of the character of substantive law is not applicable to proceedings under the Act. Res judicata, after all, is a branch or specie of the Rule of Estoppel called Estoppel by Record and though Estoppel is often described as a rule of evidence, the whole concept is more correctly viewed as a substantive rule of law. (See: Canadian and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamships, Ltd. (1947) AC 46, at p. 56 (P. C.).”

6. The Division Bench of Calcutta High Court in ***Sm. Pritikona Banerjee*** vs. ***Rabi Shankar Banerjee***, AIR 1987 Calcutta 269 has held that section 21-A provides for joint and consolidated trail in certain cases. The said provision is not exhaustive. Therefore, where only one petition filed by the husband for restitution of conjugal rights was pending in the court of the District Judge and neither party had presented either in the court of the District Judge or in other District Court any other proceeding specified in section 21-A, an application by the wife before the High Court under section 24 for transfer of the proceeding from the Court of the District Judge to some other District Court would be maintainable. Section 21-A has no application. The Division Bench has held as under:

“[1] The defendant wife made this application under Section 24 of the Civil Procedure Code, 1908 for transfer of Matrimonial Suit No. 77 of 1985 filed by the plaintiff opposite party husband for restitution of conjugal rights in the learned District Judge's Court, Howrah. Mr. Banerjee, appearing on behalf of the plaintiff opposite party husband has raised a preliminary objection to the maintainability of this application under Section 24 of the Civil Procedure Code on the ground that the special provision to transfer petition contained in Section 21A of the Hindu Marriage Act has by implication ousted the jurisdiction of this Court under Section 24 of the Act in the matter of transfer of matrimonial proceedings. We are unable to agree. In the first place, the conditions for applicability of Section 21A of the Hindu Marriage Act are not present in the present case. Only one matrimonial proceeding instituted by plaintiff husband is pending in the learned District Judge's Court, Howrah. Neither party has presented either in the District Judge's Court, Howrah or in other District Court any other proceeding specified in Section 21A of the Hindu Marriage Act. We are relieved of the necessity of giving further reasons because Mr. Banerjee appearing on behalf of the plaintiff opposite party himself has drawn our attention

to the decision of the Supreme Court in Guda Vijayalakshmi v. Guda Ramchandra Sekhara Sastry, . Tulzapurkar, J. delivering the judgment of the Court inter alia held that the case in Smt. Rama Kanta v. Ashok Kumar, reported in and also the case of Priyavari Mehta v. Priyanath Mehta, reported in were not correctly decided and had accordingly overruled them. The learned Judge clearly recognised a stand in which Section 21A would be inapplicable and the resort will have to be (had) to the powers under Sections 23 to 25 of the Civil Procedure Code for directing transfer of petitions for consolidated hearing. It was further held that Section 21A of the Act provided for joint and consolidated trial in certain cases and the said provision was not exhaustive. The above decision of the Supreme Court being binding upon us we are unable to entertain any contrary submission regarding the scopes of Section 21A of the Hindu Marriage Act and of Section 24 of the Civil Procedure Code.

[2] We proceed to consider whether in the interest of justice the matrimonial proceedings now pending in the learned District Judge's Court, Howrah ought to be transferred. We have taken due consideration of the fact that the defendant petitioner wife resides in a remote village in the district of Birbhum and that she would be seriously inconvenienced if she was to frequently come to Howrah for contesting the matrimonial suit. Not only there would be hazards of travel over a fairly long distance but also Court may take judicial notice of the acute difficulty of obtaining accommodation except at considerable costs in the town of Howrah. At the same time we are not unmindful of the difficulty which the plaintiff husband may face by reason of the matrimonial suit being transferred to Suri from Howrah where he is at present working. Therefore, after considering all aspects of the matter we direct that the Matrimonial Suit No. 77 of 1985 be transferred from the Court of the learned District Judge, Howrah to the Court of the learned District Judge, Burdwan from the point at which the suit had been pending till this order of transfer was made. The learned District Judge may try the suit or may transfer the suit to the learned Additional District Judge's Court at Burdwan. The suit be expeditiously disposed of in accordance with law. To expedite the hearing we direct the defendant wife to file her written statement in the learned District Judge's Court, Burdwan within two months from this date. The learned District Judge will be at liberty to extend the time in case sufficient cause is made out. Both parties waive service of notice. We express no opinion on the merits. The learned District Judge, Howrah will transmit the records to the Court of the learned District Judge, Burdwan expeditiously."

7. Their Lordships of the Hon'ble Supreme Court in ***Deepa*** vs. ***Anil Panicker***, (2000) 9 SCC 441 have held in a case where wife was staying at Trichur, expressing her financial as well as physical inability to contest the petition at Ranchi, in view of these circumstances their Lordships had transferred the petition from the court of the Judicial Commissioner, Ranchi to the Matrimonial Court, Tirchur.

8. Learned Single Judge of Madras High Court in ***Baby Chitra*** vs. ***K. Radhakrishnan***, 2005 (1) Hindu Law Reporter 51 has held that in matrimonial like cases,

convenience of wife must be given utmost importance. Learned Single Judge has held as under:

> **"3. The learned counsel appearing on behalf of the respondent, though has no objection to transfer the case from Chennai to Madurai as sought from her, he has very serious objection to offer regarding the averments and the allegations made in the petition for transfer. Of course, they are subject to an order passed in the main O.P. and the parties could contest the same in the main O.P. itself. So far as the transfer of the main O.P.filed by the husband in the Family Court, Madras seeking divorce is concerned, it is only desirable to transfer the same to the Family Court, Madurai. Since the petitioner is the permanent resident o Madurai and it is also not fair on the part of the Court to order a lady to travel such a long distance for showing appearance on each ad every hearing ad the feasibility is only to have the case decided by a Court of her own place and hence it is only desirable to transfer the case from Family Court, Chennai to Madurai Family Court, as it is prayed for on the part of the petitioner."**

9. Learned Single Judge of Punjab and Haryana High Court in ***Kiran Bala*** vs. ***Ram Phal***, 2005 (2) Hindu Law Reporter 410 has held that while considering the question of transfer of matrimonial proceedings regard must be had to the convenience of wife. Learned Single Judge has held as under:

> **"[3] Counsel for the petitioner relying upon a number of decisions of the Supreme Court in Rachna Kanodia v. Anuk Kanodia, 2002(1) M.L.J. 86 (S.C.); Neelam Kanwar v. Davinder Singh Kanwar, 2001(1) M.L.J. 509 (S.C.); Archna Singh v. Alok Partap Singh, 2002(2) M.L.J. 568 and Savitri v. Hari Chand, contended that in these cases the Supreme Court ordered transfer of matrimonial proceedings at or near the place where the wife was residing and while doing so, due consideration was given to the convenience of the wife. The counsel, thus, submitted that in view of the facts stated in the petition and the observations of the Supreme Court in the above referred cases, the prayer of the petitioner deserves to be accepted. Counsel for the respondent on the other hand opposed the prayer made in the petition.**
>
> **[4] I have heard counsel for the parties and perused the record, I have also gone through the judgments cited by the counsel for the petitioner. In all these decisions all that has been observed in a single tone is that while considering the question of transfer of matrimonial proceedings, regard must be had to the convenience of the wife. In the said cases, the proceedings which were pending at very distant place and even in the Courts of a different State have been ordered to be transferred to or near the place where the wife was residing. Mere incorporation of observations made by the Supreme Court made in all of the aforesaid decisions would unnecessarily burden this order. However, the observations of the Supreme Court in Neelam Kanwar's case (supra) are being noticed as under:**
>
> **"We are mindful of the fact that the petitioner is a lady and first respondent is a male, and, therefore, (for) convenience of wife, a transfer to the place where the lady is residing, would be preferred by this Court unless, it is shown that there are special reasons not to do so. No special reason is shown."**

Having regard to the observations of the Apex Court in the above cases and in the facts of this case which have neither been denied or controverted by the respondent, the petition deserves to be accepted."

10. In view of definitive law cited hereinabove, the Court is of the considered view that it would be difficult for the petitioner to travel Dehra to defend the case pending before the Civil Judge (Senior Division), Dehra. The studies of the child would also be effected. Petitioner would also be put to immense hardships while travelling from Kasauli to Dehra. She has to take leave in order to reach Dehra from Kasauli. Petitioner has also to incur expenditure while travelling from Kasauli to Dehra. The atmosphere of Kasauli would be more congenial to her where two proceedings instituted against the respondent under section 125 of the Code of Criminal Procedure and under sections 12, 18, 19, 20, 21 and 22 of the Protection of Women from Domestic Violence Act, 2005 are already pending.

11. Accordingly, the petition is allowed. Petition No.10/2014 pending before the Civil Judge (Senior Division), Dehra is withdrawn and transferred to the court of Civil Judge (Senior Division), Kasauli. The parties are directed to appear before the Civil Judge (Senior Division), Kasauli on 6.11.2015. Pending application(s), if any, also stands disposed of. No costs.

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

Sandeep Kumar ...Petitioner.

VERSUS

State of H.P. and another ...Respondents.

CWP No.4143 of 2015.
Decided on: October 15, 2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as Constable in the police department - he died while in services- petitioner applied for appointment on compassionate ground which was rejected on the ground that family income of the petitioner exceeds the ceiling fixed by the government- held, that Government is not to take into consideration the terminal benefits and the income from the family pension while computing the income of the family - decision quashed and the Government directed to take a fresh decision in accordance with the judgment. (Para-3 and 4)

For the petitioner: Ms.Simrat Bedi, Advocate.

For the Respondents: M/s Romesh Verma & Anup Rattan, Addl.A.Gs., and J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Issue notice. Mr.Romesh Verma, learned Additional Advocate General, waives notice for the respondents.

2. The grievance projected in this writ petition by the petitioner is that the father of the petitioner, who was working with the respondent as Clerk, died on 18th October, 2009, while in service, constraining the petitioner to file an application for appointment on compassionate ground, which was rejected on the ground that the family income of the petitioner exceeds the ceiling fixed by the Government.

3. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

> *"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
>
> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.*
>
> *48. While reaching at this conclusion, we are supported by the decision of the Apex Court in* ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:*
>
> > *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*

49. The Apex Court in ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
>
> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.*
> >
> > *Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."*
>
> *4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."*

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.

16. In ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-*

> *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."*

Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."

Emphasis applied.

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).*** *Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.*

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income

Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law....."

4. Having said so, the writ petition is allowed, impugned order Annexure PF is quashed and set aside, and the respondents are directed to examine the case of the petitioner in light of the judgment referred to above and pass appropriate order within a period of six weeks from today.

5. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

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

Trilok Chand ...Appellant.

Versus

Union of India and others ...Respondents.

LPA No. 288 of 2010
Decided on: 15.10.2015

Constitution of India, 1950- Article 226- Petitioner was compulsorily retired from service- he filed a writ petition and all the service benefits were granted to him- however, no monetary benefits were granted for the period- he was out of service- held, that petitioner was out of service because of the act of the respondent- it is not the case of the respondent that petitioner was gainfully employed during the period- hence, 50% salary granted to the petitioner. (Para-5 to 9)

For the appellant: Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate.

For the respondent: Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appellant-writ petitioner has questioned the judgment and order, dated 14.09.2010, made by the learned Single Judge in CWP No. 1544 of 2009, titled as Trilok

Chand versus Union of India & others (for short "the impugned judgment) to the extent of not granting the service benefits - salary for the period with effect from 01.05.2007 to 31.08.2009, on the grounds taken in the memo of appeal.

2. The appellant-writ petitioner was compulsorily retired from service in terms of order, dated 30.04.2007 (Annexure P-10), constraining him to file appeal (Annexure P-11) before the appellate authority, which too was rejected in terms of Annexure P-12.

3. Though, the appellant-writ petitioner was granted all service benefits including the pensionary benefits in terms of Annexure P-13, but, feeling aggrieved, he questioned Annexures P-10 and P-12 on the grounds taken in the memo of the writ petition. The writ petition was resisted by the respondents by the medium of reply. The learned Single Judge, after examining the pleadings and the law applicable, allowed the writ petition and quashed Annexure P-10, but has held that the appellant-writ petitioner was not entitled to monetary benefits for the period he was out of service.

4. It is apt to record herein that after noticing the fact that Annexure P-12 was not mentioned in the operative portion of the impugned judgment, the appellant-writ petitioner moved CMP No. 11099 of 2010, which came to be allowed vide order, dated 20.12.2010 and Annexure P-12 was also quashed.

5. The respondents have not questioned the impugned judgment on any count, thus, has attained finality so far it relates to them.

6. Challenge in this appeal is limited, as discussed hereinabove.

7. The appellant-writ petitioner was out of service because of the act of the respondents, i.e. in view of the compulsory retirement, which has been held to be illegal and stands quashed.

8. It is not the case of the respondents that the appellant-writ petitioner was gainfully working during the said period.

9. Keeping in view the facts of the case read with the fact that the appellant-writ petitioner has faced departmental inquiry and order of compulsory retirement was made, we deem it proper to direct the respondents to grant 50% of the salary for the period with effect from 01.05.2007 to 31.08.2009 to the appellant-writ petitioner.

10. Viewed thus, the appeal is allowed and the impugned judgment is modified, as indicated hereinabove. Pending application(s), if any, stand(s) disposed of accordingly.

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

Aman alias Ram son of Shri Ramesh Kumar .....Appellant.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 362 of 2014
Judgment reserved on: 14th August, 2015
Date of Judgment: 16th October, 2015

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act 2012-** Section 8- Prosecutrix aged 6 years was called by the accused to old dilapidated structure of HPPWD and was raped – prosecutrix was taken by PW-1 and PW-7- Prosecutrix had corroborated the prosecution version and had denied that she was tutored- PW-1 had seen the prosecutrix bleeding – Medical Officer had also noticed blood on the person of the prosecutrix- prosecution witnesses had supported the prosecution version- there were no major contradictions in their testimonies- accused did not adduce any evidence to rebut the mental state to be presumed under POCSO Act- held, that accused was rightly convicted by the trial Court. (Para- 12 to 24)

Cases referred:
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad versus Naval Dubey and another, (1992)3 SCC 204
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505
Triloki Nath and others vs. State of U.P., AIR 2006 SC 321
Jose vs. State of Kerala, AIR 1973 SC 944
Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328
Radhey Shyam vs. State of Rajasthan, (2014)5 SCC 389
K. Venkateshwarlu vs. State of Andhra Pradesh, (2012)8 SCC 73
Hamza Humammedkutty alias Mani and others vs. State of Kerala, (2013)11 SCC 150
Mullaperiyar Environmental Protection Forum vs. Union of India and others, (2006)3 SCC 643
Rameshbhai Chandubhai Rathod vs.State of Gujarat, (2009)5 SCC 740

For the Appellant: Mr. Vikas Rathore, Advocate.
For the Respondent: Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment and sentence passed by learned Sessions Judge-cum-Special Judge Chamba in Sessions Trial No. 18 of 2014 titled State of H.P. vs. Aman @ Ram decided on 30.10.2014.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on 28.12.2013 at about 5.30 PM minor prosecutrix aged six years was playing near her house. It is alleged by prosecution that appellant called the minor prosecutrix and took minor prosecutrix to old dilapidated quarter of H.P.PWD situated at Tala locality and thereafter opened trouser of minor prosecutrix aged six years and committed sexual assault under POCSO Act 2012. It is alleged by prosecution that in the meanwhile Smt. Usha who is relative of minor prosecutrix reached at the place of incident. It is alleged by prosecution that minor prosecutrix was crying and blood was oozing out from her private parts. It is alleged by prosecution that thereafter PW1 Usha and PW7 Radhika took minor prosecutrix to police station and reported the matter and FIR Ext.PW1/A was registered by PW6 Additional SHO Harnam Singh. It is alleged by prosecution that thereafter Additional SHO Harnam Singh sent minor prosecutrix to regional hospital Chamba with lady C. Puja for her medical examination. It is alleged by prosecution that minor prosecutrix was medically examined by PW8 Dr. Swati Mahajan. It is alleged by prosecution that medical officer namely Dr. Swati Mahajan observed that bleeding was present upon vagina of minor prosecutrix which was red in colour. It is alleged by prosecution that medical officer issued MLC Ext.PW8/A. It is alleged by prosecution that PW8 Dr. Swati Mahajan preserved undergarments and vaginal swab of minor prosecutrix and thereafter handed over the same to Investigating Agency. It is alleged by prosecution that thereafter PW6 Harnam Singh visited the spot of incident and prepared site plan Ext.PW6/D. It is also alleged by prosecution that PW6 Harnam Singh obtained photographs of spot Ext.PW6/A-1 to Ext.PW6/A-5 and recorded statement of minor prosecutrix and statement of complainant Usha as per their versiosn. It is alleged by prosecution that on 30.12.2013 Harnam Singh PW6 produced minor prosecutrix before Judicial Magistrate Chamba who recorded statement of minor prosecutrix. It is alleged by prosecution that statement of minor prosecutrix recorded before learned Judicial Magistrate 1st Class Chamba was videographed by PW3 Vikram Singh and CD thereof Ext.PW6/F was prepared. It is alleged by prosecution that thereafter PW6 Harnam Singh obtained birth certificate of minor prosecutrix Ext.PW6/G and as per birth certificate of minor prosecutrix minor prosecutrix was born on 2.7.2007. It is alleged by prosecution that PW6 Harnam Singh deposited the clothes of minor prosecutrix along with vaginal swab with PW5 Neeraj Kumar and same were entered into malkhana register Ext.PW5/A. It is alleged by prosecution that thereafter clothes and vaginal swab of minor prosecutrix along with documents were handed over to Abdesh Kumar with direction to deposit the same in the office of RFSL Dharamshala along with RC No. 4 of 2014 Ext.PW5/B. It is also alleged by prosecution that thereafter PW4 C. Abdesh Kumar deposited the articles handed over to him by PW5 MHC Neeraj Kumar at RFSL Dharamshala, which were examined by Scientific Officer and Assistant Director Biology and Serology at Dharamshala and report Ext.PW6/H was sought. It is alleged by prosecution that accused was also medically examined and opinion of medical officer was sought and medical officer has opined that accused was capable to perform sexual intercourse and MLC Ext.PA of accused was obtained.

3. Charge was framed by learned Sessions Judge-cum-Special Judge Chamba (H.P.) against appellant Aman @ Ram under Section 376 IPC and under POCSO Act 2012. Accused did not plead guilty and claimed trial.

4. Prosecution examined eight oral witnesses in support of its case and also tendered documentary evidence.

5. Learned trial Court convicted the appellant under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act 2012. Learned trial Court sentenced the appellant to simple imprisonment for a period of three years and also

imposed fine to the tune of Rs.20,000/- (Rupees twenty thousand only) under the Protection of Children from Sexaul Offences Act 2012. Learned trial Court further directed that in default of payment of fine convict shall further undergo simple imprisonment for a period of two months. Learned trial Court further directed that period of detention of convict during investigation and trial shall be set off. Learned trial Court also directed that fine amount if realized shall be paid to the victim as compensation under Section 357 Cr.P.C.

6. Feeling aggrieved against the judgment and sentence passed by learned Trial Court convict filed present appeal.

7. Court heard learned Advocate appearing on behalf of the appellant and learned Assistant Advocate General appearing on behalf of the respondent and also perused the entire record carefully.

8. Following points arises for determination in the present appeal:-

Point No. 1

Whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court caused miscarriage of justice to the appellant as mentioned in memorandum of grounds of appeal?

Point No. 2

Final Order**.**

9. Reasons for findings on point No.1:

9.1. PW1 Usha has stated that she is working as Class-IV employee in T.V. Hospital Chamba. She has stated that name of her sister-in-law is Radhika who resides in her neighbourhood and she has two sons and a daughter. She has stated that age of her daughter is six years old. She has stated that on 28.12.2013 at about 5.30 PM she had sent her son to bring vegetables from market and when she was going in search of her son she saw that minor prosecutrix was lying near old government building which was fallen into dilapidated condition. She has stated that minor prosecutrix was crying and her body was bleeding. She has stated that she lifted the minor prosecutrix and took minor prosecutrix to police station. Witness was declared hostile by prosecution. She has denied suggestion that she has told to police officials that accused present in Court committed sexual assault with minor prosecutrix. She has denied suggestion that she has seen the accused committing sexual assault upon minor prosecutrix and she has denied suggestion that as accused is her relative she has resiled from her earlier statement given to investigating agency.

9.2 PW2 minor prosecutrix aged six years has stated that accused called her and took her to a dilapidated old house which was situated near her house. Minor Prosecutrix has stated that she was playing near her house. Minor prosecutrix has stated that accused opened her trouser and placed his hand in her private parts. Minor prosecutrix has stated that in the meanwhile her aunt came at the spot and rescued minor prosecutrix from accused. Minor prosecutrix has denied suggestion that there were many residential houses near the place of incident. Minor prosecutrix has denied suggestion that there were hospital and police station near the place of incident. Minor prosecutrix has denied suggestion that accused did not meet her. Minor prosecutrix has also denied suggestion that accused did not lift her to place of sexual assault. Minor prosecutrix has denied suggestion that accused did not place his hands in her private parts. Minor prosecutrix has denied suggestion that accused did not remove her trouser. Minor prosecutrix has denied suggestion that her family has inimical relations with family of accused. Minor prosecutrix has denied

suggestion that she had sustained injuries due to fall on stony surface. Minor prosecutrix has denied suggestion that she is tutored by her family to give statement in Court.

9.3 PW3 Vikram Singh has stated that he is posted as Constable in general duty at P.S. Chamba since 2010 and on 30.12.2013 he went to the Court of Judicial Magistrate Chamba where minor prosecutrix was produced for recording her statement. He has stated that he switched on the camera and placed same on table of learned JMIC Chamba who recorded statement of minor prosecutrix which was videographed by camera placed by him. He has stated that he handed over the CD to JMIC Chamba.

9.4 PW4 Abdesh Kumar has stated that he is posted as Constable in general duty in P.S. Sadar Chamba. He has stated that on 4.1.2014 MHC Neeraj Kumar P.S. Sadar Chamba handed over to him one parcel sealed with six seals of RH Chamba stated to be containing trouser and vaginal swab of minor prosecutrix along with sample seal and one envelope sealed with three seals of RH Chamba addressed to RFSL Dharamshala along with one more parcel sealed with ten seals of RH Chamba stated to be containing underwear, trouser and pubic hairs of accused along with sample seal vide RC No. 4 of 2014 with direction to deposit in the office of RFSL Dharamshala. He has stated that he did not tamper with case property and after depositing the aforesaid articles he returned RC to MHC. He has denied suggestion that no case property took by him to office of RFSL Dharamshala and also denied suggestion that he did not deposit the case property in office of RFSL Dharamshala.

9.5 PW5 HC Neeraj Kumar has stated that he is posted as MHC in P.S. Sadar Chamba since January 2013 and on 30.12.2013 SI Harnam Singh deposited with him one cloth parcel sealed with six seals of RH Chamba stated to be containing vaginal swabs and trouser of minor prosecutrix along with sample seal. He has stated that he also deposited with him one another cloth parcel sealed with ten seals of RH Chamba stated to be containing underwear, trouser and pubic hairs of appellant along with two envelops each sealed with three seals of RH Chamba with direction to deposit in the office of RFSL Dharamshala (H.P.). He has stated that he entered the case property in malkhana register and on 4.1.2014 he handed over the aforesaid articles to constable Abdesh Kumar with direction to deposit in the office of RFSL Dharamshala vide RC No. 4 of 2014 who after depositing the same at RFSL Dharamshala returned RC to him. He has stated that he did not tamper with case property when case property remained in his custody. He has stated that copy of malkhana register is Ext.PW5/A and copy of RC is Ext.PW5/B and same are true and correct as per original record. He has stated that he issued CIPA certificate Ext.PW5/C which bears his signatures. He has denied suggestion that no case property was deposited with him by Harnam Singh and also denied suggestion that he did not send the same to RFSL Dharamshala (H.P.).

9.6 PW6 SI Harnama Singh has stated that he is posted as Additional SHO in P.S. Sadar Chamba since November 2013 and on 28.12.2013 at about 7 PM Smt. Usha came in police station along with her sister-in-law and minor prosecutrix. He has stated that Smt. Usha Devi made her statement regarding incident which was recorded in computer. He has stated that he recorded statement as per version given by Smt. Usha Devi. He has stated that thereafter he sent minor prosecutrix for her medical examination through lady C. Puja and also moved application Ext.PW6/A. He has stated that mother of minor prosecutrix and her aunt also accompanied minor prosecutrix to hospital and thereafter he along with ASI Ashok and two home guards visited the house of accused and interrogated the accused and arrested him at 8.15 PM vide memo Ext.PW6/B. He has stated that accused was also medically examined and he filed application for medical examination of accused Ext.PW6/C.

He has stated that on 29.12.2013 he visited the spot and prepared site plan Ext.PW6/D. He has stated that he also obtained photographs of spot Ext.PW6/A-1 to Ext.PW6/A-5 and thereafter he recorded statements of minor prosecutrix and her mother as per their versions. He has stated that he also recorded supplementary statement of Usha as per her version. He has stated that on 30.12.2013 statement of minor prosecutrix was recorded under Section 164 Cr.P.C. before learned Judicial Magistrate Chamba. He has stated that statement of minor prosecutrix recorded before learned Judicial Magistrate Chamba was also videographed and CD Ext.PW6/F was prepared. He has stated that he also obtained birth certificate of prosecutrix Ext.PW6/G. He has stated that on 5.3.2014 he received FSL report Ext.PW6/H and recorded statements of HC Neeraj and Abdesh Kumar as per their versions and after completion of investigation he prepared challan and presented in criminal Court. He has denied suggestion that he has recorded statement of Smt. Usha according to his own convenience and he has denied suggestion that he has also recorded statement of prosecutrix as per his own convenience. He has denied suggestion that he has prepared site plan as per his own convenience. He has denied suggestion that relations between the accused and complainant party are strained. He has denied suggestion that he has filed false criminal case in connivance with complainant.

9.7 PW7 Radhika has stated that she is housewife and she has two sons and one daughter. She has stated that her one son is residing with his aunt at Pathankot and one is studying in tenth class. She has stated that age of prosecutrix is 7 years and further stated that on 28.11.2013 her relative disclosed her that accused took prosecutrix in an old dilapidated building and thereafter he removed her trouser and committed sexual assault upon minor prosecutrix. She has stated that thereafter she went to the house of accused. She has stated that accused threw water on her and threatened her with dire consequences. She has further stated that she and her relative Smt. Usha took prosecutrix to police station and thereafter FIR was lodged. She has stated that her relative disclosed about incident to her at about 5/5.30 PM. She has denied suggestion that her relative did not disclose the incident to her and also denied suggestion that she did not visit police station along with her relative Usha and minor prosecutrix. She has denied suggestion that due to enmity she has deposed falsely.

9.8 PW8 Dr. Swati Mahajan has stated that she is posted as medical officer in RH Chamba from 1.2.2015 and on 28.12.2013 police moved an application Ext.PW6/C for medical examination of minor prosecutrix. She has stated that prosecutrix was brought by lady C. Puja with alleged history of sexual assault by someone. She has stated that minor prosecutrix was conscious cooperative well orientated to time place and person. She has stated that after medical examination she observed as under. (1) There were multiple small papules over trunk and neck. There was no mark of injury over breast. There was no evidence of external injury. (2) Menstrual history has not attained menarche yet. Per vaginal examination prosecutrix was not cooperative. Pubic hairs were not present. Labia Majora was not fully developed. Labia minor was not visible. Fourchette was narrow. Hymen was not ruptured. Fingers were not going inside the vagina. Bleeding was present on vagina which was red in colour. She has stated that undergarments of minor prosecutrix along with vaginal swabs were preserved and handed over to police. She has stated that she issued MLC Ext.PW8/A which is in her hands and bears her signature. She has stated that as per her final opinion there was nothing to suggest that sexual assault has not taken place. She has stated that if somebody inserts single finger or other hard object inside the vagina the injuries mentioned in MLC Ext.PW8/A are possible. She has stated that if somebody falls on sharp object the injuries mentioned in MLC are possible however such possibility is quite remote.

10. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that he is innocent and witnesses have deposed falsely. No defence evidence adduced by accused.

11. Prosecution produced following documentary evidence. (1) Ext.PW1/A copy of FIR. (2) Ext.PW5/A Extract of register No. 19. (3) Ext.PW5/B Copy of RC. (4) Ext.PW5/C CIPA certificate. (5) Ext.PW6/A Application to medical officer for medical examination of minor prosecutrix. (6) Ext.PW6/A-1 to Ext.PW6/A-5 photographs. (7) Ext.PW6/B Arrest memo of accused. (8) Ext.PW6/C Application for medical examination of accused. (9) Ext.PW6/D Site plan. (10) Ext.PW6/E Statement of minor prosecutrix under Section 164 Cr.P.C. (11) Ext.PW6/F CD. (12) Ext.PW6/G Birth certificate of minor prosecutrix. (13) Ext.PW6/H RFSL report. (14) Ext.PW8/A MLC of minor prosecutrix aged six years. (15) Ext.PA MLC of accused Aman aged 22 years.

12. Submission of learned Advocate appearing on behalf of the appellant that minor prosecutrix has made tutored version and reliance could not be placed on her testimony is rejected being devoid of any force for the reasons hereinafter mentioned. Age of minor prosecutrix in present case was six years at the time of incident. Learned Sessions Judge-cum-Special Judge Chamba has put questions to the minor prosecutrix in order to ascertain whether minor prosecutrix was matured to give her statement before the Court. Learned Sessions Judge-cum-Special Judge Chamba has observed during trial of case that minor prosecutrix was matured to give her statement. Minor prosecutrix has specifically stated before learned Sessions Judge-cum-Special Judge that person should always speak the truth. Minor prosecutrix has stated that it is sin to tell a lie. Thereafter minor prosecutrix has stated in positive manner that when she was playing near her residential house then appellant took her in a dilapidated old house and opened her salwar and thereafter opened his own trouser and thereafter placed his hand upon her private parts. Minor prosecutrix has specifically denied suggestion that she was tutored by her family members to give statement in Court. She has denied suggestion that she has sustained injuries due to fall on stony surface. Hence it is held that minor prosecutrix is not tutored witness and it is held that testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court. It is well settled law that Court should be sensitive while dealing with cases of sexual assault upon the minor prosecutrix.

13. Submission of learned Advocate appearing on behalf of appellant that no injury of any kind was found upon body of minor prosecutrix and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Appellant was convicted by learned Sessions Judge-cum-Special Judge Chamba (H.P.) under Section 8 of POCSO Act 2012. POCSO Act is a special Act. POCSO Act was enacted to provide protection to minor children from criminal offence of sexual assault, sexual harassment and pornography. Article 15 of Constitution of India inter alia confers the power upon the State to make special provisions for children. Article 39 of Constitution of India inter alia provides that State shall frame policy so that tender age of children should not be abused and their childhood and youth should be protected from exploitation and minor children should be given facilities to develop in healthy manner and in atmosphere of freedom and dignity. Sexual assalt is defined under Section 7 of POCSO Act 2012.

14. As per Section 7 of POCSO Act whoever with sexual intent touches the vagina of minor prosecutrix then offence under Section 7 of POCSO Act 2012 relating to sexual assault is made out. In present case minor prosecutrix PW2 has specifically stated in positive manner that accused caught her and took her to a dilapidated old house and thereafter opened her trouser and thereafter accused opened his own trouser and thereafter

accused placed his hand upon vagina of minor prosecutrix. It is held that even touching the vagina of minor prosecutrix with sexual intent is sexual assault under Section 7 of POCSO Act 2012. Sexual assault with sexual intent is proved on record beyond reasonable doubt as per testimony of minor prosecutrix which is trustworthy and reliable.

15. Submission of learned Advocate appearing on behalf of appellant that testimony of minor prosecutrix is not corroborated by any oral or documentary evidence and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. PW1 Usha has specifically stated that minor prosecutrix was lying near old government building and her body was bleeding. PW1 Usha has stated in positive manner that she lifted the minor prosecutrix. Thereafter immediately minor prosecutrix was produced before medical officer Dr.Swati Mahajan. Incident took place at 5.30 PM on 28.12.2013 and minor prosecutrix was medically examined by medical officer at 9.20 PM on same day. Minor prosecutrix at the time of medical examination was six years. PW8 Dr. Swati Mahajan has stated that bleeding was present in vagina of prosecutrix which was red in colour. Hence it is held that testimony of minor prosecutrix is also corroborated by medical officer PW8 Dr. Swati Mahajan. Testimony of PW8 Dr. Swati Mahajan is also trustworthy reliable and inspire confidence of Court.

16. Testimony of minor prosecutrix is further corroborated by report submitted by RFSL Dharamshala Ext.PW6/A wherein there is special recital in positive manner that blood was detected in vaginal swabs of minor prosecutrix aged six years. There is positive recital in report submitted by RFSL Dharamshala that human semen was detected on underwear of accused.

17. Submission of learned Advocate appearing on behalf of appellant that appellant was falsely implicated in present case due to enmity is rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not lead any defence evidence despite opportunity granted by learned Sessions Judge-cum-Special Judge Chamba. There is no evidence on record in order to prove that there were inimical relations between the minor prosecutrix and accused. There is no oral or documentary evidence placed on record in order to prove inimical relations between the accused and family members of minor prosecutrix. It is held that plea of appellant that he has been implicated due to inimical relations is defeated on the concept of *ipse dixit* (An assertion made by person without proof.)

18. Submission of learned Advocate appearing on behalf of appellant that police station was at a distance of 100-200 metres from place of incident and house of accused is situated at the distance of 10 metres from police station and road was very busy road and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Minor prosecutrix has specifically stated in positive manner that accused took the prosecutrix to an isolated place which was dilapidated building. Photographs Ext.PW6/A-1 to Ext.PW6/A-5 placed on record by prosecution proved in positive manner that place where appellant had committed sexual assault upon minor prosecutrix was isolated place.

19. Submission of learned Advocate appearing on behalf of the appellant that judgment of learned Sessions Judge-cum-Special Judge Chamba is based upon surmises and conjectures and learned Sessions Judge-cum-Special Judge Chamba did not properly appreciate oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. Testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court in present case. Testimony of minor prosecutrix is further corroborated by PW3 Vikram Singh who has videographed the

statement of minor prosecutrix recorded under Section 164 Cr.P.C. before Judicial Magistrate and is also corroborated by testimony of PW4 Abdesh Kumar who took the parcels in office of RFSL Dharamshala for chemical examination. Testimony of PW2 minor prosecutrix is also corroborated by testimony of PW5 who has stated that case property was deposited with him by ASI Harnam Singh and thereafter case property was deposited in office of RFSL Dharamshala (H.P.). Testimony of PW2 minor prosecutrix is corroborated by PW7 Radhika mother of minor prosecutrix and is also corroborated by PW6 ASI Harnam Singh. Testimony of minor prosecutrix is further corroborated by documentary evidence i.e. MLC of minor prosecutrix placed on record and MLC of accused placed on record. As per birth certificate Ext.PW6/G placed on record minor prosecutrix was born on 10.7.2007. It is proved on record that as per medical certificate Ext.PA placed on record accused was capable for performing sexual intercourse.

20. Submission of learned Advocate appearing on behalf of appellant that there are material contradictions and improvements in testimonies of prosecution witnesses produced by prosecution and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In present case incident took place on 28.12.2013 at about 5.30 PM in old dilapidated building of HPPWD in Tala Chamba town and evidence of prosecution witnesses were recorded on 12.5.2014, 17.6.2014, 18.6.2014, 30.7.2014 after gap of sufficient time. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu*** that even if there are some omissions contradictions and discrepancies then entire evidence would not be discarded. It was held that undue importance should not be given to omissions, contradictions and discrepancies which do not go to the root of the case. ***See AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh, See AIR 1985 SC 48 titled State of U.P. vs. M.K. Anthony, See AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, See AIR 2007 SC 2257 titled State of Rajasthan vs. Om Parkash, See (2009)11 SCC 588 titled Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, See (2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others, See AIR 1988 SC 696 titled Appabhai and another vs. State of Gujarat, See AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, See (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others, See (2012)10 SCC 433 Kuriya and another vs. State of Rajasthan.*** It was held in case reported in ***(1996)2 SCC 384, titled State of Punjab vs. Gurmit Singh and others*** that testimony of prosecutrix must be appreciated in the background of entire case and trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. .***(Also see (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused. Also see (2000)1 SCC 247 titled State vs. Lekh Raj and another. Also see (1992)3 SCC 204 titled Madan Gopal Kakkad versus Naval Dubey and another).***

21. It is well settled law that maxim *falsus in uno falsus in omnibus* is not applicable in criminal law. ***(See: AIR 1980 S.C.957 Bhe Ram Vs. State of Haryana, See AIR 1971 S.C. 2505 Rai Singh Vs. The State of Haryana. See AIR 2006 SC 321 titled Triloki Nath and others vs. State of U.P.)*** It was held in case reported in ***AIR 1973 SC 944 titled Jose vs. State of Kerala*** that conviction can be given on testimony of solitary witness in criminal case if testimony of witness inspires confidence of Court. It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

22. Even as per Section 30 of POCSO Act 2012 there is presumption of culpable mental state of accused and Special Court is under legal obligation to presume the existence of such mental state. Accused did not adduce any positive oral and documentary evidence on record in order to prove that he had no such mental state relating to sexual assault under POCSO Act 2012. It is well settled law that in sexual assault cases direct evidence is not available beyond evidence of victim. It is well settled law that testimony of victim in sexual assault cases is vital and unless there are compelling reasons which necessitate looking for corroboration of statement of prosecutrix Court should not find difficulty to act upon testimony of prosexutrix alone to convict accused person if testimony of victim of sexual assault inspires confidence and is reliable. Corroborative evidence is not imperative component in every sexual assault case. Corroboration is not *sine qua non* for conviction in sexaul assault case.

23. Submission of learned Advocate appearing on behalf of appellant that offence under Section 376 IPC is not proved in present case and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Learned Sessions Judge-cum-Special Judge Chamba has not convicted appellant under Section 376 ICP but learned Sessions Judge-cum-Special Judge Chamba has convicted the appellant under Section 8 of POCSO Act 2012. It is held that it is proved beyond reasonable doubt that appellant took minor prosecutrix aged six years towards an isolated place and thereafter removed her salwar and thereafter removed his own trouser and thereafter touched the vagina of minor prosecutrix with his fingers intentionally and voluntarily with intent to commit sexual assault with minor prosecutrix aged six years. Aged of accused at the time of sexual assault was twenty two years and accused was major at the time of commission of sexual assault upon minor prosecutrix.

24. Case law cited by learned Advocate appearing on behalf of appellant i.e. **(2014)5 SCC 389** titled **Radhey Shyam vs. State of Rajasthan**, **(2012)8 SCC 73** titled **K. Venkateshwarlu vs. State of Andhra Pradesh**, **(2013)11 SCC 150** titled **Hamza Humammedkutty alias Mani and others vs. State of Kerala**,**(2006)3 SCC 643** titled **Mullaperiyar Environmental Protection Forum vs. Union of India and others**, **(2009)5 SCC 740** titled **Rameshbhai Chandubhai Rathod vs.State of Gujarat** are not applicable in the facts and circumstances of present case. Facts of present case and facts of cases cited supra are different. In the cases cited supra by learned Advocate appearing on behalf of appellant case was not registered under POCSO Act 2012 but present case is registered under POCSO Act 2012 which is a special Act. In view of above stated facts and case law cited supra point No.1 is answered in negative against appellant.

Point No. 2 (Final Order)

25. In view of above stated facts and case law cited supra appeal filed by appellant is dismissed. Judgment and sentence passed by learned Sessions Judge-cum-Special Judge Chamba under POCSO Act 2012 is affirmed. It is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. It is held that no miscarriage of justice is caused to appellant. File of the Court of learned Sessions Judge-cum-Special Judge Chamba along with ceritified copy of this judgment be sent back forthwith. Appeal stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

****

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

Bajan Allianz General Insurance Company Limited and another ...Appellants.

Versus

Smt. Sumila Devi and others ...Respondents.

FAO No. 427 of 2009
Decided on: 16.10.2015

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that sole bread earner died in the road accident while driving the car belonging to 'R'- claimants were not required to prove that deceased was employed by 'R' as driver- they were only required to prove that deceased had lost his life in the motor vehicle accident which was duly proved- deceased was driving the vehicle and cannot be said to be a gratuitous passenger- therefore, insured was rightly held liable to pay compensation. (Para-11 to 14)

For the appellants: Mr. Aman Sood, Advocate.

For the respondents: Mr. B.S. Chauhan, Senior Advocate, with Mr. Vaibhav Tanwar, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 20.06.2009, made by the Motor Accident Claims Tribunal, Shimla(for short "the Tribunal") in M.A.C.C. No. 51-S/2 of 2008/07, titled as Smt. Sumila Devi and another versus Bajaj Allianz General Insurance Company and others, whereby compensation to the tune of Rs.3,69,500/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

Brief facts:

2. The claimants have filed claim petition for grant of compensation to the tune of Rs.4,51,500/-, as per the break-ups given in the claim petition. The claimants have averred in the claim petition that their sole bread earner, namely Shri Lokinder Singh, died in a road accident, while driving Maruti Car bearing registration No. HP-10-1329, on 30.03.2007, belonging to Shri Raja Ram, who too died in the said accident.

3. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 12.12.2007:

> "(i)Whether Sh. Lokinder Singh died in an accident involving the vehicle No. HP-10-1329 as alleged? OPP
>
> (ii) If issue No. 1 is proved in affirmative, whether the petitioners are entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties.
>
> (iii) Whether the petition is not maintainable in the present form? OPR

(iv) Whether the petitioners are estopped from filing the petition by their act and conduct? OPR

(v) Whether the vehicle was being plied in violation of the terms and conditions of the Insurance Policy. If so, its effect? OPR-1&2

(vi) Whether the driver was not holding and possessing a valid and effective driving licence to drive the offending vehicle as alleged. If so, its effect? OPR-1&2

(vii) Whether the deceased was a gratuitous passenger as alleged. If so, its effect? OPR-1&2

(viii) Relief."

7. The claimants have led evidence and one of the claimants, namely Smt. Sumila Devi, appeared in the witness box. The insurer has not led any evidence. However, Smt. Salochna, widow of the owner-insured appeared in the witness box.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved all the issues and held the claimants entitled to compensation in terms of the impugned award.

9. The claimants and the legal representative of the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

10. Learned counsel for the appellants argued and contested the impugned award on following points:

(i) That the claimants are the legal heirs/representatives of the owner-insured of the offending vehicle, thus, cannot maintain the claim petition;

(ii) That the claimants have not proved that the deceased was employed as a driver with the offending vehicle; and

(iii) That the deceased was travelling in the offending vehicle as a gratuitous passenger.

11. The arguments of the learned counsel for the appellants, though attractive, are devoid of any force for the following reasons:

12. It is admitted case that deceased-Shri Lokinder Singh was driving the offending vehicle at the relevant point of time, met with the accident, he and Raja Ram, owner of the offending vehicle, sustained injuries and succumbed to the injuries. No claim has been filed so far it relates to the death of Raja Ram. The claimants are the dependents of Lokinder Singh and are claiming compensation on the ground that he was driving the vehicle and met with the accident. Thus, the argument of the learned counsel for the appellants that the claim petition was not maintainable is not sustainable.

13. The claimants were not required to prove that Lokinder Singh was employed by Raja Ram as a driver with the offending vehicle. What they were required to prove, in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") read with the Himachal Pradesh Motor Vehicles rules, 1999 (for short "the Rules"), is that Lokender Singh has lost his life in the traffic accident, which they have proved.

14. There is ample evidence on the file to hold that the deceased was not travelling in the offending vehicle as a gratuitous passenger, but was driving the same.

15. The offending vehicle was insured with the appellants at the relevant point of time and the insurance policy was subsisting.

16. Having said so, the impugned award merits to be maintained and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

17. 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.

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

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

FAOs No. 38 & 200 of 2009
Reserved On : 09.10.2015
Date of decision: 16.10.2015

FAO No. 38 of 2009

Smt. Gian Vati & others ...Appellants.

Versus

Smt. Pushpa Devi & another ....Respondents.

FAO No. 200 of 2009

Oriental Insurance Company ...Appellant

Versus

Smt. Gian Vati & others ....Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that income of the deceased was not less than Rs. 50,000/- per month and that deceased was government contractor and horticulturist – Tribunal had assessed income of the deceased as Rs.12,000/- per month on the basis of documents placed before it but had wrongly deducted 1/3rd amount of the income towards personal expenses, whereas, 1/4th amount was to be deducted towards personal expenses- claimants have lost dependency of Rs.9,000/- per month- age of the deceased was 51 years – multiplier of '9' was applicable, thus, amount of Rs. 9,000 x 12 x 9= Rs.9,72,000/- was awarded under the head loss of dependency, Rs.10,000/ each awarded under the head loss of consortium, loss of estate, love and affection and funeral expenses, thus, total amount of Rs.10,12,000/- awarded with interest @ 7.5% per annum as compensation. (Para-15 to 19)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

FAO No. 38 of 2009

For the appellants : Mr. Rakesh Dhaulta, Advocate.

For the respondents: Mr. Anil Chauhan, Advocate, for respondent No. 1.

Mr. G.C. Gupta, Senior Advocate with Mr. Abhay Gupta, Advocate, for respondent No. 2.

FAO No. 200 of 2009

For the appellants : Mr. G.C. Gupta, Senior Advocate with Mr. Abhay Gupta, Advocate.

For the respondents: Mr. Rakesh Dhaulta, Advocate, for respondents No. 1 to 4.
Mr. Anil Chauhan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in these appeals is to the award, dated 12th November, 2008, passed by the Motor Accident Claims Tribunal, Shimla (hereinafter referred to as "the Tribunal") in MAC Petition No. 19-S/2 of 2007, whereby compensation to the tune of Rs.7,98,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and the insurer was saddled with liability (for short, "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants have questioned the impugned award by the medium of FAO No. 38 of 2009, on the ground of adequacy of compensation.

3. By the medium of FAO No. 200 of 2009, the insurer has challenged the impugned award on the ground that the owner has committed willful breach.

4. The owner-insured and driver have not questioned the impugned award on any count. Thus, it has attained finality so far as it relates to them.

5. The claimants have prayed for enhancement of compensation. The insurer has prayed that it be exonerated and the owner be saddled with liability. It has also pleaded in its appeal that the award amount is excessive.

6. In order to determine the issues, it is necessary to give a brief summary of the case, the womb of which has given birth to the instant appeal.

7. The claimants have pleaded in the claim petition that on 25.09.2006, deceased Mohi Ram Jodhta was traveling in the vehicle-Truck bearing registration No. HP-62-0945 alongwith potatoes. The said truck met with an accident at 12.30 p.m. near Nihari-Barvi, Tehsil Kotkhai, District Shimla, which was being driven by driver, namely, Het Ram, rashly and negligently, caused injuries to Mohi Ram Jodhta, who succumbed to the said injuries. It is also averred in the claim petition that the income of the deceased was not less than Rs.50,000/- per month, being a Government contractor and horticulturist. The owner has admitted Para No. 24 of the claim petition. Thus, it is an admitted fact that the deceased was traveling in the offending truck as owner of potatoes.

8. The respondents contested the claim the petition on the grounds taken in their replies.

9. Following issues came to be framed by the Tribunal:

"i) Whether the death of Mohi Ram Jodhta was caused in the accident in question due to the rash and negligent driving of truck No. HP-62-0945 by its driver, as alleged? ..OPP

ii) Whether the petitioners are entitled to compensation, if so, to what amount and from which of the respondents?....OPP

iii) Whether the petition is not competent and maintainable, as alleged? ..OPP

iv) Whether the deceased was traveling in the vehicle in question, as a gratuitous passenger, if so, its effect?....OPR-2

v) Whether the vehicle in question was being driven at the time of accident in violation of terms and conditions of the Insurance Policy? OPR-2

vi) Relief."

10. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver Het Ram has driven the offending vehicle, rashly and negligently, on 25.09.2006, at about 12.30 p.m., near Nihari-Barvi, Tehsil Kotkhai, District Shimla, caused the accident, as a result of which, deceased Mohi Ram Jodhta sustained injuries and succumbed to the same.

Issue No. 1.

11. The claimants have proved issue No. 1. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

Issue No. 2.

12. The claimants have specifically averred in the claim petition that they are entitled to Rs.20,00,000/-, as per the break-ups given in the claim petition. They have placed on record revenue documents Ext. PW-1/A to Ext. PW-1/D and copy of letter dated 6th June, 2005, Ext. PW. 1/E, indicating that the officials of the Forest Corporation had awarded contracts to deceased Mohi Ram Jodhta. The claimants were dependants upon deceased, who was earning Rs.4.00 to Rs.5.00 lacs per annum, by working as a contractor and Rs.2.00 to Rs.2.5 lacs per annum from orchard.

13. The Tribunal after scanning the evidence held that deceased was earning Rs.12,000/- per month. It has discussed in para-18 of the impugned award the statement of Sardar Singh (PW-5), Clerk in the Himachal Pradesh Forest Corporation and has given details about the income of the deceased.

14. In para-19 of the impugned award, the Tribunal has discussed that the income of the deceased during the years 2003-2004 was Rs.1,67,820/- from orchard and Rs.30,000/- from agricultural vocation. It is apt to reproduce paras 18 & 19 of the impugned award herein:

> '18. PW-5 Sardar Singh, Clerk of H.P. Forest Corporation has testified that Mohi Ram was working as a Contractor. He has proved in evidence letter of Award, Ex. PW-1/E, issued on 6.6.2005. He has further testified that during the years, 2000-2005 about 10 works were allotted in favour of Mohi Ram of the cost of different amounts. He has approved in evidence tax deduction certificate, Ex. PW-1/A, according to which tax of Rs. 17,089/- and an amount of Rs.3,832/- during the years, 2005-6 was deducted as tax at source. He has further testified that an amount of Rs. 39,363/- during the years, 2001-02, Rs. 5,265/- during the years, 2002-03 and an amount of Rs. 41,725/- in the same years had been deducted as tax at source which fact could not be disputed by way of cross-examination.
>
> 19. PW-8, sh. Minti, Sr. Tax Assistant has testified that during the years, 2003/04, the income of Mohi Ram was assessed at Rs.

1,67,820/- and Rs. 30,000/- from agricultural upon which tax of Rs. 19,925/- was paid. He has proved in evidence the intimation slip, Ex. PW-8/A, and further testified that during the years, 2004-05, agricultural income of deceased was Rs. 1,50,000/- per annum. The intimation slip of which has been proved as Ex. PW-8/B.

15. It appears that the Tribunal has correctly assessed the income of the deceased to the tune of Rs.12,000/- per month, but has fallen in an error in deducting 1/3rd of his income towards the personal expenses of the deceased. 1/4th was to be deducted towards his personal expenses, keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.9,000/- per month.

16. The Tribunal has also fallen in an error in applying the multiplier of '8'. The age of deceased at the time of accident was 51 years. The multiplier of '9' is applicable in view of the 2nd Schedule appended to the Motor Vehicles Act, 1988 read with the ratio laid down by the Apex Court in **Sarla Verma's** case, supra.

17. Accordingly, it is held that the claimants are entitled to Rs.9,000/- x 12 = Rs.1,08,000 x 9 =Rs.9,72,000/-, under the head ' loss of dependency'.

18. The Tribunal has awarded Rs.30,000/- under the head 'conventional charges', which is too meager. The claimants are held entitled to Rs.10,000/- under the head 'loss of consortium' , Rs.10,000/- under the head 'loss of estate', Rs.10,000/- under the head 'loss of love and affection' and Rs.10,000/- under the head 'funeral expenses'.

19. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs.9,72,000/- + 10,000/- + 10,000/- + 10,000/- +10,000/-, total amounting to Rs.10,12,000/- with 7.5% interest per annum form the date of filing of the claim petition.

Issue No. 3.

20. The insurer has not led any evidence to prove this issue. Even otherwise, learned Counsel for the insurer was not able to show how the claim petition was not maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4.

21. It was for the insurer to plead and prove that the deceased was traveling in the offending vehicle as a gratuitous passenger, has not led any evidence. Thus, it has failed to discharge the onus.

22. The claimants have specifically averred in para 24 of the claim petition that the deceased was traveling in the offending vehicle as owner of potatoes. At the cost of repetition, the owner and driver have admitted the said fact. Thus, the findings returned by the Tribunal on Issue No. 4 are upheld.

Issue No. 5.

23. It was also for the insurer to plead and prove that the owner has committed any willful breach, has not led any evidence. However, the documents, i.e. Ext. RW-1/A, Driving Licence and Ext. RW-1/B Insurance Policy, prove that the driver was having a valid

and effective driving licence at the relevant time. Thus, the insurer has failed to prove this issue. Accordingly, the findings returned by the Tribunal on issue No. 5 are upheld.

24. Learned Counsel for the insurer argued that there was collusion between the truck owner, driver and claimants. It was for the insurer to plead and prove the same, has not led any evidence to prove the said fact.

25. The insurer is directed to deposit the enhanced amount within six weeks from today before the Registry. The Registry is directed to release the amount already deposited and the enhanced amount on deposition, in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award. through payees' account cheque.

26 Having said so, **FAO No. 200 of 2009** filed by the insurer is dismissed.

27. The amount of compensation is enhanced, as indicated above. Accordingly, the impugned award is modified and **FAO No. 38 of 2009**, filed by the claimants is allowed.

28. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Girja Nand ...Petitioner

Vs.

Sumeer Kashypa & ors ...Respondents.

CMPMO No.311 of 2015
Decided on: 16.10.2015

Motor Vehicles Act, 1988 - Section 169- Matter was listed for evidence of the petitioner on 2.5.2015- no witness was present and the petitioner was asked to produce the evidence on self responsibility - two witnesses were present on 20.7.2015- Tribunal declined to grant adjournment and closed the evidence of the petitioner- held, that Tribunal should have rendered all assistance for summoning the witnesses- Tribunal had not recorded any finding that petitioner had deliberately delayed the outcome of the claim petition- hence, order passed by Tribunal set aside and Tribunal directed to afford one opportunity to the petitioner and to provide all assistance for summoning the witnesses.

For the Petitioner : Mr. Dhruv Shaunak, Advocate
For the Respondents : Mr. Jeevesh 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:

Tarlok Singh Chauhan, Judge:

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahar, H.P. on 20.7.2015, whereby evidence of the petitioner came to be closed.

2. Issues in this case were framed on 6.1.2015 and thereafter the matter was ordered to be listed for the evidence of the petitioner on 2.5.2015. On 2.5.2015, no witnesses were present and on that very day, petitioner was directed to produce his evidence on self responsibility on 5.6.2015. ON 4.6.2015, no witness was present and the matter was adjourned to 20.7.2015 for recording the statements of PWs to be produced on self responsibility. On 20.7.2015, two witnesses were present and examined, but since the other witness sought to be examined by the petitioner were not present, therefore, the learned Tribunal declined to grant any further opportunities on the ground that it was the last opportunity.

3. It is against this order that the present petition has been preferred on the ground that the order passed by the learned court below is harsh and oppressive and that there was no deliberate or intentional default on the part of the petitioner in not examining the witnesses.

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

4. At the very outset, it may be mentioned that this Court has never appreciated or even accepted the orders of the Courts/Tribunals in refusing to render assistance to the parties in summoning witnesses. I fail to understand as to how the learned Tribunal could have directed the petitioner on the second date itself to produce the entire evidence on self responsibility instead of rendering all assistance in summoning of the witnesses, which in terms of order 16 of the Code of Civil Procedure is a right conferred upon a party.

5. This Court in ***Vidya Devi & Ors. Vs. Urgan Toshi & Ors, CMPMO No. 211 of 2014,*** decided on 3.7.2015, had the occasion to deal with a similar issue and it was held:-

> *"6. This Court on more than one occasion has held that Order 16 of the Code of Civil Procedure casts an obligation on the Court to render all assistance in summoning of witnesses and as a general rule the parties are entitled for examination of witnesses, though in certain cases time frame may be exception. This Court has further held that merely because of the cases are old and targeted one, the same cannot be a ground for the Courts and Tribunals to proceed rashly with such cases.*
>
> *7. In* ***FAO No. 285 of 2014****, titled* ***National Insurance Company Ltd.*** *versus* ***Smt. Jhanpli Devi****, decided on 21.05.2015, this Court held:-*
>
> > *"8. Can the Courts, Tribunals and Authorities proceed rashly with the cases only because these are old and targeted ones? Is the Court rendering any favour while granting assistance to the parties by issuing process to the witnesses summoned? These are certain questions which are required to be considered in these appeals.*
> >
> > *9. Of late, there appears to be a rising trend in the Subordinate Courts where they are totally oblivious of their duties to render not only justice but do complete justice to the parties. This is particularly so when the cases are relatively old and targeted ones.*
> >
> > *10. Firstly, I see no reason why the Commissioner should have imposed cost while allowing the aforesaid application*

preferred by the Insurance Company more particularly, when the appellant/ insurance company was not at fault, because admittedly it was the claimants who for the first time had confronted RW-2 in his cross-examination with driving licence Ex.R-1X and immediately thereafter the Insurance Company had moved the application for permission to lead additional evidence.

11. Secondly, it is not understandable as to why the Court refused to render any assistance for summoning the witnesses through Court process and directed the Insurance Company to produce the witnesses from the office of District Transport Officer, Senapati District Manipur on self responsibility. It needs to be re-emphasized and re-stated that the Courts do no favour to any party by summoning witnesses through its process. The same is rather a right granted under the law to the parties in lis.

12. Order 16 of the Code of Civil Procedure casts an obligation on the Court to render all assistance to summoning of the witnesses. As a general rule, the parties are entitled as of right to obtain summons to witnesses, though in certain cases the time frame may be an exception."

6. That apart, it would be noticed that even on the date when the petitioner's evidence came to be closed, statements of two witnesses had already been recorded. It was only third opportunity which had been granted to the petitioner and there is no finding recorded even by the learned Tribunal that the petitioner was deliberately delaying the outcome of the claim petition. The learned Tribunal appears to be oblivious of the fact that it was dealing with the claim petition and there would be hardly any reason why the petitioner would like to delay the outcome thereof.

7. In view of the aforesaid discussion, the order passed by the learned Motor Accident Claims Tribunal cannot be sustained and it liable to be quashed and set aside. Accordingly, the present petition is allowed and the order dated 20.7.2015 passed by the learned Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. is set aside. The parties through their counsel are directed to appear before learned Tribunal on 23.11.2015 on which date, the court shall fix the date for recording entire evidence of the petitioner and shall further provide all necessary assistance for summoning the witnesses. It is made clear that no further opportunity, under any circumstance, shall be provided to the petitioner for this purpose.

8. Even though the order passed by the learned Tribunal is not sustainable in the eyes of law, nonetheless insofar as the respondents No. 1 and 2 are concerned, they have been dragged to unnecessary litigation, accordingly writ petition is though allowed in the aforesaid terms, but the same would, however, be subject to cost of Rs.2000/- i.e. Rs.1000/- each to respondents No. 1 and 2 to be paid by the petitioner.

9. With these observations, petition is disposed of, so also the pending application(s), if any.

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

FAO No.285 of 2009 and
FAO No.286 of 2009
Reserved on : 09.10.2015
Pronounced on : 16.10.2015

1.	**FAO No.285 of 2009**	
	Ketal Singh	.....Appellant
	Versus	
	Narinder Kumar and others	..... Respondents
2.	**FAO No.286 of 2009**	
	Ketal Singh	.....Appellant
	Versus	
	Bhag Devi & others	..... Respondents

Motor Vehicles Act, 1988- Section 149- Insured challenged the awards, wherein, insured was given right to recovery by the Tribunal holding that offending vehicle was being driven without any route permit of the area where accident had occurred- held, that insurer has failed to prove that cause of accident was the geographical condition prevailing in the area where vehicle was being plied at the time of accident without any route permit- further held, that insurer has even failed to prove that it was one of the conditions contained in the insurance agreement that vehicle could not be plied in the area other than the one mentioned in the route permit- insurer has failed to prove any breach on the part of the owner – held that insurer is liable to satisfy the awards. (Para-10 to 14 and 20)

Cases referred:
Oriental Insurance Company Ltd., Palampur vs. Bishan Dass and others, AIR 1988 HP 26
National Insurance Company vs. T. Elumalai and another, AIR 1990 Madras 71
National Insurance Co. Ltd. vs. Challa Bharathamma & Ors., III (2004) ACC 292 (SC)

For the appellant(s):	Mr.Arun Kumar, Advocate, vice Mr.Peeyush Verma, Advocate.
For the respondents:	Ms.Soma Thakur, Advocate, vice Ms.Devyani Sharma, Advocate, in FAO No.286 of 2009. Mr.Ratish Sharma, Advocate, for respondent No.7, in FAO No.286 of 2009. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are the outcome of a motor vehicle accident, which was caused by driver, namely, Kuldeep Singh while driving the truck bearing registration No.HR-37A-5735, rashly and negligently. Therefore, both the appeals are taken up together for final disposal.

2. Claimants in MAC Petition No.34/03 RBT 7/05/03 are the legal representatives of deceased Gurmail Singh, who filed the Claim Petition claiming compensation to the tune of Rs.9.00 lacs, as per the break-ups given in the Claim Petition The injured Narinder Kumar also filed the Claim Petition, which was registered as MAC

Petition No.35/03 RBT 6/05/03, titled Narinder Kumar vs. Kuldeep Singh and others, claiming compensation to the tune of Rs.4.00 lacs, as per the break-ups given in the Claim Petition.

3. Precisely, the facts of the case are that on 21st November, 2002, deceased Gurmail Singh alias Mela Ram, alongwtih one pillion rider, namely, Narinder Kumar, was going on his motorcycle bearing registration No.HP-19A-1576, and when they reached at Amb at about 10.30 p.m., a truck bearing registration No. HR-37A-5735 was parked in the middle of road, without any indicator as per the requirement and mandate of the Motor Vehicles Act and Rules. The said Gurmail Singh applied the brakes, but, despite taking all precautions, the motorcycle struck with the truck resulting into injuries to Gurmail Singh, who lateron succumbed to the same. The pillion rider Narinder Kumar also suffered injuries in the said accident.

4. The claim petitions were resisted by the respondents by filing replies. The Tribunal, after examining the pleadings of the parties, framed similar issues and the issues framed in Claim Petition No.34/03 RBT 7/05/03, (subject matter of FAO No.286 of 2009), are reproduced below:

> *"1. Whether deceased Gurmail Singh had died because of negligence on the part of the respondent No.1 being driver of truck No. HR-37A-5735, as alleged? OPP*
>
> *2. If issue No.1 is proved in the affirmative whether the petitioner is entitled to compensation. If so, how much and from whom? OPP*
>
> *3. Whether the petition is not maintainable as alleged? OPR*
>
> *4. Whether the petition is bad for non-joinder and mis-joinder of parties, as alleged? OPR.*
>
> *5. Whether accident in question took place because of rash and negligent driving of motor-cycle No.HP-19A-1576 by deceased Gurmail Singh himself as alleged, if so, its effect? OPR*
>
> *6. Whether driver of truck No.HR-37-5735 was not holding any valid and effective driving licence at the time of accident in question, if so, its effect? OPR*
>
> *7. Whether the petition is vague, baseless and does not disclose any cause of action against respondent No.3, as alleged. If so, its effect? OPR 3 & 4*
>
> *8. Whether the deceased Gurmail Singh was driving the vehicle in question at the time of accident in question without any valid and effective driving licence. If so, its effect? OPR 4*
>
> *9. Whether the vehicle NO.HP-19A-1576 was being driven in violation of the terms and conditions of the insurance policy at the relvant time. If so, its effect? OPR.4*
>
> *9A. Whether the truck NO.HR-37A-5735 was being plied without any valid and effective route permit and fitness certificate at the relevant time, if so its effect? OPR.3.*
>
> *10. Relief."*

5. Parties led their evidence. The Tribunal, after examining the pleadings and evidence, allowed both the Claim Petitions, vide two separate awards, dated 16th February, 2009. In the Claim Petition filed by the legal representatives of deceased Gurmail Singh, the Tribunal awarded a sum of Rs.2,10,000/-, with interest at the rate of 7.5% per annum, from the date of filing of the claim petition till the payment, (subject matter of FAO No.286 of 2009). In the Claim Petition filed by the injured Narinider Kumar, the Tribunal awarded a sum of Rs.12,500/-, with interest at the rate of 7.5% per annum, from the date of filing the

claim petition till deposit, (subject matter of FAO No.285 of 2009). The insurer was saddled with the liability at the first instance, with right of recovery from the owner.

6. Feeling aggrieved, the owner has filed the instant appeals.

7. It is apt to record herein that the claimants, the insurers and the driver Kuldeep Singh have not questioned the impugned awards on any count, thus, the same have attained finality so far as these relate to them.

8. The owner/insured Ketal Singh has questioned the impugned award on the ground that the Tribunal has fallen in error in holding that the insured has committed willful breach, since the insurer has not proved on record the said factum.

9. Thus, the only question to be determined in these appeals is – Whether the Tribunal has rightly granted the right of recovery to the insurer. The answer is in the negative for the following reasons.

10. The driver of the offending truck, namely, Kuldeep Singh, has stepped into the witness box as RW-2 and the insurer has also examined one Kulwant Kumar (RW-1) to prove the driving licence of the driver. The insurer has not led any other evidence to prove that the owner had committed any willful breach or there was negligence on his part. In order to hold that the owner/insured had committed willful breach, the insurer has to lead evidence and prove issue No.9-A, has not led any evidence. Thus, it cannot lie in the mouth of the insurer that the owner had committed willful breach, since the insurer has failed to discharge the onus cast upon it.

11. The Tribunal, while discussing issue No.9-A, has held that the offending vehicle was being driven without any route permit, which fact weighed with the Tribunal in holding that the owner had committed willful breach of the terms and conditions of the insurance policy. Copies of the Insurance policy and the registration certificate have been placed on record as Ext.RY and RW-2/A, respectively, which do disclose that the vehicle was duly registered and insured with the insurer. However, copy of the route permit has not been proved on the record.

12. In view of the above, the question is – Whether the vehicle being driven in the area, the mention of which has not been made in the route permit, can be termed as a ground to exonerate the insurer from its liability.

13. The insurer has failed to prove that the cause of accident was the geographical conditions prevailing in the area where the vehicle was being plied at the time of accident without any route permit. On the other hand, the evidence does disclose that the offending truck was parked in the middle of the road. Thus, the accident was the outcome of sheer negligence on the part of the truck driver. Therefore, by no stretch of imagination, it can be held that the owner has committed willful breach.

14. Even otherwise, the insurer has failed to prove that it was one of the conditions contained in the insurance agreement that the vehicle could not be plied in the areas other than mentioned in the route permit or that the insurer would not be liable in case any accident occurred other than the areas mentioned in the route permit.

15. Similar question arose before this Court in case titled **Oriental Insurance Company Ltd., Palampur vs. Bishan Dass and others, AIR 1988 HP 26,** wherein it was held that breach of route permit is not a breach of the mandate of Section 96 (old), pari materia to Section 149 (new), of the Act. It is apt to reproduce paragraph 2 of the said judgment hereunder:

"2. In the present case, the use of insured vehicle in question on a route for which there was no permit does not attract Cl.(c) of sub-sec.(2) of S. 96 of the Act which has been pressed into service to deny the statutory liability. At the highest, it is a case of breach of the condition of the permit which is not the same thing as breach of the purpose for which it was issued. The decision of Bombay High Court in Raghunath Eknath Hivale v. Shardabai Karbhari Kale, 1986 Acc CJ : (AIR 1986 Bom 386) and those of some of the other High Courts which are referred to in para 10 of the said decision lend support to the above view. Even if such use amounts to the breach of statutory rules then also the defences allowed by sub-sec.(2) are not attracted. The decision of the Gujarat High Court in Bomanji Rustomji Ginwala v. Ibrahim Vali Master, AIR 1982 Guj 112, supports this view. The contrary view expressed in New India Assurance Co. Ltd. v. Samundari Roadways Co. (P) Ltd., 1985 Acc CJ 239 (Punj & Har.) is, with respect, not correct."

16. The Madras High Court in **National Insurance Company vs. T. Elumalai and another, AIR 1990 Madras 71,** has also taken a similar view. It is apt to reproduce paragraph 17 of the said decision hereunder:

"17. It is, therefore, clear that an insurer is not entitled to take a defence, which is not specified in S. 96(2) of the Act. These provisions have to be construed strictly. As stated earlier, it is not the breach of any conditions of the policy of insurance, that would provide the insurer a defence under S. 96(2) of the Act. The policy of insurance may permit the insurer to avoid its liability under various circumstances. However, as against the liability of the insurer to third parties, the terms of the policy of insurance are subject to the provisions of S. 96(2) of the Act. If there is a breach of the contract on the part of the insured the insurer could proceed against the insured, but as far as the third party risks are concerned, the liability having been created by the statute, cannot be over-ridden by the terms of the contract of insurance between the parties. S. 96(2) of the Act, does not include violation of the terms of the permit relating to plying in certain geographical area. Hence, the plea that the auto-rickshaw was found plying in the city of Madras contrary to its permit, even if established factually, cannot be a ground since the same does not fall within the ambit of S. 96(2) of the Act. It is not, therefore, open to the appellant to plead that the auto-rickshaw was found plying in the City of Madras, in contravention of a condition in its permit restricting the geographical area wherein the vehicle could be plied."

17. This Court, in an analogous case, in **FAO No.362 of 2012, titled ICICI Lombard General Insurance Company vs. Sumitra Devi and Ors.**, decided on **25th July, 2014**, has held in paragraph 10 as under:

"10. According to the learned counsel for the appellant-insurer, the question is legal one and without leading any evidence, the insurer can raise these issues. This argument is devoid of any force for the reason that it was for the insurer to have proved, by leading cogent evidence, that the owner had committed willful breach. But there is no iota of evidence on the file which would show that the owner was in breach. Thus, the argument cannot be pressed into service. The insurer has also to plead and prove that the cause of accident is the peculiar geographical condition prevailing in the State of Himachal Pradesh, where, as submitted by the learned counsel for the appellant-insurer, the vehicle was being plied, at the time of accident, without any route permit. However, there is no evidence to that effect. Accordingly, this argument of the learned counsel for the appellant deserves outright rejection."

18. Applying the tests, as discussed hereinabove, the insurer has not led any evidence and has failed to prove that the violation of the route permit, if any, is the violation

of the terms and conditions contained in the insurance policy. Thus, it cannot be held to be a ground available to the insurer to seek exoneration.

19. Learned counsel for the appellant relied upon the judgment of the Apex Court in **National Insurance Co. Ltd. vs. Challa Bharathamma & Ors., III (2004) ACC 292 (SC),** wherein, the question involved in the present lis, was not discussed by the Apex Court and, therefore, is not applicable to the facts of the present case and is distinguishable.

20. Having said so, both the appeals are allowed, the impugned awards are modified by providing that the insurer has failed to prove any breach on the part of the owner and accordingly, the insurer is saddled with the liability to satisfy the impugned awards. The insurer is directed to deposit the amount, alongwith interest as awarded by the Tribunal, within a period of six weeks from today in the Registry and on deposit, the Registry is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned awards. In case the owner has deposited any statutory amount, the same shall be refunded to him, alongwith interest, forthwith.

21. Both the appeals stand disposed of accordingly.

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

Kishan Singh (dead) through Jasvinder Singh and others ...Appellants.

Versus

Rasheed Khan and others ...Respondents.

FAO No. 239 of 2009
Decided on: 16.10.2015

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimant had not proved the rashness and negligence of the driver – held, that it was duly proved on record that driver was driving the vehicle in a rash and negligent manner- he had not taken any precaution - he had not kept in mind the fact that somebody would have been crossing the road or somebody may abruptly appear in front of the vehicle and had not taken due care while applying brakes abruptly- claimant had sustained 30% permanent disability – his monthly income was Rs. 8,319/- as per salary certificate- amount of Rs. 50,000/- each awarded towards pain and suffering and loss of income and Rs. 20,000/- awarded under the head treatment charges. (Para-12 to 16)

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Nemo for respondents No. 1 and 2.
Mr. Deepak Bhasin, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the judgment and award, dated 05.03.2009, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short

"the Tribunal") in MAC Petition No. 47-MAC/2 of 2007, titled as Kishan Singh versus Rasheed Khan and others, whereby the claim petition filed by the claimant came to be dismissed (for short "the impugned award").

Brief facts:

2. Claimant-Kishan Singh was driving the scooter, bearing registration No. HP-27-3493, on 01.03.2006, with all precautions on his own side, i.e. left side of the road. A pick-up van, bearing registration No. HP-18 B-0314, which was being driven by the driver, namely Shri Soma, rashly and negligently, near Village Johron, Tehsil Paonta Sahib, a boy suddenly appeared in front of the said pick-up van, the driver abruptly applied the brakes without taking the precautions, which were supposed to be taken in terms of the mandate of the Motor Vehicles Act, 1988 (for short "the MV Act") read with the H.P. Motor Vehicles Rules, 1999 (for short "the Rules"). In the process, the scooter collided with the Pick-up van. The claimant-Kishan Singh sustained injuries, was taken to Civil Hospital, Paonta Sahib, suffered permanent disability to the extent of 30% and had spent a sum of Rs.75,000/-. He has claimed compensation to the tune of Rs.5,00,000/-, as per the break-ups given in the claim petition.

3. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 01.01.2008:

> "1. Whether the petitioner Kishan Singh sustained injuries to his person in the accident caused by respondent No. 2 while driving his Pick-up Van No. HP-18 B-0314 in a rash and negligent manner by hitting the scooter of the petitioner on dated 01.03.2006 at 5.345 PM at place village Johron under Police Station Paonta Sahib, as alleged? OPP
>
> 2. If issue No.1 is proved in affirmative, whether the petitioner is entitled to receive compensation, if so, to what amount and from whom? OPP
>
> 3. Whether the petition is not maintainable in the present form, as alleged? OPR-3
>
> 4. Whether the petition has been filed in collusion with respondents No. 1 and 2, as alleged? OPR-3
>
> 5. Relief."

5. The claimant has led evidence. The owner-insured and the insurer have not led any evidence, however, the driver himself appeared in the witness box. Thus, the evidence led by the claimant has remained unrebutted.

6. The driver has deposed in his cross-examination that he applied the brakes abruptly because a child came in front of the vehicle suddenly.

Issues No. 1 and 4:

7. Both these issues are interlinked, thus, are being determined together.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has not proved the factum of rash and negligent driving on the part of the driver-Soma, which is factually incorrect for the reason that there is evidence on the file that he was driving the vehicle rashly and negligently, has not taken any precaution while keeping in mind the fact that somebody would have been crossing the road or somebody

may abruptly appear in front of the vehicle and has also not taken due care while applying brakes abruptly.

9. Thus, the pleadings and evidence are sufficient to hold that the driver, namely Shri Soma, had driven the offending vehicle, i.e. Pick-up Van, bearing registration No. HP-18 B-0314, rashly and negligently on 01.03.2006 and caused the accident. Accordingly, the findings returned by the Tribunal on issues No. 1 and 4 are set aside and it is held that the claimant has proved that the driver-Soma had driven the offending vehicle rashly and negligently at the relevant point of time and caused the accident, in which the claimant sustained injuries.

10. Before dealing with issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

11. The insurer has not led any evidence to prove this issue, thus, has failed to discharge the onus. Accordingly, the same is decided against the insurer and in favour of the claimant.

Issue No. 2:

12. There is evidence on the file that the claimant has sustained injuries in the accident and was under treatment for a considerable period. It is evident from the disability certificate, Ext. PW-3/A, that the claimant has suffered permanent disability to the extent of 30%. The monthly income of the claimant was Rs.8319/- in terms of the salary certificate, Ext. PW-1/A. The documents on the file do disclose that the claimant has spent a huge amount on his treatment in various hospitals.

13. It appears that the claimant has not been paid any compensation under 'No Fault Liability'.

14. The question is - what is the appropriate amount to be awarded to the claimant?

15. Keeping in view the extent of the permanent disability suffered by the claimant read with the fact that he had undergone pain and sufferings, I deem it proper to exercise guess work and award Rs.50,000/- under the head 'pain and sufferings', Rs.50,000/- under the head 'loss of income' and Rs.20,000/- under the head 'treatment charges'.

16. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.1,20,000/- (Rs.50,000/- + Rs.50,000/- + Rs.20,000/-) with interest @ 6% per annum from the date of filing of the claim petition till its realization.

17. The factum of insurance of the offending vehicle, i.e. Pick-up van, bearing registration No. HP-18B-0314, is not in dispute. Thus, the insurer of the said vehicle is saddled with liability.

18. It is worthwhile to record herein that during the pendency of the appeal, the claimant has died and his legal representatives have been brought on record.

19. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition of the amount, 50% of the same be released in favour of appellant No. 1(e) and rest 50% be released in favour of the remaining appellants in equal shares after proper identification.

20. Having glance of the above discussions, the impugned award is set aside and the appeal is allowed, as indicated hereinabove.

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

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

Smt. Laxmi Thakur & another ...Appellant
Versus
Smt. Parvati Devi & others ..Respondents

FAO No. 398 of 2009
Decided on : 16.10.2015

Motor Vehicles Act, 1988- Section 140- Tribunal had dismissed the application under Section 140 of Motor Vehicles Act- held, that while deciding the application under Section 140 the principle of no fault liability has to be kept into consideration- order set aside and the case remanded to the Tribunal to decide the application afresh. (Para-2 to 4)

For the appellant: Mr. B.C. Verma, Advocate.
For the respondents: Nemo for respondents No. 1(a) 1(b) & 2.
Mr. Ritesh Sharma, Advocate, for respondent no. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award, dated 5th June, 2009, passed by the Motor Accident Claims Tribunal, (Fast Track Court) Shimla, H.P. (for short, 'the Tribunal'), in M.A.C. Petition No. 51-S/2 of 2008, titled Smt. Laxmi Thakur & another versus Shri Sharma Nand Chauhan & others, whereby the application under Section 140 of the Motor Vehicles Act, 1988, hereinafter referred to as 'the Act', along the main petition came to be dismissed (for short, the 'impugned award').

2. It appears that the Tribunal has wrongly and illegally dismissed the application under Section 140 of the Act alongwith the main petition. The application under Section 140 of the Act was to be considered keeping in view the principle of 'No Fault Liability'.

3. Having said so, the impugned award is set aside. The main petition alongwith application under Section 140 of the Act is revived.

4. The respondents are at liberty to file replies, if not already filed. Thereafter, the Tribunal to decide the claim petition after hearing the parties.

5. Parties are directed to appear before the Tribunal on **09.11.2015.**

6. The appeal is disposed of accordingly.

7. Registry to send the record of the case alongwith a copy of this judgment forthwith.

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

FAO (MVA) No. 459 of 2011 a/w FAO No. 460 of 2011, FAO No. 462 of 2011 and FAO No. 433 of 2011.
Judgment reserved on 9th October, 2015.
Date of decision: 16th October, 2015.

FAO No. 459 of 2011.	
Master Arsh	.....Appellant.
Versus	
The HRTC and another	...Respondents
FAO No. 460 of 2011.	
Master Arsh	.....Appellant.
Versus	
The HRTC and another	...Respondents
FAO No. 462 of 2011.	
Rajesh Dipta	.....Appellant.
Versus	
The HRTC and another	...Respondents
FAO No. 433 of 2011.	
HRTC	.....Appellant.
Versus	
Rajesh Dipta	...Respondent.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries on his left, arm which was crushed- Medical Officer proved that claimant had sustained 40% permanent disability – he has placed on record medical bills to the extent of Rs.18,000/-- he will have to undergo treatment for the injuries sustained in the accident in future as well - Rs.50,000/- awarded towards future medical treatment and Rs.18,000/- awarded towards actual medical expenses, Rs.20,000/- awarded for conveyance charges, Rs.30,000/- awarded towards attendant charges- minimum income of the claimant can be taken as Rs.6,000/- per month by guess work and considering the disability of 40%, loss of income will be at least Rs.2,400/- per month- age of the claimant is 6 years and multiplier of '13' is applicable, thus, amount of Rs. 2400x12x13= Rs. 3,74,400/- awarded towards loss of income- Rs.50,000/- awarded towards pain and suffering and Rs.50,000/- awarded for loss of amenities of life- total amount of Rs. 5,92,000/- (Rs.3,74,000/- + Rs.50,000/- +Rs. 20,000+Rs.30,000/-+ Rs.50000/-+Rs.50,000/-+Rs.18000/-) along with interest @ 7.5 % per annum awarded as compensation. (Para-14 to 22)

Motor Vehicles Act, 1988- Section 166- Claimant sustained injuries in his right ankle joint in a motor vehicle accident- Medical Officer testified that owner had sustained 20% permanent disability- his income can be taken as Rs. 5,000/- per month by guess work - he has suffered 20% permanent disability; therefore, loss of income would be Rs. 2,000/- per month- claimant was 34 years of age- multiplier of '11' is applicable- thus, claimant is entitled to Rs. 2000x12x11=Rs.2,64,000/-- amount of Rs.50,000/- each awarded under the head 'pain and suffering' and loss of amenities of life, Rs.12,000/- awarded for medical treatment, Rs.3,000/- awarded as attendant charges, Rs.10,000/- awarded under the head loss of income and, thus, total amount of Rs.3,89,000/- awarded as compensation. (Para-29 and 30)

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife- her husband was deprived of his matrimonial home- son has lost love and affection- minimum amount of Rs. 4,500/- per month will be required for engaging a labourer for maintaining house hold and performing domestic functions- thus, claimants have sustained loss of Rs.4,500/- per month – after deducting 1/3rd amount towards personal expenses, loss of dependency is Rs. 3,000/- per month- age of the deceased was 26 years at the time of accident- multiplier of '14' would be applicable- thus, claimants are entitled to Rs. 3,000 x 12 x 14 = Rs. 5,04,000/- sum of Rs. 10,000/- each awarded under the head loss of estate, funeral expenses, Loss of consortium and loss of love and affection- total compensation of Rs. 5,44,000/- awarded along with interest. (Para-23 & 24)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Oriental Insurance Company versus Padama Devi and others, I L R 2015 (V) HP 526
Managing Director HPMC Nigam Vihar vs. Naresh Kumar and Ors, I L R 2015 (IV) HP 435
Anil Kumar versus Sh. Nittin Kumar and others, , I L R 2015 (IV) HP 445 (D.B.)
Mallikarjun vs Divisional Manager, National Insurance Co. Ltd. & anr (2014) 14 SCC 396
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.

For the appellant(s): Mr. B.M Chauhan, Advocate for the appellants, except FAO No. 433 of 2011.
Mr.Jagdish Thakur, Advocate, for the appellant in FAO No.433/2011.
For the respondent(s): Mr.B.M. Chauhan, Advocate,for the resp. in FAO No.433/ 2011.
Mr. Jagdish Thakur, Advocate for HRTC.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

FAO No. No. 459 of 2011 and 460 of 2011.

These two appeals are outcome of a vehicular accident, which was caused by driver Misar Lal, while driving HRTC Bus No. HP-07-0747, rashly and negligently on 16.11.2009 at about 4 p.m. in the area of Rukhltu wherein Master Arsh sustained multiple injuries because his left arm was crushed. His mother Smt. Anjali Devi sustained injuries and succumbed to the injuries on 23.11.2009, constraining master Arash minor to file claim petition through his guardian on his behalf and sought compensation, as per the break-ups given in the claim petition No. 7-S/2 of 2010 and in Claim Petition No. 8-S/2 of 2010, Master Arsh Dipta and Rajesh Dipta husband of Ajlai Devi and father of Arsh has sought grant of compensation as per the break ups given in that Claim Petition.

2. Both the claim petitions were resisted and contested by the respondents and following issues came to be framed in the Claim Petitions as follows:

1. Claim Petition No.7-S/2 of 2010.

"1. Whether the petitioner suffered injuries due to rash and negligent driving of HRTC bus No. HP-07-0747 by its driver Misar Lal? ....OPP

2. If issue No. (i) is proved in affirmative, to what amount of compensation the petitioner is entitled to? …OPP

3. Relief."

2. Claim Petition No. 8-S/2 of 2010.

"1. Whether Smt. Anjali Dipta had died due to rash and negligent driving of HRTC bus No. HP-07-0747 by its driver Misar Lal? ….OPP

2. If issue No. (i) is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? …OPP

3. Relief."

3. Parties led evidence.

4. The Tribunal, after scanning the evidence, awarded compensation to the tune of Rs.3,45,000/- along with interest @ 8% per annum with costs to the tune of Rs.5,000/- in Claim petition No. 7-S/2 of 2010 decided on 1.10.2011 and in Claim petition No. 8-S/2 of 2010 decided on 28.9.2011, Rs.3,36,000 along with interest @ 9% per annum with Rs.3000/- as cost, was awarded in favour of claimants.

5. Both these awards are impugned in these appeals. Thus, I deem it proper to determine both these appeals by this common judgment.

6. Respondents have not questioned the impugned awards on any ground. The claimants have filed the appeals for enhancement of compensation thus, there is no dispute viz-a-viz issue No.1. The only issue to be determined in these appeals is whether in both the cases, the amount awarded is adequate or otherwise.

7. I have gone through the pleadings, record and the impugned awards. I am of the considered view that in both the cases, the impugned awards merit to be enhanced for the following reasons.

8. In Claim Petition No. 7-S/2 of 2010, it is specifically averred that the claimant is entitled to compensation to the tune of Rs.20 lacs, as per the break-ups given in the claim petition. The Tribunal, after examining the pleadings and documents, granted the compensation as follows:

(i)	*Medical Expenses, past and prospective*	*Rs.20,000/-*
(ii)	*Conveyance Charges*	*Rs.5,000/-*
(iii)	*Services of attendant*	*Rs.10,000/-*
(iv)	*Pain and suffering*	*Rs.5,000/-*
(v)	*Future income*	*Rs.3,00,000/-*
(vi)	*Costs*	*Rs.5,000/-*

9. The Tribunal has discussed in para 14 of the impugned award in Claim Petition No. 7-S/2 of 2010 that Dr. Ravinder Mokta has appeared in the witness-box as PW4 and proved the disability certificate Ext. PW4/A and petitioner has suffered 40% permanent disability. The Tribunal has not kept in mind the factum, which is to be kept in mind, while assessing the compensation. The Tribunal has to assess the compensation by a guess work.

10. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be awarded under various heads.

11. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in ***2010 AIR SCW 6085***.

12. This Court in ***FAO No. 317 of 2011*** titled ***Oriental Insurance Company versus Padama Devi and others,*** decided on 18.9.2015, ***FAO No. 18 of 2009*** titled ***Managing Director HPMC Nigam Vihar vs. Naresh Kumar and others*** decided on ***14.8.2015*** and ***FAO No. 72 of 2008*** titled ***Anil Kumar versus Sh. Nittin Kumar and others decided on 10.7.2015*** has also laid down the same principles.

13. The apex Court in ***Mallikarjun versus Divisional Manager, National Insurance Co. Ltd. and another*** reported in ***(2014) 14 SCC 396*** has also discussed that what should be the amount of compensation as per the percentage of disability. It is apt to reproduce para 12 of the said judgment herein:

> *"12.Though it is difficult to have an accurate assessment of the compensation in the case of children suffering disability on account of a motor vehicle accident, having regard to the relevant factors, precedents and the approach of various High Courts, we are of the view that the appropriate compensation on all other heads in addition to the actual expenditure for treatment, attendant, etc., should be, if the disability is above 10% and upto 30% to the whole body, Rs.3 lakhs; upto 60%, Rs.4 lakhs; upto 90%, Rs.5 lakhs and above 90%, it should be Rs.6 lakhs. For permanent disability upto 10%, it should be Re.1 lakh, unless there are exceptional circumstances to take different yardstick."*

14. Admittedly, the claimant has suffered 40% permanent disability, is not disputed by any party. The claimant has placed on record the medical bills to the tune of Rs.18,000/-. He has to undergo treatment till he is alive because he has to go for grafting and other things and, at least, Rs.50,000/- should have been awarded under the head "Medical expenses for future." Accordingly, it is held that the claimant is entitled to ***Rs.50,000/-*** for "future medical treatment" and also ***Rs.18,000/-***, as medical expenses, as awarded by the Tribunal.

15. The Tribunal has discussed in para 15 of the impugned award that the services of the attendant was required and assessed Rs.5,000/- for "conveyance charges" which is too meager. The claimant remained in the hospital for a pretty long time and had to undergo for grafting and other follow up treatment. ***Rs.20,000/-*** under this head, by a guess work, should have been granted, and is accordingly, granted under the head "conveyance charges".

16. The Tribunal has granted only Rs.10,000/- under the head "attendant charges". Admittedly, the claimant was attended upon for three months. A minimum of Rs.10000/- per month is to be granted for the charges of attendant. Thus, ***Rs.30,000/-*** under the head "attendant charges" are awarded, instead of Rs.10,000/- as awarded by the Tribunal.

17. In para 18 of the impugned judgment the Tribunal has discussed that the claimant has suffered 40% permanent disability, which has shattered his life for ever and his future prospects has become bleak. The said findings have not been questioned by any party. By a guess work, it can be said that the minimum income of the injured is to the tune of Rs.6000/- per month and disability assessed is 40%. He has lost, at least, Rs.2400/- per month. The age of the injured was 6 years and multiplier of "13" was applicable keeping in view the 2nd schedule of the Motor Vehicles Act, for short "the Act" read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

18. Thus, the claimant is held entitled to Rs.2400x12x13= ***Rs.3,74,400/-.***

19. The Tribunal has awarded only Rs.5000/- under the head "pain and suffering." The claimant has to suffer pain and suffering throughout his life. At least Rs.50,000/- is to be awarded as per the latest judgment of the apex Court and is accordingly awarded ***Rs.50,000/-*** under the head "pain and suffering".

20. The Tribunal has not awarded any amount under the head "loss of amenities of life". Thus ***Rs.50,000/-*** is awarded under the head "loss of amenities of life".

21. Thus in all, the claimant is held entitled to Rs.3,74,000/- + Rs.50,000/- +Rs. 20,000+Rs.30,000/-+ Rs.50000/-+Rs.50,000/-+Rs.18000/- i.e,. total ***Rs.5,92,000/-*** along with 7.5% interest from the date of the impugned award till its realization.

22. Accordingly, FAO No. 459 of 2011 is allowed and the amount of compensation is enhanced as indicated hereinabove.

23**.** Now coming to Claim Petition No. 8-S/2 of 2010 **subject matter of FAO No. 460 of 2011.** The deceased was a house wife. Claimant No.2 husband of the deceased has been deprived of his matrimonial home. Son Arsh Dipta has lost love and affection of his mother and in case, the petitioner had to engage a labourer for maintaining house hold goods and performing domestic functions, minimum expenses of Rs.4500/- per month can safely be assessed. Thus, it is held that the minimum income the claimant has lost was Rs.4500/- per month. After deducting 1/3rd, the claimant has lost source of dependency to the tune of Rs.3000/- per month. The age of the deceased was 26 years at the time of accident and the multiplier of "14" was applicable in view of the 2nd schedule of the Act read with ***Sarla Verma and Reshma Kumari's*** cases referred to supra. The claimant is entitled to Rs.3000x12x14= Rs.5,04,000/- and also under the following heads as follows:

(i)	*Loss of estate*	*Rs.10,000/-*
(ii)	*Funeral expenses*	*Rs.10,000/-*
(iii)	*Loss of consortium*	*Rs.10,000/=-*
(iv)	*Loss of love and affection*	*Rs.10,000/-*
		Total Rs.5,44,000/-

24. Thus, FAO No. 460 of 2011 is also allowed and the amount of compensation is enhanced to Rs.5,44,000/- along with interest @ 7/5% per annum from the date of claim petition till its realization, as indicated hereinabove.

FAOs No.433/2011 and 462 of 2011

25. These two appeals are also outcome of the same accident, thus, I deem it proper to determine both these appeals together.

FAO No. 462/2011.

26 The claimant had filed claim Petition No. 9-S/2 of 2010, before the Tribunal, for the grant of compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition, on the ground that he is a contractor and had been earning Rs.15,000/- per month from all sources. It is averred that on 16.11.2009, he and his family had been on way from Shimla to their house in HRTC Bus No. HP-07-0747. The Bus driver had been driving the Bus rashly and negligently with the result vehicle had gone down the highway in the area of Rukhltu due to which the claimant suffered multiple injuries in right ankle joint. He remained admitted in IGMC Shimla w.e.f. 17.11.2009 till 21.11.2009.

27. In view of the findings returned in FAOs No. 459/2011 and 460 of 2011, above, the findings returned by the Tribunal on issue No. 1 are upheld. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise.

28. I have gone through the findings recorded in paras 14 to 20 of the impugned award. While going through the said findings, one comes to an inescapable conclusion that the compensation amount is inadequate for the following reasons.

29. The claimant has examined Dr. Ravinder Mokta as PW3 and Dr. L.R. Verma, as PW4, the relevant portion of their statements have been recorded in paras 14 and 15 of the impugned award. The claimant has suffered 20% permanent disability because he sustained injuries on his right ankle joint. It has affected his movement throughout his life thereby has affected his income as a labourer. Virtually he cannot work as labourer. While keeping in view the ratio laid down by the apex Court in **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** and other cases, referred to supra, in paras 10 to 13, it can be safely said that the claimant has lost source of income to the tune of Rs.5000/- per month. He has suffered 20% permanent disability. Thus, by a guess work, it can be said that the claimant has lost source of income to the tune of Rs.2000/- per month. The claimant was 34 years of age at the time of accident and the multiplier of "11" is applicable keeping in view the 2nd schedule of the Motor Vehicles Act, for short "the Act" read with ***Sarla Verma and Reshma Kumari's*** cases referred to in para 17 of this judgment. Thus, the claimant is entitled to Rs.2000x12x11=Rs.2,64,000/-.

30. The claimant is also held entitled to compensation under the head "pain and suffering" to the tune of Rs.50,000/- and under the head "loss of amenities of life" Rs.50,000/-. The claimant is awarded Rs.12000/- for medical treatment, Rs.3000/- as attendant charges and Rs.10,000/- under the head "loss of income" for two months during the treatment. Accordingly, the claimant is held entitled to Rs.2,64000/- + Rs.50,000/-+ Rs.50,000/-+ Rs12000/-+Rs.3000/-+Rs.10,000/-. Total Rs.3,89,000/-.

31. Viewed thus, the appeal is allowed and the amount of compensation is enhanced to Rs.3,89,000/- along with interest @ 7/5% per annum from the date of claim petition till its realization, as indicated hereinabove.

FAO No. 433 of 2011.

32. Keeping in view the findings returned hereinabove; the appeal filed by the appellant is not maintainable. As such dismissed.

33. The owner-HRTC Department is directed to deposit in all the cases, the entire amount, minus the amount already deposited, in the Registry within six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants in all the appeals, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account. The amount already deposited be also released in favour of the claimants in all the appeals.

34. Viewed thus, all the appeals stand disposed of, as indicated hereinabove.

35. Send down the records forthwith.

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

Naresh Pal Singh .....Appellant.

Versus

Rahul Katoch and others .....Respondents

FAO (MVA) No. 441 of 2008.
Date of decision: 16th October, 2015.

Motor Vehicles Act, 1988- Section 149- Insured challenged the award on the ground that vehicle was insured at the relevant time but Insurance Policy could not be produced before the Court- an application is also filed to place the insurance policy on record- application allowed by the Court and the policy taken on record- held, that policy shows that vehicle was insured at the time of accident and, therefore, Insurer has to indemnify the award- appeal disposed of accordingly. (Para-3 and 4)

For the appellant:	Mr.Ajay Sharma, Advocate.
For the respondents:	Mr. Rakesh Thakur, proxy counsel for Mr. Naresh Kaul, Advocate, for respondent No.1. Mr. Rohit Chauhan, proxy counsel for Mr. Suneet Goel, Advocate, for respondent No.2. Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award dated 24.4.2008, made by the Motor Accident Claims Tribunal Kangra at Dharamshala, in MAC Petition No. 29-D/06, titled Rahul Katoch versus Naresh Pal Singh and others, for short "the Tribunal", whereby compensation to the tune of Rs.2,76,180/- alongwith interest @7 ½ per annum came to be awarded in favour of the claimant and insured was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The insured/appellant has questioned the impugned award on the ground that the vehicle was insured at the relevant point of time but unfortunately, the insurance policy was not produced before the Court at the relevant point of time, which was in force w.e.f. 25.11.2005 to 24.11.2006. He has filed application **CMP No. 630/2008** before this Court for taking on record the insurance policy. The insurer has resisted the same on the grounds taken in the memo of application. The application is granted and the insurance policy is taken on record. The application is disposed of.

4. The learned proxy counsel for the insurer has sought adjournment. The claimant is suffering right from 13.4.2006 and is victim of a vehicular accident, has been dragged from pillar to post and post to pillar. Both the insurance policies have been issued by the insurance company. It was obligatory on the part of the insurance company to disclose the insured that the policy was effective from 25.11.2004 to 24.11.2005 and because of the inadvertence of the learned counsel for the appellant, before the Tribunal, the claimant has suffered. The documents on the file do disclose that the vehicle was insured w.e.f. 25.11.2004 to 24.11.2005 and the accident has taken place on 28.8.2005. Having said so, the insurer has to indemnify the award. Accordingly, the insurer is saddled with the liability.

5. Viewed thus, the appeal is allowed and the impugned award is modified as indicated hereinabove.

6. The insurer is directed to deposit the entire amount within eight weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of

the claimant, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

7. The statutory amount deposited by the insured is awarded as costs in favour of the claimant and be released in favour of the claimant.

8. The appeal stands disposed of alongwith pending applications, if any.

9. Send down the record, forthwith, after placing a copy of this judgment.

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

The National Insurance Company ...Appellant

Versus

Mohinder Paul & another ...Respondents

FAO No. 453 of 2008
Date of decision: 16.10.2015

Motor Vehicles Act, 1988- Section 149- Claimant was travelling in an Ambassador car which met with an accident in which claimant sustained injury- insurer had not led any evidence to show that owner had committed breach of the terms and conditions of the insurance policy- the sitting capacity of the vehicle was 5 and the risk of the claimant was covered- held, that Insurance Company was rightly held liable to pay compensation.

(Para-12 to 15)

For the appellant : Ms. Seema Sood, Advocate.

For the respondents: Mr. Raman Prashar, Advocate, for respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the insurer has questioned the award dated 16th May, 2008, passed by the Motor Accidents Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal") in MAC Case No. 76 of 2005, whereby compensation to the tune of Rs.1,75,157/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1 herein and against the insurer-appellant herein, (for short, "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant, insured/owner-cum-driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer-Insurance Company has questioned the impugned award on the ground taken in the memo of appeal.

4. Learned Counsel for the appellant-insurer has argued that the Tribunal has fallen in an error in saddling the insurer with liability for the reason that the risk of the claimant was not covered.

5. In order to determine the said issue, it is necessary to give brief facts of the case, which has given birth to the present appeal.

6. On 5.12.2003, the claimant was traveling in vehicle-Ambassador Car bearing registration No. CH-6009, from Lathiani to Barsar, which was being driven by driver, namely, Harpal Singh, rashly and negligently, and caused the accident at about 4.15 a.m., at 'Khooni Mod', Galu Barsar, sustained injuries, was referred to the Zonal Hospital, Hamirpur. Thereafter, he remained admitted in the Rajendra Medical Hospital, Patiala, constraining him to file claim petition before the Tribunal, for grant of compensation to the tune of Rs.17,00,000/-, as per the break-ups given in the claim petition.

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

8. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner had suffered injuries in a motor vehicle accident on 05.12.2003 involving car bearing No. CH 6009, being driven and owned by respondent No. 1? ...OPP

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation and if so, to what amount and from whom? ...OPP

3. Whether respondent No. 1 was not holding a valid and effective Driving Licence at the time of accident and if so, its effect? ...OPR-2

4. Whether the offending car was being driven in violation of the terms and conditions of the insurance policy, as alleged and if so, its effect? ...OPR-2

5. Relief."

9. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned award, whereby a compensation to the tune of Rs.1,75,157/- with interest @ 7.5% per annum was awarded in favour of the claimant and liability was fastened upon the insurer.

Issue No. 1.

10. The claimant has proved issue No. 1. Otherwise, there is no dispute on this issue. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

Issues No. 3 & 4.

12. The onus to prove issues No. 3 & 4 was upon the insurer, has failed to lead any evidence. It was upon the insurer to plead and prove that owner/insured has committed breach of the terms and conditions of the insurance policy, failed to do so. Accordingly, the findings returned by the Tribunal on the aforesaid issues are upheld.

Issue No. 2.

13. The amount awarded is neither meager nor excessive. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

14. I have gone through the entire record. It is recorded in the insurance policy that seating capacity is '5'. Thus, the risk was covered.

15. Having said so, the Tribunal has rightly made discussion and saddled the insurance company with the liability.

16. Accordingly, no interference is required. The impugned award is upheld and the appeal is dismissed.

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

18. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

The New India Assurance Company ...Appellant
Versus
Sh. Anoop Kumar & others ...Respondents

FAO No. 397 of 2009
Date of decision: 16.10.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident and the claimant was travelling in the vehicle as a gratuitous passenger- Insurer did not lead any evidence to prove that driver did not have a valid driving licence or that claimant was travelling as a gratuitous passenger- the onus to prove these facts was upon the insured and in absence of evidence, insured was rightly saddled with the liability. (Para-8 and 9)

For the appellant : Mr. B.M. Chauhan, Advocate.
For the respondents : Nemo for respondent No. 1.
Mr. Jagdish Thakur, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 25th May, 2009, passed by the Motor Accidents Claims Tribunal, Fast Track Court, Chamba, District Chamba (HP) (hereinafter referred to as "the Tribunal") in MAC Case No. 52 of 2008, whereby compensation to the tune of Rs.1,62,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1 herein and a the insurer-appellant herein was saddled with liability, (for short, "the impugned award"), on the grounds taken in the memo of appeal.

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

3. The insurer-Insurance Company has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in saddling the insurer with liability for the reason that driver was not having a valid and effective driving licence at the relevant time and the claimant was traveling in the offending vehicle as a gratuitous passenger.

5. Following issues came to be framed by the Tribunal:

" *(i)* Whether the petitioner sustained injuries in a motor vehicle accident, which took place on 11.6.2007 near Dadwan morh Tehsil and Distt. Chamba due to rash and negligent driving of driver of vehicle bearing No. HP46-0433? OPP

(ii) If issue No. 1 is approved in affirmative, whether the petitioner is entitled for the grant of compensation, if so, to what amount and from which of the respondent? OPP.

(iii) Whether the driver of the offending vehicle was not holding a valid driving licence at the time of accident? OPR-3.

(iv) Whether the petitioner was traveling in the goods career vehicle as gratuitous passenger as alleged, if so, its effect? OPR.

(v) Whether the vehicle involved in the accident was being driven without fitness certificate and no road tax has been paid at the time of accident as alleged, if so, its effect? OPR-3.

(vi) Relief."

6. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned award, whereby a compensation to the tune of Rs.1,62,000/- with interest @ 9% per annum was awarded in favour of the claimant and liability was fastened upon the insurer.

Issue No. 1.

7. There is no dispute on this issue. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 to 5.

8. It was for the insurer to prove these issues, has not led any evidence. Thus, it has failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 5 are upheld.

9. Learned Counsel for the appellant-insurer argued that the driver was not having a valid and effective driving licence at the relevant time. The insurer has neither led any evidence to prove the said factum nor has proved that the owner-insured as committed any willful breach in terms of the mandate of Section 149 of the Motor Vehicles Act read with the Insurance Policy.

Issue No. 2.

10. The award amount is meager, cannot be said to be excessive.

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

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

13. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

Noop Singh and another ...Appellants.
Versus
Sobha Ram and another ...Respondents.

FAO No. 422 of 2009
Decided on: 16.10.2015

Motor Vehicles Act, 1988- Section 149- Claimant specifically averred in the claim petition that he and his partner had hired the vehicle for carrying their agricultural produce- owner admitted in the reply that claimant was travelling in the vehicle as a gratuitous passenger- held, that Tribunal had rightly held that the claimant to be a gratuitous passenger. (Para-12 and 13)

For the appellants: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Sandeep Sharma, Advocate, for respondent No. 1.
Mr. Praneet Gupta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award, dated 06.06.2009, made by the Motor Accident Claims Tribunal, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 95 of 2005, titled as Sobha Ram versus Sh. Noop Singh and others, whereby compensation to the tune of Rs.80,177/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and the insurer was directed to satisfy the award with right of recovery (for short "the impugned award").

2. The claimant-injured and the insurer 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 owner-insured and the driver of the offending vehicle have questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer.

Brief facts:

4. The claimant-injured sought compensation, as per the break-ups given in the claim petition, on the ground that he alongwith his partner Shri Hukam Chand hired the offending vehicle, i.e. jeep, bearing registration No. HP-65-0733, on 27.07.2005, for transporting cabbage and cauliflower from Village Kulthani to Hamirpur and after selling the same, when they were coming back in the said vehicle, which met with accident due to

the rash and negligent driving of the driver, sustained injuries, was taken to Civil Hospital, Gohar, wherefrom he was referred to Zonal Hospital, Mandi.

5. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

6. Following issues came to be framed by the Tribunal:

> "1.Whether the respondent No. 2 was driving the Jeep No. HP-65-0733 on 27-7-2005 at 7 P.M. at place Salahar Mode in a rash ad negligent manner resulting in injuries to the petitioner as alleged? OPP
>
> 2. If issue No. 1 is proved whether the petitioner is entitled for compensation. If so as to what amount and from whom? OPP
>
> 3. Whether the petitioner was travelling as a gratuitous passenger at the time of accident in Vehicle No. HP-65-0733 as alleged? OPR
>
> 4. Whether the respondent No. 2 was not holding a valid and effective driving licence and the vehicle was being driven in violation of the terms and conditions of the insurance police as alleged? OPR
>
> 5. Relief."

7. Parties have led evidence.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the driver of the offending vehicle had driven the same rashly and negligently at the relevant point of time and because of his negligence, the claimant-injured has sustained injuries and saddled the owner-insured and the driver of the offending vehicle with liability.

Issues No. 1 and 4:

9. There is no dispute about issues No. 1 and 4. Accordingly, the findings returned by the Tribunal on issues No. 1 and 4 are upheld.

Issues No. 2 and 3:

10. The adequacy of compensation is not in dispute. The appellants have questioned the findings returned by the Tribunal on issue No. 2 to the extent whereby they have been saddled with liability.

11. The Tribunal has specifically held that the claimant has failed to prove that he was travelling in the offending vehicle alongwith vegetables. Even the owner-insured has denied the said factum in his reply.

12. I have gone through the record. There is not even a single iota of evidence to hold that the claimant had hired the offending vehicle for transporting the vegetables and while coming back, the said vehicle met with the accident. Rather, it was proved that the claimant was a gratuitous passenger.

13. The claimant has specifically averred in para 24 (i) and (ii) of the claim petition that he and his partner had hired the offending vehicle for carrying their agricultural produce. The owner-insured, though, has not denied the contents of para 24 (i), but in reply to para 24 (ii) of the claim petition has admitted that the claimant was travelling in the offending vehicle as a gratuitous passenger. Then, how can he now turn around and say that the pleadings made by the claimant are correct.

14. Having said so, the findings returned by the Tribunal on issues No. 2 and 3 are upheld.

15. In view of the above, the impugned award is to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

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

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

FAO No.289 of 2009 and
FAO No.421 of 2009
Decided on : 16.10.2015

1. FAO No.289 of 2009

Parveen Kumar .....Appellant

Versus

Sunil Kumar and another ..... Respondents

2. FAO No.421 of 2009

National Insurance Company Ltd. .....Appellant

Versus

Parveen Kumar & another ..... Respondents

Motor Vehicles Act, 1988- Section 149- Insurer questioned the award on the ground that owner had committed willful breach of the terms and conditions of the Insurance policy and the Insurer was wrongly saddled with the liability- held, that Insurer has failed to plead and prove that vehicle was being driven in contravention of the terms and conditions of the Insurance Policy- Insurer also failed to show from the Insurance Policy that driving the vehicle without any fitness certificate would amount to breach of the terms and conditions of the insurance policy- appeal dismissed. (Para-3 to 8, 12 & 14 to 16)

Presence for the Parties:

Mr.Tara Singh Chauhan, Advocate, for Claimant Parveen Kumar.
Mr.Jagdish Thakur, Advocate, for owner/driver Sunil Kumar.
Mr.Deepak Bhasin & Mr.I.N. Mehta, Advocates, for the Insurance Company.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are the outcome of one award, dated 28th February, 2009, passed by the Motor Accident Claims Tribunal, Una, (for short, the Tribunal), in Claim Petition No.33 of 2005, titled Parveen Kumar vs. Sunil Kumar and another, whereby compensation to the tune of Rs.67,400/-, with interest at the rate of 7% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the

claimant and the insurer was saddled with the liability, (for short the impugned award). Accordingly, both the appeals are taken up together for final disposal.

2. FAO No.289 of 2009 has been filed by the claimant Parveen Kumar for enhancement of compensation, while the insurer has laid challenge to the impugned award by filing FAO No.421 of 2009.

3. Facts of the case giving rise to the present appeals are summarized thus. On 20th April, 2003, Claimant Parveen Kumar, alongwith one Manmohan, was traveling on a scooter bearing No.HP-19-2297, and at about 11.45 a.m., when they reached at village Chanari near Silver Factory, a Tata Sumo bearing No.PB-07E-7213, which was driven by Sunil Kumar (original respondent No.1) rashly and negligently, hit the scooter, resulting into injuries to the claimant Parveen Kumar. An FIR bearing No.57 of 2003, dated 21st April, 2003, was registered at Police Station Gagret, District Una, H.P. under Sections 279, 337 and 201 of the Indian Penal Code. Thus, the claimant filed the claim petition claiming comepsnation to the tune of Rs.10.00 lacs, as per the break-ups given in the Claim Petition.

4. The Claim Petition was resisted by the respondents by filing replies.

5. The Tribunal after examining the pleadings of the parties framed the following issues:

> "1. Whether the petitioner received injuries in an accident caused by rash and negligent driving of respondent No.1? OPP
>
> 2. If issue No.1 is proved in the affirmative, to what amount of compensation the petitioner is entitled and from whom? OPP
>
> 3. Whether the petition is not maintainable against the respondent? OPP
>
> 3-A Whether the respondent No.1 was not holding a valid and effective driving licence at the time of alleged accident, if so, its effect? OPR2
>
> 4. Whether the vehicle was being plied at the time of accident against the terms of the insurance policy and so respondent No.2 is not liable to indemnify respondent No.1? OPR
>
> 5. Whether the petition is bad for non-joinder of necessary parties? OPR
>
> 6. Relief."

6. In order to prove his case, the claimant-injured has examined PW-1 Rachhpal Singh, PW-2 Dr.Ashish Lekhi, PW-3 Agya Ram and PW-4 Vijay Singh. The claimant also stepped into the witness box as PW-5. On the other hand, respondents have examined three witnesses, namely, Karam Chand (RW-1) and Kulwant Kaur (RW-2). Sunil Kumar (driver-cum-owner) has appeared as RW-3.

7. The Tribunal, after scanning the evidence, allowed the claim petition, as detailed above.

8. Feeling aggrieved the insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with the liability inasmuch as the owner had committed willful breach of the terms and condtions of the insurance policy, (subject matter of FAO No.421 of 2009). On the other hand, the claimant-injured has questioned the impugned award on the ground of adequacy of compensation, (subject matter of FAO No.289 of 2009).

9. I have heard the learned counsel for the parties and have gone through the impugned award.

10. In order to determine the controversy, I deem it proper to discuss each issue separately.

Issue No.1

11. The Tribunal, after going thorugh the evidence led by the parites, held that the claimant-injured has proved that Original Respondent No.1 Sunil Kumar had driven the offending vehicle rashly and negligently and had caused the accident. Even otherwise, the said findings are not in dispute. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

Issue No.3 and 5

12. Before dealing with the other issues, I deem it proper to take up these issues at the first instance. The claimant-injured has proved by leading cogent evidence that he became victim of the vehicular accident. Thus, it cannot be said that the claim petition was not maintainable or that the same was bad for non-joinder of necessary parties. Accordingly, the findings returned on these issues by the Tribunal, though not in dispute, are upheld.

Issues No.3A and 4:

13. Coming to issues No.3A and 4, it was for the insurer to plead and prove that the vehicle was being driven in contravention of the terms and conditions contained in the insurance policy or the driver of the offending vehicle was not competent to drive the vehicle in question, in which the insurer has miserably failed. The insurer has not led any cogent evidence fromwhere it could be inferred that the driver was not having a valid and effective driving licence or the insured had committed willful breach.

14. The learned counsel for the insurer argued that the offending vehicle was being driven without any fitness certificate, thus the owner had committed breach of the terms and conditions of the insurance policy. However, the learned counsel for the insurer was not in a position to show from the insurance policy that such a condition was contained in the insurance policy, not to speak of proof of the said fact. The Tribunal has rightly made discussion in paragraph 31 of the impugned award and has rightly come to the conclusion that this ground is not available to the insurer to seek exoneration, being beyond the realm of the contract Ext.RX. It was for the insurer to plead and prove that the insurance policy contained a condition to that effect, in which the insurer has failed. Accordingly, the argument advanced by the learned counsel for the appellant is turned down, being devoid of any force.

15. Coming to issue No.2, the Tribunal, after referring to the evidence led by the claimant-injured, has rightly assessed the quantum of compensation. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

16. As a sequel of the above discussion, there is no merit in both the appeals and the same are dismissed. Consequently, the impugned award is upheld. The Registry is directed to release the amount of compensation in favour of the claimant forthwith, after proper identification.

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

Sanjay Kumar ...Appellant

Versus

Davinder Kumar & others ...Respondents

FAO No. 386 of 2009
Date of decision: 16.10.2015

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident- he had not led any evidence to prove that driver of the truck had driven the same rashly and negligently- FIR was lodged against the claimant and challan was presented against him- therefore, his plea that accident was caused due to the rashness and negligence of the driver of the truck cannot be accepted- Tribunal had rightly held that claimant was not entitled for any compensation. (Para- 6 to 9)

For the appellant : Mr. Pawan Gautam, Advocate.
For the respondents : Nemo for respondents No. 1 & 2.
Mr. Ajay Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The claimant has preferred this appeal against the award dated 8th May, 2009, passed by the Motor Accidents Claims Tribunal, (I), Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in Claim Petition No. 72-J-II/05, whereby the claim petition came to be dismissed (for short, "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant has specifically averred in the claim petition that on 06.05.2005, at about 10.50 a.m., at Gharan Petrol Pump, driver, namely, Davinder Kumar, had driven offending vehicle-truck bearing registration No. HP-19-7806, rashly and negligently, hit Maruti Car bearing registration No. HP-37A-1387, being driven by claimant Sanjay Kumar, sustained injuries, was taken to the hospital and was admitted there. He had filed claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/-, on the grounds taken in the memo of the claim petition.

3. The respondents resisted and contested the claim petition on the grounds taken in the memo of their objections.

4. Following issues came to be framed by the Tribunal:

"i). Whether the petitioner has suffered injuries due to rash and negligent driving of mini-truck No. HP-19-7806 by respondent No. 1?...OPP

ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? ..OPP

iii). Whether the truck in question was being driven in contravention of the terms and conditions of Insurance Policy? ...OPR-3

iv). Whether the petition is not maintainable? ...OPR-3

v). Whether respondent No. 1 not holding valid and effective Driving Licence, at the time of accident? ...OPR-3.

vi). Whether the petition is bad for non-joinder of necessary parties?.OPR-3.

vii). Relief."

5. The parties have led evidence.

6. The claimant has not led any evidence to prove that driver, namely Davinder Kumar, had driven the offending vehicle, rashly and negligently at the relevant time. But there is evidence to the effect that FIR was lodged against the claimant and challan was presented before the court of competent jurisdiction against him.

7. The Tribunal has rightly made discussion in paras 11 to 13 of the impugned award.

8. Having said so, the claimant has proved issue No. 1. There is no need to return findings on the other issues.

9. Having said so, the impugned award is upheld and the appeal is dismissed.

10 Send down the records after placing copy of the judgment on record.

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

Union of India & others ..... Appellants

Versus

M/s Kinnaur Federation & others ..... Respondents

FAO No.16 of 2009
Reserved on: 09/10/2015
Pronounced on: 16/10/2015

Motor Vehicles Act, 1988- Section 166- Claim Petition dismissed by the Tribunal holding that claimants had failed to prove rash and negligent driving by the driver of the truck which collided against the bridge and damaged the same- held, that claimants have failed to plead and prove that Truck was being driven at high speed or in rash and negligent manner - further, held that evidence suggests that the driver was crossing the bridge with normal speed and the bridge collapsed - claim petition rightly dismissed by the Tribunal- appeal also dismissed. (Para-2 to 5, 7 and 9)

For the appellants: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Ajay Chandel, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondents No.1 and 2.
Mr. Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 20th September, 2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, "the Tribunal") in M.A.C. petition No.30 of 2002, titled Union of India & others vs. M/s Kinnaur

Federation & others, whereby the Claim Petition came to be dismissed, (for short, the "impugned award").

Brief facts:

2. Appellants-claimants filed a Claim Petition on 24th May, 2002 and sought compensation to the tune of Rs.83,55,486/-, as per the break-ups given in the Claim Petition. It is averred by the claimants that claimants No.2 and 3 were engaged in the maintenance and upkeep of Border Road National Highway-22 from Wangtu to Powari and had constructed 200 feet span, double reinforced bailey bridge, named Kharo, in January, 2001, on Satluj river. It was further averred that Rs.85.00 lacs were spent on the construction of the said bridge, which was catering to the needs of the armed forces and civil administration. Unfortunately, on 6th January, 2002, at 5.30 p.m., a loaded truck bearing registration No.HP-25-0290, which was being driven rashly and negligently by its driver, respondent No.2 Ravinder Singh, while crossing the said bridge, struck with the last panel of the bridge, due to which the bridge collapsed, constraining the claimants to construct a diversion road, by raising retaining structures etc. Thus, it was claimed that the claimants suffered loss to the tune of Rs.83,55,486/- due to the rash and negligent driving on the part of the truck driver aforesaid.

3. Respondents contested the claim petition and filed the replies. On the pleadings of the parties, the following issues were settled by the Tribunal:

> "1. Whether the property of the petitioner was damaged due to rash and negligent act of the respondent No.2 as alleged? OPP
>
> 2. If issue No.1 is proved in the affirmative, to what amount of compensation and from who are the petitioners entitled to? OPP
>
> 3. Whether the accident was caused due to negligent act of the petitioner No.3 as alleged in preliminary objection No1. If so, its effect? OPR-1 & 2.
>
> 4. Whether the petitioner has not been filed by the competent person as alleged, if so, its effect? OPR 1 & 2.
>
> 5. Whether respondent No.3 is not liable to indemnify the insured as alleged, if so its effect? OPR-3.
>
> 6. Whether the present petition is maintainable in the present form, as alleged? OPR-3.
>
> 7. Relief."

4. Claimants have examined as many as seven witnesses, namely, Sohan Lal, M.P. Singh, K.P.R. Singh, Sunil Chand Shrivastava, S.K. Sarkar, R.S. Malik and Anand Yadav (PW-1 to PW-7, respectively). The respondents have also examined ten witnesses, i.e. Surat Ram, Chet Ram, Ajit Ram, Kashmir Singh, Ravinder Singh, Chhering Ram, Hukam Singh, R.K. Sharma, Bhinder Singh and V.K. Aggarwal. Parties have also placed on record documents, the mention of which has been made in the impugned award.

5. The Tribunal, after examining the pleadings of the parties and the evidence, held that the claimants have failed to prove that the driver of the offending truck was driving the said truck rashly and negligently and there was any negligence on his part.

6. I have gone through the impugned award and the material placed on the record. The impugned award is well reasoned. I do not want to load the judgment by referring to the evidence led by the parties, in detail, which has been discussed by the Tribunal at length in the impugned award in paragraphs 9 to 21.

7. The claimants have failed to plead and prove that the truck was being driven at a higher speed or rashly and negligently. There is no averment in the Claim Petition, what to speak of evidence, to show that the driver had driven the offending truck rashly and negligently at a high speed while crossing the bridge. On the contrary, there is sufficient evidence on the file which does disclose that the driver was crossing the bridge with normal speed and the bridge collapsed.

8. In this regard, the Tribunal has made discussion in paragraphs 23 to 25 of the impugned award, which are reproduced below:

> "23. The case of the petitioners makes it evident that it was not their case that the driver of truck No.HP-25-0290 was driving the truck on the bridge at a high speed so as to establish that on account of such rash driving, the bridge collapsed. Sh.Anand Yadav labourer has also not testified that the respondent No.2 was driving the truck at an excessive speed and thereby endangered the bridge and it collapsed. This makes it evident that it is not established that the drive was driving the truck No.HP-25-0290 rashly and on account of such driving the bridge collapsed.
>
> 24. The driving of truck No.HP-25-0290 negligently by respondent No.2 also does not stand substantiated. Sh.M.P. Singh who was posted as Executive Engineer GREF at Delhi was not present at the occurrence site and could not have seen the manner in which the truck was being driven nor he could have noticed that the truck was being driven negligently. The testimony of this witness that the bridge collapsed due to the negligence of the drive of the truck in such circumstances is of no avail. Sh. K.P.R. Singh PW-3 was not present at the time of the accident nor has inspected the site personally and as such his testimony that the truck struck against the right side of the bridge cannot be relied upon.
>
> 25. Sh.Anand Yadav w2ho was working as a labourer with GREF P.W.7 has testified that the truck had struck against the panel of the right side of the bridge and on account of such driving the bridge collapsed and the truck also fell down. The bridge collapsed due to the negligence of the driver of the truck. He in cross-examination testified that the panel of the bridge had got bent and the panel was double panel with height of 8 feet. The respondents have not deposed that any such bent panel was noticed by any of the officers at the spot. The bridge was bailey bridge and the photographs make it evident that the bridge was hanging and as such the respondents could have easily retrieved the bent panel. There is nothing to suggest that any such panel of the right side was found bent by any body. Therefore, his testimony that the panel on the right side had bent due to strike of the truck does not appear to be gospel truth and sole testimony of this witness about the manner of the accident tis not above board and cannot be relied upon to hold that the accident was caused on account of negligent driving."

9. The findings recorded by the Tribunal are borne out from the records. The claimants have failed to prove that the driver had driven the vehicle rashly and negligently and that was the cause of collapsing of the bridge in question. There is nothing on the file which can be made basis that the maintenance of the bridge was carried out after the bridge was constructed in the year 2001. The bridge in question was on the National Highway and considerable number of vehicles (loaded/unloaded) would have been crossing the said bridge day in and day out. There is nothing on the file which is suggestive of the fact that the respondents had placed any cautionary boards on the entry points of the bridge regarding the speed limit to be maintained during the crossing of the bridge or about the load bearing capacity of the bridge. The claimants or the State Authorities had not deployed any police

official to check the vehicles crossing the bridge. Regarding this, the Tribunal has made detailed discussion in paragraphs 26 to 29 of the impugned award.

10. The learned counsel for the appellants was asked to show from the record that the damage was caused to the bridge in question due to the rash and negligent driving of the driver. The learned counsel for the appellants was not able to show that the driver had driven the offending truck rashly and negligently. He was also not in a position to show that the bridge was manned by the police officials on both entry points.

11. Having said so, the findings returned by the Tribunal on issue No.1 merit to be upheld and the same are upheld. It is immaterial to discuss the other issues, since the remaining issues flow from issue No.1.

12. In view of the above discussion, there is no merit in the appeal, the same is dismissed and the impugned award is upheld.

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

United India Insurance Company ...Appellant
Versus
Sh. Sohan Singh & others ...Respondents

FAO No. 443 of 2008
Date of decision: 16.10.2015

Motor Vehicles Act, 1988- Section 149- Claimant had sustained injuries in a motor vehicle accident involving a tractor and a motor cycle- owner and driver of the truck were not impleaded as parties before the Tribunal- it was contended that claimants could not have filed the claim petition without impleading the owner and driver of the tractor as parties and the claim petition was not maintainable- held, that in case of accident, claimants can file a claim petition against one of joint tortfeasors and claim compensation from them – it would be open for the joint tortfeasor to file the claim against the other and to seek compensation. (Para-10 to 13)

Case referred:
Khenyei versus New India Assurance Co. Limited & others, 2015 AIR SCW 3169

For the appellant : Mr. P.S. Chandel, Advocate.
For the respondents: Mr. Aman Sood, Advocate, for respondents No. 1 & 2.
Mr. Vijay Chaudhary, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 28th May, 2008, passed by the Motor Accidents Claims Tribunal, Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 40 of 2006, whereby compensation to the tune of Rs.4,61,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-respondents No. 1 & 2 herein and the

insurer came to be saddled with liability (for short, "the impugned award"), on the grounds taken in the memo of appeal.

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

3. Only, the insurer-Insurance Company has questioned the impugned award on the grounds, which are mentioned in para-6 of the appeal. It is apt to reproduce para-6 of the appeal herein:-

> "*6. That Ld. Tribunal while passing the impugned award has not at all appreciated and considered the plea set up on its behalf to the effect that since both the vehicles i.e. Tractor no HP-31-1286 and Motor Cycle No. HP-32-1274 were involved in the accident and rash and negligent in causing the accident. Accident has taken place due to the contributory negligence on the parts of the drivers of both the vehicles. Ld. Tribunal should have fastened the liability on the owners of both the vehicle equally as both of them has contributed in causing the accident in equal proportion. Ld. Tribunal despite of holding the tractor driver rash and negligent in causing the accident, has wrongly, illegally and incorrectly has not fastened him of any liability of compensation. Ld. Tribunal has committed material irregularity and illegality by not foisting any liability on the owner and driver of the tractor despite of being holding them rash and negligent. Since the impugned award passed by Ld. MACT is based on surmises and conjunctures and the same being contrary to law, material illegality and irregularity has been committed and as such award deserved to be quashed and set aside and the proportionate liability on the owner of the tractor may kindly be imposed upon them."*

4. Learned Counsel for the appellant-insurer argued that the claim petition was not maintainable for the reason that the owner and the driver of the tractor were not impleaded as party respondents in the claim petition and the accident was the outcome of the contributory negligence of the drivers of tractor and motor cycle.

5. The claimants had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/-, as per the breaks-up given in the claim petition, on the ground that driver, namely, Labh Singh had driven the offending vehicle-motor cycle bearing registration No. HP-32-1274, rashly and negligently, on 7.2.2006, at about 6.10 p.m., at Naulakha, P.O. Kanaid, Tehsil Sundernagar, District Mandi, HP, struck the motor cycle against the rear portion of trolley of tractor No. HP-31-1236, caused injuries to Tej Singh and succumbed to the said injuries.

6. The respondents resisted and contested the claim petition on the grounds taken in the memo of their replies.

7. Following issues came to be framed by the Tribunal:

> "*1. Whether Tej Singh died on account of motor vehicle accident which took place on 7.2.2006, at about 6:10 P.M. at place Naulakha, when the deceased was pillion rider on motor cycle No. HP-31-1274, which was being driven by respondent No. 2, as alleged? ...OPP*

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

3. *Whether the claim petition is being bad for misjoinder of parties as alleged? ….OPR-2*

4. *Whether the deceased was unauthorized passenger being pillion rider on motor cycle No. HP-32-1274 and as such not covered by the policy of the insurance as alleged? …OPR-3*

5. *Whether the respondent No. 2 was not holding a valid and effective driving licence to drive motor cycle and motor cycle was being driven in violation of the terms and conditions of the insurance policy as alleged?…..OPR-3*

6. *Relief"*

8. Parties have led evidence.

9. The Tribunal, after scanning the evidence, oral as well as documentary, held that the accident was outcome of the contributory negligence and the claim petition is maintainable.

10. The claimants have rightly filed the claim petition against one of joint tortfeasors and the claimants are entitled to compensation from any of them. It is apt to reproduce paras 20 & 22 of the impugned award herein:-

> "*20. It was strenuously urged on behalf of the respondent that the petitioners have not intentionally impleaded the driver of the tractor as co respondent so as to claim compensation from the insurance of the motor cycle i.e. respondent No. 3. To my mind from the evidence on the record it is clearly established that the accident has arisen out of the use of both motor cycle as well as tractor resulting in injury to Tej Singh who ultimately succumbed to the said injuries. It is just possible that the petitioner in order to get compensation easily from the insurance company of the motor cyclist has only impleaded the owner of the motor cycle as well as its insurer as party. It has been held in the case of Karnataka Road Transport Corpn vs. Arun & Aravind II (2004) ACC 53 (FB) that where the accident has taken place due to use of two vehicles their liability is joint and several. The claimants are at liberty to claim compensation from either of the joint tortfeasors. The provisions of section 163-A, in the Act were enacted with a view to provide speedy remedy to the claimants and they have been given choice to claim compensation from either of the joint tort feasors. Similar view has been taken in the case of Sushila Bhadoriya and Ors versus Madhya Pradesh State Road Transport Corporation & Anr. IV (2005) ACC 603 (FB).*
>
> *21. ……*
>
> *22. No doubt there are allegations in the FIR against the tractor driver but even if they are taken to be true the same would not absolve the respondents from their liability under the law as use of motor cycle in the accident stands fairly established. This issue is decided accordingly."*

11. The Apex Court in ***Khenyei versus New India Assurance Co. Limited & others,*** reported in **2015 AIR SCW 3169** has laid down the same principle. It is apt to reproduce para-18 of the aforesaid judgment herein:

"18. This Court in Challa Bharathamma (AIR 2004 SC 4882) & Nanjappan, (AIR 2004 SC 1630) (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

12. Learned Counsel for the appellant argued that owner and driver of the tractor were not added as party respondents in the claim petition and they be also saddled with liability.

13. Keeping in view the ratio of the law laid down by the apex Court in the judgment, *supra,* I am of the considered view that the appellant has a right to recover half of the award amount.

14. Accordingly, the impugned award is upheld and the appeal is dismissed. However, the insurer is at liberty to seek appropriate remedy.

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

16. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

United India Insurance co. Ltd. .....Appellant.
Versus
Bimla Devi and others ...Respondents

FAO (MVA) No. 328 of 2009
Date of decision: 16th October, 2015

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award claiming that accident is not proved to be outcome of rash and negligent driving by the offending driver- held, that enough evidence has been led by the claimants on record to prove rashness and negligence of offending driver which was not rebutted by the insurer- further held, that age of the deceased was 40 years and multiplier of '13' was applicable but the Tribunal has fallen in error while applying multiplier of '16'- Tribunal has further fallen in error by awarding interest @ 12% per annum whereas, it should have been 7.5% per annum- award modified accordingly. (Para-6, 8 and 12)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.
For the respondents: Mr. Rakesh Thakur, Advocate, for respondents No. 1 to 3.
Mr. Rahul Mahajan, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award dated 24.3.2009, made by the Motor Accident Claims Tribunal Solan, in Petition No. 34-S/2 of 2007/06, titled Bimla Devi and others versus Charan Singh and others, for short "the Tribunal", whereby compensation to the tune of Rs.13,96,119.00/- alongwith interest @ 12% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The claimants being the victims of a vehicular accident filed claim petition before the Tribunal, for the grant of compensation, to the tune of Rs.40 lacs, as per the break-ups given in the claim petitions, on the ground that Madan Lal husband of Bimla Devi and father of claimants No. 2 and 3 who was bread earner of the family became victim of a vehicular accident, caused by driver, namely Rakesh Kumar while driving truck No. HR-47-4890 rashly and negligently during the intervening night of 17/18 June, 2005.

4. The claim petition was resisted by all the respondents, and following issues came to be framed.

(i) Whether the deceased Madan Lal died due to rash and negligent driving of the respondent No. 2 while driving truck bearing No. HR-43-4898 on 18.6.2005 at about 2.00 P.M. near Panipat? OPP.

(ii) If issue No. 1 is proved in affirmative, as to what amount of compensation, the petitioners are entitled to and from whom? OPP.

(iii) Whether the respondent was not having valid and effective driving licence at the time of accident. If so its effect thereto? OPR-3.

(iv) Whether the truck bearing No. HR-47-4890 did not have valid registration certificate, route permit and fitness certificate and was being driven in breach of the standard policy conditions. If so, its effect thereto? OPR-3.

(v) Relief.

5. Claimants have examined two witnesses, and in addition Bimla Devi claimant No. 1 also stepped into the witness box as PW2. The insured and insurer have not led any evidence. Only Rakesh Kumar driver has stepped into the witness box as RW-1. Thus, the evidence led by the claimants have remained unrebuted.

6. The claimants have pleaded in the claim petition that driver Rakesh Kumar had parked the truck in breach of the Motor Vehicles Act, for short "the Act in middle of the road. Though it is not specifically denied by the owner and driver of the offending vehicle or the insurer but there is evasive denial. The claimants have examined Mohamad Salim as PW3 who has stated that truck was parked in the middle of the road without taking due care and caution, as required, and dashed with the parked truck of Madan Lal, who sustained injuries, was taken to Hospital and succumbed to the injuries. The Tribunal has discussed his statement in para 8 and has also discussed the statement of respondent No. 3, i.e. driver in para 9 of the impugned award. I am of the considered view that the Tribunal has rightly made the discussion in para 8 of the impugned award. Even otherwise, respondents have not led any evidence to prove that the accident was outcome of rash and negligent driving of Madan Lal. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

7. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 and 4. It was for the insurer to prove both these issues, has not led any evidence, thus has failed to discharge the onus. Accordingly, both the issues are decided in favour of the claimants and against the insurer. Thus, the findings on these issues are upheld.

8. **Issue No. 1.** Admittedly, claimants have proved that the age of the deceased was more than 40 years. His date of birth was 3.6.1965 as per the driving licence Ext. PW2/B and the accident has taken place on 18.6.2005. Thus, he was more than 40 years of age at the time of the accident. The Tribunal has also held that he was 40 years of age but has fallen in an error in applying the multiplier of "16" whereas multiplier of "13" was applicable in view of the 2nd Schedule of the Motor Vehicles Act read with **Sarla Verma and others versus Delhi Transport Corporation and another** reported in **AIR 2009 SC 3104** and upheld in **Reshma Kumari and others versus Madan Mohan and another**, reported in **2013 AIR SCW 3120**.

9. The Tribunal, after examining the pleadings, evidence and other documents held in para 10 of the impugned award that the minimum income of the deceased was not less than 15,000/- per month. I am of the considered view that the Tribunal has rightly made the discussion and held that the minimum income of the deceased was Rs.10,000/- per month and after deducting 1/3rd he has lost source of dependency to the tune of Rs.6670/-. Thus, the source of dependency can be rounded as Rs.6700/- per month and multiplier applicable is "13" and not "16". Thus, the claimants are held entitled to Rs.6700x12x13= Total Rs.10,45,200/-.

10. The Tribunal has rightly awarded compensation under the head "loss of Consortium" Rs.50,000/-, "love and affection" Rs.50,000/- and "transportation and medicines" Rs.15119/-. The same are upheld.

11. Having said so, the claimants are entitled to Rs.10,45,200/- +Rs.50,000+Rs.50,000/-+Rs.15119/-. Total Rs. 11,60,319/-.

12. The Tribunal has also fallen in an error in awarding interest @ 12% per annum whereas interest @ 7.5% per annum was required to be awarded. Thus, the claimants are held to entitled to Rs.11,60,319 with interest @ 7.5% per annum from the date of claim petition till its realization.

13. Viewed thus, the impugned award merits to be modified and is accordingly modified, as indicated hereinabove.

14. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account and excess amount if any, shall be refunded to the insurer, through payee's account cheque.

15. The appeal stands disposed of accordingly.

16. Send down the record, forthwith, after placing a copy of this judgment.

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

United India Insurance Company .....Appellant

Versus

Leelan Devi and others ..... Respondents

FAO No.264 of 2009
Decided on : 16.10.2015

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award and pleaded that it was wrongly saddled with liability as claimant/injured was travelling in the offending vehicle as a gratuitous passenger – held, that evidence on record proves that claimant had hired the vehicle - Insurance Policy shows that it covered risk of three person i.e. one driver and two passengers - in view of this, Insurance Company was rightly saddled with liability- appeal dismissed. (Para-6 to 9)

Presence for the Parties:

For the appellant: Mr.P.S. Chandel, Advocate.

For the respondents: Mr.Adarsh K. Vashista, Advocate, for respondent No.1.
Nemo 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 award, dated 5th March, 2009, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P., (for short, the Tribunal), in Claim Petition No.06 of 2007, titled Leelan Devi vs. Vinod Kumar and others, whereby compensation to the tune of Rs.3,09,434/-, with interest at the rate of 7% per annum from the date of filing of the claim petition till deposit, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short the impugned award).

2. Facts of the case giving rise to the present appeal are that on 2nd April, 2003, Claimant Leelan Devi, alongwith other persons, was traveling in a Jeep bearing No.HP-22-6433, which was hired by them from Sujanpur to Jawalamukhi and back. When the said Jeep was coming from Jawalamukhi and reached at Khirki, the Jeep, being driven by original respondent No.2, namely, Vinay Kumar, rashly and negligently, met with an accident, as a result of which the claimant sustained injuries, was taken to Primary Health Center, Sujanpur, fromwhere she was referred to Regional Hospital, Hamirpur and thereafter to PGI, Chandigarh. FIR in regard to the accident bearing No.24/2003, dated 2nd April, 2003, was registered at Police Station, Sujanpur, under Section 279 and 337 of the Indian Penal Code. Thus, the claimant-injured filed the claim petition claiming compensation to the tune of Rs.15.00 lacs, as per the break-ups given in the claim petition.

3. The Claim Petition was resisted by the respondents by filing replies.

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

> "1. Whether petitioner Leela Devi has suffered injuries due to rash and negligent driving on the part of respondent No.2 while driving Jeep No.HP-22-6433? OPP
>
> 2. If issue No.1 is proved in the affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP
>
> 3. Whether the petitioner was traveling in the offending vehicle as gratuitous passenger and as such, the petition is not maintainable? OPR-3
>
> 4. Whether the offending vehicle was being driven in violation of the terms and conditions of the Insurance Policy and against the provisions of the Motor Vehicles Act and if so, its effect? OPR-3.
>
> 5. Whether respondent No.2 was not holding a valid and effective driving licence at the time of accident? OPR-2.

6. Relief."

5. In order to prove her case, the claimant-injured examined PW-1 Jai Chand, PW-2 Dr.Desh Raj Sharma, PW-3 Leelan Devi (claimant herself), PW-4 Rajesh Kumar and PW-5 Dr.Dharamveer. On the other hand, the respondents have examined two witnesses, namely, RW-1 Ranjit Singh and RW-2 Vinay Kumar (driver of the offending vehicle).

6. Feeling aggrieved, the insurer has questioned the impugned award on the ground that the Tribunal has erred in fastening the insurer with the liability since the claimant-injured was traveling in the offending vehicle as gratuitous passenger.

7. A perusal of the record shows that the insurer has failed to lead any evidence to prove that the claimant was traveling in the offending vehicle as gratuitous passenger.

8. On a bare perusal of the registration certification and the insurance policy of the offending vehicle, one comes to an inescapable conclusion that the offending vehicle was a Light Motor Vehicle, whose unladen weight was 1610 kgs. In terms of the mandate of the Motor Vehicles Act, the offending vehicle falls within the definition of Light Motor Vehicle. As per the registration certificate, the seating capacity of the offending vehicle was '1+2' i.e. one driver and two passengers. The insurance policy, on the basis of which the learned counsel for the appellant has placed reliance, also covers the risk of three persons i.e. one driver and two passengers.

9. Admittedly, the claimant had hired the offending vehicle and the insurer has not led any evidence to the contrary to prove that the claimant was traveling in the offending vehicle as gratuitous passenger.

10. Having said so, the Tribunal has rightly recorded the impugned award and has rightly saddled the insurer with the liability. Accordingly, the impugned award is upheld and the instant appeal is dismissed. The Registry is directed to release the amount of compensation in favour of the claimant forthwith, after proper identification.

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

FAOs No. 462 & 528 of 2009
Decided on: 16.10.2015

FAO No. 462 of 2009

United India Insurance Company Ltd. ...Appellant.

Versus

Smt. Simlo Devi and others ...Respondents.

FAO No. 528 of 2009

Shashi Paul ...Appellant.

Versus

Simlo Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 157- Insurer contended that the route permit was not transferred in the name of the transferee and the transfer was not brought to its notice- held, that the fact that Transfer was not brought to the notice of the Insurer is not sufficient to exonerate the insurer from the liability- non- transfer of the route permit in the name of the transferee cannot be said to be violation of the terms and conditions of the insurance

policy – Tribunal had wrongly held that insured had committed breach of the terms and conditions of the insurance policy and had wrongly granted right of recovery to the insurer. (Para-10 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and anotherAIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

FAO No. 462 of 2009:

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.
For the respondents:	Mr. Sanjay Jaswal, Advocate, for respondents No. 1 and 2. Mr. Rajesh Mandhotra, Advocate, for respondent No. 3. Mr. Vinod Thakur, Advocate, for respondent No. 4.

FAO No. 528 of 2009:

For the appellant:	Mr. Rajesh Mandhotra, Advocate.
For the respondents:	Mr. Sanjay Jaswal, Advocate, for respondents No. 1 and 2. Mr. Vinod Thakur, Advocate, for respondent No. 3. Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Both these appeals are outcome of the judgment and award, dated 22.08.2009, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (for short "the Tribunal") in M.A.C.P. No. 12-K/II-2008, titled as Simlo Devi and another versus Shashi Paul and others (for short "the impugned award"), thus, I deem it proper to determine both these appeals by this common judgment.

2. By the medium of FAO No. 462 of 2009, the insurer has questioned the impugned award on the ground of adequacy of compensation.

3. The owner-insured has questioned the impugned award by the medium of FAO No. 528 of 2009 on the ground that the Tribunal has fallen in an error in saddling him with liability.

4. The claimants and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

5. The claimants have sought compensation, as per the break-ups given in the claim petition on the ground that they have lost their son in a vehicular accident, which was caused by the driver, namely Shri Binesh Thapa, while driving van bearing registration No. HP-01-0769, rashly and negligently on 08.02.2008 at about 8.15 P.M.

6. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal:

> "1.Whether Sh. Ajay Kumar died on account of rash and negligent driving of vehicle No. HP-01-0769 by respondent No. 1? OPP

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

3. Whether the claim petition is not maintainable against the respondent No. 2? OPR-2

4. Whether the claim petition is bad for misjoinder of necessary parties? OPR-2

5. Whether respondent No. 1 had not been in possession of valid and effective driving licence if so with what effect? OPR-3

6. Relief."

8. Parties have led evidence.

9. The findings returned by the Tribunal on issues No. 1, 3, 4 ad 5 are not in dispute. Accordingly, the findings returned on the said issues are upheld.

10. Learned Senior Counsel for the insurer argued that the route permit was not transferred in the name of the transferee, thus, the owner-insured has committed a breach and the amount awarded is excessive.

11. I have gone through the documents and the evidence. Even if the vehicle is transferred and it is not brought to the notice of the insurer, the insurer cannot claim exoneration, as held by the Apex Court and this Court in a series of cases.

12. Even otherwise, there was a route permit, but was not transferred in the name of the transferee, cannot be said to be violation of the terms and conditions of the insurance policy.

13. Having said so, the Tribunal has fallen in an error in holding that the owner-insured has committed breach and granting right of recovery to the insurer.

14. The amount awarded is not in accordance with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** for the following reasons:

15. In para 17 of the impugned award, the income of the deceased has been taken as Rs.3,000/- per month, which has not been questioned by the claimants, is accordingly upheld. However, the Tribunal has fallen in an error in deducting one third towards the personal expenses of the deceased as in terms of the judgments (supra), 50% was to be deducted as the deceased was a bachelor. Thus, it is held that the claimants have suffered loss of income to the tune of Rs.1500/- per month.

16. The Tribunal has also fallen in an error in applying the multiplier of '17, as the multiplier of '15' was to be applied in terms of the mandate of the Second Schedule appended with the MV Act read with the judgments (supra).

17. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.1500/- x 12 x 15 = Rs.2,70,000/- under the head 'loss of income/dependency'. The compensation awarded under the heads 'loss of expectancy of love & affection' to the tune of Rs.10,000/-, 'funeral & conveyance' to the tune of Rs.15,000/-, 'medical expenses to the tune of Rs.29,781/- and 'attendant charges' to the tune of Rs.5,000/- is upheld.

18. Having said so, the claimants are held entitled to total compensation to the tune of Rs.2,70,000/- + Rs.10,000/- + Rs.15,000/- + Rs.29,781/- + Rs.5,000/- = Rs.3,29,781/- with interest as awarded by the Tribunal.

19. In the above backdrop, the appeal of the insured is allowed, the appeal of the insurer is partly allowed and the impugned award is modified, as indicated hereinabove.

20. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

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

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

United India Insurance Company Limited .....Appellant
Versus
Balbir Kaur & others ..... Respondents

FAO No.335 of 2009
Date of decision: 16.10.2015

Motor Vehicles Act, 1988- Section 149- Award challenged by the Insurer on the grounds that driver of the offending vehicle did not have valid and effective driving licence, and secondly, amount awarded is excessive- held, that no evidence was led by the Insurer to prove that Insured/Owner had not taken all necessary steps before engaging the driver- no evidence was led by the Insurer to prove that the driver of the offending vehicle was not having valid and effective driving licence- further held, that Tribunal had fallen in error in deducting 1/3rd amount towards personal expenses, whereas, deduction should have been 1/4th amount in view of settled law- award modified accordingly. (Para-3 to 5 and 7)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Jagdish Thakur, Advocate, for respondents No.1 to 5.
Nemo for respondents No.6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 5th May, 2009, passed by the Motor Accident Claims Tribunal-II, Una, District Una, H.P., (for short, "the Tribunal") in MAC Petition No.3/2007, titled Smt. Balbir Kaur & others vs. Sh. Ranjeet Singh & others, whereby a sum of Rs.9,62,000/- alongwith interest at the rate of 7½ % per annum came to

be awarded as compensation in favour of the claimants and the insurer was saddled with the liability (for short the "impugned award").

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

3. Only the insurer has questioned the impugned award on two counts (i) that the driver of the offending vehicle was not having valid and effective driving licence; and (ii) that the amount awarded is excessive.

4. Having said so, there is no dispute about the findings returned on issues No.1, 3, 4 and partly on issue No.2. Accordingly, the findings returned on issues No.1, 3 and 4 are upheld.

5. Before I deal with the adequacy of compensation, I deem it proper to deal with issues No.5 and 6. It was for the insurer to plead and prove that the driver of the offending vehicle was not having valid and effective driving licence. The insurer has examined Vinod Kumar RW-3, who has categorically stated, as rightly discussed in paragraphs 23 and 24 of the impugned award, that the driving licence was not fake. The insurer has not led any evidence to the effect that the insured-owner has not taken all necessary steps before engaging the driver. There is no evidence that owner has committed willful breach. Having said so, the findings returned on issues No.5 and 6 are also upheld.

6. It was pleaded and proved by the claimants that the deceased was a government employee and drawing a monthly salary of Rs.14,130/- and salary certificate (Ext. PW-2/A) do disclose that the deceased was drawing salary to the tune of Rs.14,130/- per month. Admittedly, the age of the deceased was 52 years at the time of the accident. The Tribunal has rightly applied the multiplier of '8' 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.***

7. The Tribunal has also fallen in error in deducting 1/3rd towards personal expenses. 1/4th was to be deducted towards the personal expenses in view of the ***Sarla Verma*** read with ***Reshma Kumari's*** cases referred to supra. Accordingly, the claimants have lost source of dependency to the tune of Rs.10500/-X12X8= Rs.10,08,000/- plus Rs.10,000/- under the head of 'funeral expenses, Rs.20,000/- under the head of 'loss of happiness of married life' and Rs.20,000/- under the head of 'loss of love and affection', as awarded by the Tribunal.

8. The claimants have not questioned the adequacy of award. Accordingly, amount awarded by the Tribunal is upheld.

9. The insurer-appellant is directed to deposit the amount in the Registry of this Court within six weeks from today, if not already deposited. On deposit, the entire amount shall be released in favour of the claimants, strictly as per the terms and conditions contained in the impugned award.

10. The appeal is dismissed alongwith all miscellaneous applications, if any.

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

State of H.P. and another ...Petitioners.

Versus

Inder Singh ...Respondent.

CWP No. 2388 of 2009
Decided on: 26.10.2015

Constitution of India, 1950- Article 226- Tribunal directed that petitioner no. 2 is entitled for regularization as Driller subject to availability of post- reliance was placed upon judgment of High Court in case titled **Sohan Lal and another versus State of Himachal Pradesh and another CWP No.939 of 1996** decided on 08.08.1996- held, that matter was clearly covered by judgment of High Court in **Sohan Lal and another Vs. State of H.P. & another** and there was no infirmity in the order passed by Tribunal. (Para-1 and 2)

For the petitioners: Mr. V.S. Chauhan, Additional Advocate General, with Mr. J.K. Verma, Deputy Advocate General, and Mr. Ramesh Thakur, Assistant Advocate General.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The judgment and order, dated 03.12.2007, made by the H.P. State Administrative Tribunal (for short "the Tribunal") in OA (M) No. 421 of 1996, titled as Inder Singh versus State of H.P. and another, is impugned in this writ petition, wherein the Tribunal, while relying on judgment, dated 08.08.1996, made by this Court in **CWP No. 939 of 1996,** titled as **Sohan Lal and another versus State of Himachal Pradesh and another,** decided on 08.08.1996, allowed the original application filed by the respondent herein.

2. We have perused the judgment rendered by this Court in Sohan Lal's case (supra). It is apt to reproduce relevant portion of the judgment herein:

> *".....We have perused Annexure R-2, wherein it is mentioned that petitioner No. 2 has put in 538 days as Beldar and 2772 days as Driller from the year 1983 to 1993 (11 years). In view of this, we hold that petitioner No. 2 is entitled for regularisation as Driller with effect from 1-1-1995, as has been done in the case of petitioner No. 1 subject to availability of post on that day."*

3. The said judgment squarely covers the case in hand. The writ petition is dismissed accordingly alongwith all pending applications.

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

State of Himachal Pradesh and another ...Petitioners.
Versus
Jarm Chand ...Respondent.

CWP No. 1805 of 2008
Decided on: 26.10.2015

Constitution of India, 1950- Article 226- Petition dismissed in view of judgments titled **State of H.P. and others versus Gehar Singh, (2007) 12 Supreme Court Cases 43 and Gauri Dutt & ors. versus State of H.P., Latest HLJ 2008 (HP) 366.**

Cases referred:
State of H.P. and others versus Gehar Singh, (2007) 12 Supreme Court Cases 43
Gauri Dutt & ors. versus State of H.P., Latest HLJ 2008 (HP) 366

For the petitioners: Mr. V.S. Chauhan, Additional Advocate General, with Mr. J.K. Verma, Deputy Advocate General, and Mr. Ramesh Thakur, Assistant Advocate General.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Much water has flown down. Nothing survives in this writ petition in view of the law laid down by the Apex Court in the case titled as **State of H.P. and others versus Gehar Singh,** reported in **(2007) 12 Supreme Court Cases 43,** and by a Division Bench of this Court in the case titled as **Gauri Dutt & ors. versus State of H.P.,** reported in **Latest HLJ 2008 (HP) 366.** Accordingly, the writ petition is dismissed alongwith all pending applications.

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

Ashwani Kumar son of Dina Nath. .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No.379 of 2009.
Judgment reserved on: 08th September, 2015
Date of Judgment: October 27, 2015.

Indian Penal Code, 1860- Section 498-A, 302 and 201 read with Section 34- Deceased was married to accused 'A' – accused started maltreating the deceased on the pretext of not bringing anything from her paternal home- accused demanded 5 lacs but the deceased

could only bring Rs. 1 lakh- accused 'A' also deserted the deceased after she gave birth to a daughter- deceased committed suicide by hanging herself from the ceiling fan in her matrimonial home - prosecution witnesses had specifically deposed about demand of dowry and the maltreatment - Medical Officer specifically stated that deceased had died due to strangulation leading to asphyxia and death- no fracture of thyroid bone was detected which is common in case of suicide- this clearly shows that deceased had not committed suicide but was murdered- accused 'A' had sustained injuries which were not explained - ropes were recovered at the instance of accused- murder was committed inside the house and the accused was bound to explain the circumstances leading to the death which they had not done- minor contradictions after the lapse of time are not sufficient to doubt the prosecution case - all the links in the chain of circumstances were proved- trial Court had rightly convicted the accused- appeal dismissed. (Para-10 to 23)

Cases referred:

C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505
Triloki Nath and others vs. State of U.P., AIR 2006 SC 321
Prakash vs. State of Rajasthan (DB), 2013 Cri.L.J. 2040
State of U.P. vs. Dr. Ravindra Prakash Mittal, AIR 1992 SC 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
Jose vs. State of Kerala, AIR 1973 SC 944
Mani vs. State of Tamil Nadu, (2009)17 SCC 273
Pohalya Motya Valvi vs. State of Maharashtra, (1980)1 SCC 530
Suryanarayana vs. State of Karnataka, (2001)9 SCC 129
Panchhi and others vs. State of U.P., 1998(4) RCR 74 (SC
Baby Kandayanathil vs. State of Kerala, (1993) Supp 3 SCC 667
Nivrutti Pandurang Kotate vs. State of Maharashtra, 2998(2) RCR (Cri.) 74

Golla Yelugu Govindu vs. State of A.P., 2008(4) RCR(Cri.) 183
Acharaparambath Pradeeepan vs. State of Kerala, (2006)13 SCC 643
Ratansinh Dalsukhbai Nayak vs. State of Gujarat, (2004)1 SCC 64
Yuvaraj Ambar Mohite vs. State of Maharashtra, 2006(10) SCALE 369
Dattu Ramrao Sakhare vs. State of Maharashtra, (1997)5 SCC 341
Prakash vs. State of Madhya Pradesh, (1992)4 SCC 225
State of U.P. vs. Nahar Singh (dead) and others, (1998)3 SCC 561
Donthula Ravindranath @ Ravinder Rao vs. State of Andhra Pradesh, 2014 Cri.LJ 1217
Niwas vs. Ram Bharose, AIR 1994 SC 1539
Umesh Singh vs. State of Bihar, 2013(3) RCR (Criminal) 120
Suraj Singh vs. State of U.P., 2010(1) RCR (Criminal) 88
Mahmood vs. State of U.P.,(2007)14 SCC 16
Allarakha K. Mansuri vs. State of Gujarat, (2002)3 SCC 57
Amar Singh vs. State of Punjab,(1987)1 SCC 679
M.G. Agarwal vs. State of Maharashta, AIR 1963 SC 200
Munish Mubar vs. State of Haryana, (2012) 10 SCC 464

For the appellant: M/s Anup Chitkara and Ms. Neha Scott, Advocates.
For the respondent: Mr.J.S.Guleria,Assistant Advocate General

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment and sentence passed by learned Additional Sessions Judge Una District Una HP in Sessions trial No. 27 of 2008 decided on 31.7.2009 titled State of H.P. Vs. Ashwani Kumar and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that co-accused Ashwani Kumar was married with deceased Monika in the year 2000. It is alleged by prosecution that after marriage accused persons started maltreating and harassing deceased Monika on the pretext of not bringing anything from her parental house in the marriage. It is further alleged by prosecution that deceased Monika came back from her parental house on 2.4.2008 after about 22 days and accused persons demanded Rs.500000/- (Five lacs) but deceased Monika brought only Rs.100000/- (One lac) when deceased came back to her matrimonial house from her parental house. It is further alleged by prosecution that co-accused Ashwani Kumar deserted deceased Monika after she blessed with daughter and deceased Monika was constrained to live at her parental house in Dalhousie for one year. It is further alleged by prosecution that deceased Monika filed a petition under Section 125 Cr.PC and also filed a complaint before HP State Women Commission. It is further alleged by prosecution that brother of deceased had given mobile phone to deceased Monika when she came back from her matrimonial house and same was broken by co-accused Ashwani Kumar. It is further alleged by prosecution that on dated 5.4.2008 in the morning a telephonic message was received in police station Gagret that deceased Monika had died after hanging herself from ceiling fan at Daulatpur chowk and police party headed by SI Mohinder Singh reached at the spot. It is further alleged by prosecution that PW30 SHO P.S.Thakur police station Gagret also reached at the spot and statement of PW1 Anil Gupta was recorded under Section 154 Cr.PC and thereafter FIR Ext PW26/A was recorded. It is further alleged by prosecution that PW29 SI Mohinder Singh had prepared inquest report Ext PW5/A and also clicked

photographs at the spot Ext PW12/A to Ext PW12/F. It is further alleged by prosecution that PW30 Inspector P.S Thakur prepared site plan Ext PW30/A and also took into possession scarf Ext. P1 and P2 vide seizure memo Ext PW1/B. It is further alleged by prosecution that disclosure statement under Section 27 of Indian Evidence Act 1872 was made by co-accused Ashwani Kumar Ext PW1/C and as per disclosure statement thin rope and scarf were recovered. It is further alleged by prosecution that PW30 Inspector P.S.Thakur prepared site plan at the spot and also took into possession complaints filed by deceased Monika and copy of bill pertaining to purchase of mobile phone. It is further alleged by prosecution that accused persons were medically examined. It is further alleged by prosecution that post mortem of deceased Monika was conducted and as per post mortem report deceased Monika had died due to strangulation homicidal leading to asphyxia and death. It is further alleged by prosecution that scarf and thin rope were sent for chemical examination and as per report of chemical analyst death could be caused by strangulation with thin rope and scarf. It is further alleged by prosecution that as per medical opinion ligature marks found on the neck of deceased Monika were possible with scarf. It is further alleged by prosecution that injuries were also observed upon the body of co-accused Ashwani Kumar. It is further alleged by prosecution that accused persons caused disappearance of evidence by way of concealing scarf and by way of concealing strangulating material to screen the offender from legal punishment. Charge was framed against accused persons under Sections 498-A, 302, 201 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. The prosecution examined thirty oral witnesses in support of its case and also produced documentary evidence.

4. Statement of accused persons recorded under Section 313 Cr.PC. Accused persons did not lead any defence evidence. Accused has stated that deceased Monika wanted that co-accused Ashwani Kumar should shift his work to Banikhet and when co-accused Ashwani Kumar did not accept the request of deceased Monika thereafter deceased committed suicide in her matrimonial house. Learned trial Court convicted co-accused Ashwani Kumar under Section 302 IPC and acquitted co-accused Ashwani Kumar under Section 498-A and 201 IPC. Learned trial Court acquitted co-accused persons namely Dina Nath and Manorma under Sections 302, 498-A and 201 IPC. Learned trial court sentenced co-accused Ashwani Kumar to undergo imprisonment for life and pay fine of Rs.10000/- (Ten thousand). Learned trial Court further directed that in default of payment of fine convict Ashwani Kumar shall further undergo simple imprisonment for one year. Learned trial Court further directed that both sentences shall run concurrently and the period of detention undergone during the inquiry, investigation and trial would be set off.

5. Feeling aggrieved against the judgment and sentence passed by learned Trial Court appellant Ashwani Kumar filed present appeal.

6. We have heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of respondent and also gone through entire record carefully.

7. Following poitns arises for determination before us.

(i) 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 appellant as alleged in memorandum of grounds of appeal?

(ii) Final order.

8.Findings upon Point No.1 with reasons

8.1 PW1 Anil Gupta has stated that deceased Monika was his younger sister. He has stated that deceased Monika was married to co-accused Ashwani Kumar son of Dina Nath in the year 2000. He has stated that deceased Monika had given birth to two children namely Kritka aged 7 years and son Kartik aged two years. He has stated that after marriage accused persons present in Court maltreated and harassed deceased Monika. He has stated that accused persons have demanded dowry from deceased Monika. He has stated that deceased Monika stayed in her parental house for about 22 days and thereafter Monika returned to her matrimonial house on dated 2.4.2008. He has stated that accused persons have demanded Rs.500000/- (Five lacs) and he had managed only Rs.100000/- (One lac) and paid the same to his sister Monika when she went to her matrimonial house from her parental house. He has stated that when his sister Monika blessed with daughter she was deserted by accused persons and deceased Monika lived with them for about one year at Dalhousie. He has stated that deceased Monika had also filed petition seeking maintenance allowance from co-accused Ashwani Kumar in Court at Dalhousie. He has stated that one complaint was also filed in HP State Women Commission. He has stated that thereafter due to interference of family members and friends the matter was compromised and deceased Monika was sent to her matrimonial house. He has stated that even after compromise accused persons had demanded golden ornaments from deceased Monika and maltreatment of deceased Monika continued. He has stated that he had given mobile phone to his deceased sister Monika when she came to her parental house but same was broken by co-accused Ashwani Kumar. He has stated that on dated 4.4.2008 deceased Monika had complaint about maltreatment given to her. He has stated that on dated 5.4.2008 some un-known persons had sent telephone call at about 9.10 AM informing about death of Monika. He has stated that when he along with relatives reached at Daulatpur chowk police officials were already reached at the spot. He has stated that when he reached at about 1.30 PM at the spot he noticed that there was a mark on the neck of his deceased sister bluish in colour and blood was coming out from nostrils. He has stated that deceased Monika had died because of act and conduct of accused persons. He has stated that his statement Ext PW1/A was recorded by police officials which bears his signature. He has stated that during investigation police officials had recovered two scarfs from the room of co-accused Ashwani Kumar and same were took into possession vide memo Ext. PW1/B. He has stated that scarfs were sealed. He has stated that co-accused Ashwani Kumar had given disclosure statement that he could recover rope with which co-accused Ashwani Kumar strangulated deceased Monika. He has stated that as per disclosure statement given by co-accused Ashwani Kumar rope was recovered which was took into possession vide memo Ext PW1/D which bears his signature and that of accused persons. He has stated that rope Ext P3 is the same which was recovered by police officials at the instance of co-accused Ashwani Kumar. He has stated that on dated 11.4.2008 he had produced certified copy of complaint filed by deceased Monika before criminal Court at Dalhousie and also produced copy of application filed before HP State Women Commission. He has stated that deceased Monika had qualified B.Sc. B.Ed. and had also qualified one year diploma in computer and she was in perfect state of mind. He has admitted that in laws of deceased Monika used to live in ground floor of residential house and deceased Monika and her husband used to live on the top floor of the residential house. He has admitted that their kitchens were separate. He has denied suggestion that accused persons did not demand dowry at any point of time. He has denied suggestion that accused persons did not maltreat deceased Monika. He has denied suggestion that he had not given Rs.100000/- (One lac) to deceased. He has denied suggestion that accused persons were not instrumental in the death of deceased Monika.

8.2 PW2 Tarsem Raj father of deceased has stated that he retired as teacher and he has two sons and two daughters. He has stated that deceased Monika was one of them. He has stated that in the year 2000 deceased Monika was married to co-accused Ashwani Kumar. He has stated that marriage was solemnized at Ashia Palace Dhangu Road Pathankot. He has stated that after about 15 days of marriage deceased Monika was maltreated and harassed by accused persons on account of insufficient dowry. He has stated that accused persons also used to give beatings to deceased Monika. He has stated that in the year 2001 deceased Monika was blessed with daughter. He has stated that thereafter again accused persons maltreated deceased Monika for giving birth to a female baby child. He has stated that deceased Monika was forced to left her matrimonial house after 15 days of the birth of female child. He has stated that deceased Monika came to Banikhet. He has stated that for about 1½ years deceased Monika remained with him at Banikhet. He has stated that during said period accused persons did not enquire about the welfare of deceased and her female child. He has stated that thereafter petition for maintenance allowance for child was filed before criminal Court at Dalhousie. He has stated that thereafter with the intervention of relatives and friends matter was resolved and maintenance case was withdrawn and deceased Monika was brought back to her matrimonial house. He has stated that all accused persons continued to maltreat and harassed deceased Monika. He has stated that after two years son was born to deceased Monika. He has stated that he spent Rs.200000/- (Two lacs) as per desire of accused persons but maltreatment and harassment remained continued. He has stated that in the month of March 2008 deceased Monika came to her parental house and stayed for about 20 days and thereafter she returned back to her matrimonial house on dated 2.4.2008. He has stated that accused persons have demanded Rs.500000/- (Five lacs) and his son managed to collect only Rs.100000/- (One lac). He has stated that on dated 5.4.2008 he received telephone call that his daughter Monika had passed away. He has stated that he reached at Daulatpur at about 3/4 PM and thereafter he went to police station Gagret where dead body was kept. He has stated that he noticed bluish mark of injuries upon the neck of deceased Monika. He has stated that blood was also oozing out from the nose of deceased Monika. He has stated that mobile phone given to deceased Monika by her brother as gift was also broken by co-accused Ashwani Kumar. He has stated that he suspected that all accused persons have killed deceased Monika. He has stated that he also noticed scratch marks on the neck of co-accused Ashwani Kumar. He has denied suggestion that his deceased daughter wanted her husband to settle his business at Banikhet. He has denied suggestion that accused persons did not demand dowry. He has denied suggestion that he had not given any money to accused persons. He has denied suggestion that accused persons have no role in the death of deceased Monika.

8.3. PW3 Pawan Jaryal has stated that he is dentist working at Banikhet. He has stated that deceased Monika came to his clinic on dated 30.3.2008. He has stated that on dated 1.4.2008 Anil Gupta brother of deceased demanded money from him because of some problem and he paid Rs.30000/- (Thirty thousand) to Anil Gupta. Witness was declared hostile by prosecution. He has admitted that Anil Gupta told him that deceased Monika maltreated by in-laws and also told that in-laws of deceased had demanded Rs.100000/- (One lac). He has stated that on dated 5.4.2008 Anil Gupta had informed him that his sister was killed. He has stated that he went to Daulatpur along with Anil Gupta and noticed marks of injuries on the neck of deceased Monika. He has denied suggestion that he had beaten co-accused Ashwani Kumar. He has denied suggestion that he had not given Rs.30000/- (Thirty thousand) to Anil Gupta. He has denied suggestion that he is deposing falsely because Anil Gupta is his friend.

8.4. PW4 Ms.Kritika daughter of deceased Monika aged 7 years has stated that she along with her father, mother and brother used to reside together in the upper floor of the residential house and her grand parents used to reside in the ground floor of the residential house. She has denied suggestion that her father and grand parents used to beat her deceased mother. She has stated that her parents did not quarrel between themselves. She has stated that on the day of incident mother and father were sleeping separately. She has stated that she noticed that her mother was hanging from the ceiling fan. She has stated that people brought dead body down from ceiling fan by cutting the rope. She has stated that her maternal uncle had given beatings to her father.

8.5. PW5 Pardeep Kumar has stated that he was member of N.A.C. Ward No.1 Daulatpur Chowk. He has stated that on dated 5.4.2008 at about 7 AM he came to know about death of Monika. He has stated that at about 9 AM he reached at the spot. He has stated that police officials have already reached at the spot and many people were assembled. He has stated that body of deceased Monika was lying in the room. He has stated that co-accused Ashwani Kumar told that deceased had died after hanging herself from ceiling fan. He has stated that he does not know anything else about the incident. Witness was declared hostile. He has stated that inquest report Ext PW5/A bears his signature. He has stated that people assembled at the spot have disclosed that deceased Monika had hanged herself from ceiling fan. He has stated that people who came from in-laws of co-accused Ashwani Kumar have manhandled accused persons and thereafter police officials took them to police station.

8.6. PW6 Smt. Pushpa Kumari has stated that she is running shop of scarf at Daulatpur chowk. She has stated that her house is adjoining to the house of accused persons. She has stated that deceased Monika was the wife of co-accused Ashwani Kumar. She has stated that deceased was married to co-accused Ashwani Kumar about 7/8 years ago and two children born. She has stated that she does not know about relations between deceased Monika and co-accused Ashwani Kumar. She has stated that she had not heard nor seen any quarrel between deceased Monika and co-accused Ashwani Kumar. Witness was declared hostile. She has denied suggestion that deceased Monika and co-accused Ashwani Kumar frequently used to quarrel with each other. She has denied suggestion that all accused persons used to maltreat and harassed deceased Monika for not bringing sufficient dowry. She has denied suggestion that co-accused Ashwani Kumar had beaten deceased Monika in the night of 5.4.2008.

8.7. PW7 Dr. Ashish Lakhi has stated that on dated 5.4.2008 at about 5.30 AM he was informed that a patient was brought in emergency ward. He has stated that attendants were 6/7 in number asked him to examine patient outside the gate of hospital. He has stated that patient was lying in the vehicle on the lap of co-accused Ashwani Kumar. He has stated that on checking pulse of patient it transpired that Monika had already died. Witness was declared hostile. He has denied suggestion that he had noted marks of strangulation on the neck of deceased Monika. He has denied suggestion that on examination he found case of homicidal death. He has denied suggestion that he resiled from his earlier statement in order to save accused persons from punishment.

8.8. PW8 Surinder Bhawani has stated that he is running shop and he is also a press reporter. He has stated that his house is next to parental house of deceased Monika. He has stated that mother of deceased Monika told him that deceased was maltreated and harassed by her in-laws for want of dowry. He has stated that deceased had stayed at Banikhet with her parents for about one year. He has stated that deceased had also filed a case for maintenance allowance in Court situated at Dalhousie and also filed complaint before HP State Women Commission. He has stated that thereafter matter was amicably

resolved and all cases were withdrawn and thereafter Monika returned back to her matrimonial house. He has stated that deceased Monika met him about 3/4 days prior to her death and she told him that things were not going well at her matrimonial house. He has stated that on dated 5.4.2008 he received telephonic message about demise of Monika. He has stated that he along with brother of deceased Anil Gupta went to Daulatpur chowk. He has stated that dead body of deceased Monika was lying in police station. He has stated that he had noticed blue marks on the neck of deceased.

8.9. PW9 Dalip Singh has stated that deceased Monika was known to him. He has stated that he deal in ready made garments. He has stated that deceased Monika used to visit his shop. He has stated that deceased was married at Daulatpur chowk. He has stated that deceased told him that her in-laws have maltreated and harassed her and used to demand dowry. He has stated that brother of deceased Anil Gupta had also disclosed to him about said fact. He has stated that before incident deceased was at Banikhet for about 22 days and thereafter she returned back to her matrimonial house on dated 2.4.2008. He has stated that deceased Monika had also filed criminal case at Dalhousie about three years back. He has stated that co-accused Ashwani Kumar came for executing compromise and he also associated in compromise proceedings. He has stated that co-accused Ashwani Kumar had sought pardon. He has stated that thereafter deceased returned back to her matrimonial house. He has stated that on dated 5.4.2008 Anil Gupta brother of deceased told about demise of Monika. He has stated that dead body of deceased was lying in the house and he seen blue strangulation mark upon the neck of deceased Monika. He has stated that deceased had disclosed to him about maltreatment given to her by accused persons. He has denied suggestion that deceased Monika did not inform him about maltreatment and harassment meted out to her by in-laws.

8.10. PW10 Rajiv Kumar has stated that he is running a shop at Daulatpur chowk and he has a personal car. He has stated that on dated 5.4.2008 at about 5.30 AM co-accused Ashwani Kumar came to him and informed him that his wife Monika was unwell. He has stated that co-accused Ashwani Kumar requested him to take her deceased wife to hospital in his car. He has stated that he along with co-accused Ashwani Kumar and two other persons took deceased to Lakhi hospital. He has stated that medical officer checked wife of co-accused Ashwani Kumar in the vehicle. He has stated that medical officer had declared deceased Monika brought dead. He has stated that medical officer did not disclose anything else. Witness was declared hostile. He has denied suggestion that medical officer seen bluish mark on the neck of deceased. He has denied suggestion that thereafter co-accused Ashwani Kumar had disclosed to medical officer that he and deceased had fight in the night and thereafter deceased had committed suicide by hanging herself from ceiling fan. He has stated that co-accused Ashwani Kumar was crying to save his wife.

8.11 PW11 Pardeep Kumar has stated that Anil Gupta and deceased Monika were known to him. He has stated that on dated 8.4.2008 he had accompanied Anil Gupta to police station Gagret to collect post mortem of deceased Monika. He has stated that co-accused Ashwani Kumar and his parents were present at police station. He has stated that co-accused Ashwani Kumar had given disclosure statement that he could recover rope with which he had strangulated deceased Monika. He has stated that co-accused Ashwani Kumar disclosed that he had concealed rope in the store. He has stated that memo Ext PW1/C was prepared which bears his signature. He has stated that thereafter as per disclosure statement of co-accused Ashwani Kumar rope was recovered and same was sealed in cloth parcel vide seizure memo Ext PW1/D which bears his signature. He has stated that seal after use was handed over to him. He has stated that he had lost seal. He has stated that rope Ext P3 shown to him in Court is the same which was recovered by police officials as

per disclosure statement of co-accused Ashwani Kumar. He has stated that rope was having shreds of fiber of scarf which was took into possession by police officials vide seizure memo Ext PW1/D. He has denied suggestion that co-accused Ashwani Kumar did not give any disclosure statement. He has denied suggestion that no recovery was effected in pursuance to disclosure statement. He has denied suggestion that he deposed falsely because he is friend of Anil Gupta. He has denied suggestion that his statement regarding loss of seal was false.

8.12 PW12 Rakesh Kumar is running photograph studio at Daulatpur chowk. He has stated that on dated 5.4.2008 he was called by police officials to click photographs of deceased Monika. He has stated that photographs are Ext. PW12/A to Ext PW12/F and negatives are Ext PW12/A-1 to Ext PW12/R-1. He has stated that after developing same he handed over photographs and negatives to police officials.

8.13. PW13 Gian Chand has stated that he retired from bank. He has stated that his house is on the backside of co-accused Ashwani Kumar. He has stated that wife of co-accused Ashwani Kumar had died about 7/8 months ago. He has stated that he could not state how deceased Monika had died. Witness was declared hostile. He has denied suggestion that co-accused Ashwani Kumar used to beat and harassed his wife Monika. He has denied suggestion that co-accused Ashwani Kumar did not allow deceased Monika to go out from her matrimonial house. He has denied suggestion that co-accused Ashwani Kumar had disclosed him that deceased Monika had died due to heart attack and later on co-accused Ashwani Kumar told him that deceased Monika had committed suicide by way of hanging herself from ceiling fan. He has denied suggestion that when police officials came at the spot he saw blue mark of injury on the neck of deceased. He has denied suggestion that he deposed falsely in connivance with accused persons.

8.14. PW14 Kimiti Lal Jain has stated that Rajan Gupta is known to him. He has stated that he and Rajan Gupta have business relating to manufacture of footwear. He has stated that on dated 4.4.2008 Rajan Gupta was sitting over a cup of tea at about 5 PM. He has stated that he received telephonic call on his mobile phone and thereupon he was informed that his wife Vanita came and he had picked her from bus stand. He has stated that he immediately left without consuming tea.

8.15. PW15 Dr. N.S Dogra has stated that he was posted at Zonal hospital Una. He has stated that in pursuance to request received from police officials Ext PW15/A he along with other members of the board had conducted post mortem of deceased Monika at 11 AM. He has stated that body of deceased Monika was identified by Davinder Kumar and Anil Gupta. He has stated that on examination the body was found to be of normal built of 5'-2" fair complexion, no external evidence of putrefaction and rigor mortis was in the disappearing stage. He has stated that no blood from both ears and mouth was coming forthwith. He has stated that he observed as under.

> Ligature mark and neck findings.
>
> There was transverse bruise mark with epithelial damage encircling the neck in front and extending upto the back except on postero lateral aspect of neck were present at the level of thyroid region colour redish blue. Width 7.5 cm front and sides with intervening normal skin colour on posterolateral region backside and there was deep discoloration reddish blue of width 1.5 cms superior with an extension toward superiorly toward left side submendibular region and face livid with slight swelling. No fracture of thyroid bone and thyroid cartilage detected and neck not elongated. No passage or urine or face or discharge seen and ecchymosed of underlying subcutaneous tissue

present and mark was found to be ante mortem in nature. No contusion of carotid artery seen.

Injury No.1.

Abrasion (Antemortem of size 1.7 cms x 0.5cm on left inframalleolar region of lateral malleolus, oblique and reddish brown in colour.

Injury No.2

A linear frictional abrasion of size 2 cms x 3 mm on front of left leg middle 1/3rd reddish blue.

He has stated that as per opinion of board deceased died due to strangulation homicidal leading to asphyxia and death. He has stated that viscera was sent for chemical examination. He has stated that no poison was detected in the viscera. He has stated that probable duration between injury and death was immediate within five minutes. He has stated that probable duration between post mortem and death was 24-36 hours. He has stated that on dated 16.6.2008 request was received from police officials as to verify whether ligature marks were possible with scarf and rope. He has stated that as per post mortem report ligature marks upon neck of deceased were possible with scarf. He has stated that there were no marks corresponding to rope. He has stated that post mortem report Ext PW15/D bears his signature and other members of board. He has stated that ligature marks found on the person of deceased were possible with Ext P1 and Ext P2 shown to him in Court.

8.16. PW16 Dr.Pankaj Kumar has stated that he was posted as medical officer in CHC Gagret since 2002. He has stated that on dated 6.4.2008 police officials made request for medical examination of co-accused Ashwani Kumar, Dina Nath and Manorma vide Ext PW16/A. He has stated that he examined co-accused Ashwani Kumar on dated 6.4.2008 at about 10 AM who was in police custody and noticed following injuries on his person.

1. Two abrasions on dorsum of right middle and right ring finger of the size of 1x0.5cm each. Both were skin deep and crust had started appearing on the abrasion. There was no evidence of fracture of underlying bone.

2. Multiple scratches marks on the anterior of the neck. Skin deep. Dark brown in colour. Crust has started appearing.

3. Multiple scratches on the anterior of left shoulder. Dark brown in colour.

4. Contusion on the posterior aspect of right shoulder of the size of 4x0.5 cm dark brown in colour.

He has stated that all four injuries were found simple in nature caused by some blunt weapon. He has stated that probable duration of injuries were beyond 24 hours. He has stated that he had issued MLC Ext PW16/B. He has stated that such injuries are possible by nail while deceased struggled for survival. He has stated that he also examined co-accused Dina Nath. He has stated that no fresh injuries were found on the person of co-accused Dina Nath and co-accused Manorma. He has stated that he issued MLC Ext PW16/C and Ext PW16/D. He has stated that injuries reflected in Ext PW16/B were minor and superficial in nature. He has stated that these injuries are possible in beating process.

8.17. PW17 HHC Dhanna Singh has stated that in the year 2008 he was posted at police station Gagret. He has stated that on dated 16.4.2008 MHC police station Gagret had handed over two sealed parcels bearing three seal impressions 'M', four seal impressions 'B' along with sample seals, post mortem report, inquest report and FIR along with a letter to Forensic Science Laboratory vide RC No. 128 of 2008 with direction to hand over the same

in the office of Forensic Science Laboratory. He has stated that he had deposited aforesaid parcels and articles in the office of Forensic Science Laboratory on dated 17.4.2008. He has stated that on his return he had handed over receipt to MHC. He has stated that articles remained intact in his custody.

8.18. PW18 Constable Gurmail Singh has stated that in the year 2008 he was posted at police station Gagret. He has stated that on dated 8.4.2008 co-accused Ashwani Kumar had made disclosure statement in the presence of one Pardeep Kumar and Anil Gupta that he could get recovered scarf and rope which he had used in the commission of crime. He has stated that in pursuance to disclosure statement rope and scarf were recovered which were took into possession vide seizure memo Ext PW1/D. He has stated that scarf was sealed in a cloth parcel. He has stated that rope is the same which was recovered at the instance of co-accused Ashwani Kumar. He has stated that on dated 11.4.2008 Anil Gupta produced certified copy regarding complaint filed before learned Sub Divisional Judicial Magistrate Dalhousie and same was took into possession vide seizure memo Ext PW1/B. He has denied suggestion that co-accused Ashwani Kumar did not give any statement to police officials. He has denied suggestion that no recovery was effected in pursuance to disclosure statement.

8.19. PW19 K.K.Gupta has stated that he is Advocate practicing as Lawyer in District Courts Chamba since 1972. He has stated that he filed petition under Section 125 Cr.PC on behalf of deceased Monika and her minor daughter. He has stated that certified copy of the same is Ext PW1/E. He has stated that application was drafted at the instance of deceased Monika. He has stated that he was informed telephonically by petitioner that some conciliation process was going on inter se the parties. He has stated that thereafter deceased Monika did not contact him.

8.20. PW20 Dr. Piush Kapila has stated that he was posted as Assistant Professor in the department of Forensic Medicine IGMC Shimla since 1998. He has stated that he has conducted more than 1500 autopsies. He has stated that on dated 27.5.2008 a letter was received from police station Gagret District Una along with inquest report, post mortem report and two packets containing ligature material. He has stated that he issued expert opinion Ext PW20/B which is in two pages and two leaves and duly signed by him. He has stated that ligature marks upon neck of deceased Monika were contused and ruptured. He has stated that in photograph Ext PW12/E the mark present between two red lines is possible with rope shown to him in Court. He has stated that strangulation also possible with scarf Ext P1 to Ext P2 shown to him. He has stated that in cases of hanging fracture of thyroid bone is common whereas in the case of strangulation it is very uncommon. He has denied suggestion that injury shown as 1.5 cms in post mortem report around the neck could not be caused with rope Ext P3. He has denied suggestion that he has given wrong opinion.

8.21 PW21 Anoop Kumar has stated that he is running electronic shop at Banikhet. He has stated that he sold one mobile phone for Rs.1299/- to Anil Gupta on dated 21.3.2008. He has stated that he brought copy of bill book Ext PW1/H. He has stated that same was took into possession vide memo Ext PW1/J. He has stated that he had also given reliance SIM to Anil Gupta. He has denied suggestion that he did not sale any mobile phone to Anil Gupta.

8.22 PW22 Constable Sukhwinder Jit Singh has stated that he was posted at police station Gagret. He has stated that on dated 16.4.2008 MHC Bikram Singh had handed over to him two sealed parcels containing scarf and rope. He has stated that he handed over the same to medical officer who conducted post mortem of deceased Monika.

He has stated that thereafter medical officer has examined same and handed over sealed articles to him. He has stated that thereafter he handed over the same to MHC. He has stated that parcels remained intact in his custody.

8.23 PW23 Kuljeet Singh has stated that on dated 28.5.2008 MHC police station Gagret vide RC No. 178 of 2008 handed over him two parcels containing scarf and rope with direction to deposit the same in the office of Medicine Forensic Department IGMC Shimla. He has stated that parcels remained intact in his custody.

8.24. PW24 Vikram Singh has stated that he was posted as MHC police station Gagret since 17th July 2006. He has stated that on dated 16.4.2008 Inspector Partap Singh had deposited two parcels with him along with sample of seal. He has stated that parcels were sent through HHC Dhanna Singh to FSL Junga on dated 16.4.2008 vide RC No. 128 of 2008. He has stated that on dated 28.5.2008 he sent two parcels containing scarf and rope to Medicine Forensic Department IGMC Shimla. He has stated that on dated 16.6.2008 parcels received from IGMC Shimla were sent to regional hospital Una for obtaining opinion of medical officer who conducted post mortem.

8.25. PW25 HHC Faquir Mohammad has stated that he was posted at police post Daulatpur since 2007. He has stated that on dated 5.4.2008 Inspector P.S.Thakur handed over rukka Ext PW1/A to him for registration of FIR.

8.26. PW26 ASI Kuldeep Singh has stated that in the year 2008 he was posted at police station Gagret. He has stated that on dated 5.4.2008 on receipt of rukka Ext PW1/A he recorded FIR Ext PW26/A which bears his signature. He has stated that thereafter he sent case file through HHC Faquir Mohamad to investigating officer. He has stated that rukka is Ext PW1/A. He has denied suggestion that he deposed falsely.

8.27. PW27 Sumeshwar Singh has stated that he was posted as Clerk in the office of HP State Commission for Women Shimla. He has stated that he brought summoned record. He has stated that complaint Ext PW1/F was filed by deceased Monika and was received in the office of Commission on dated 5.11.2003. He has stated that complaint was diarized vide No. 1547. He has stated that on asking by police the same was handed over to police officials vide letter Ext PW27/A. He has stated that both parties were summoned by Commission in pursuance to complaint. He has stated that as per record deceased Monika was summoned twice but she did not appear before Commission and consequently complaint was filed. He has stated that as per record co-accused Ashwani Kumar appeared before Commission and his statement was recorded by Commission. He has stated that photo copy of statement made by co-accused Ashwani Kumar is mark 'O' which is dated 24.7.2003.

8.28. PW28 HC Mulkh Raj has stated that he was posted at police station Gagret. He has stated that on dated 25.6.2008 he was deputed by SHO police station Gagret to procure a copy of complaint moved by deceased Monika before HP State Women Commission Shimla vide letter Ext PW28/A. He has stated that complaint Ext PW1/F was supplied to him by Women Commission vide letter Ext PW27/A. He has stated that thereafter he handed over the same to investigating officer.

8.29 PW29 SI Mohinder Singh has stated that he was posted at police station Gagret since 2007. He has stated that on dated 5.4.2008 a telephonic message was received at police station Gagret that a lady hanged herself from ceiling fan at Daulatpur chowk. He has stated that information was recorded in DDR Ext PW24/A. He has stated that on the aforesaid information he along with other police officials visited at the spot. He has stated that body of deceased Monika was kept in a room on the ground floor of the house of co-

accused Dina Nath. He has stated that he inspected the body and prepared inquest report Ext PW5/A. He has stated that photographs of the body was clicked vide Ext PW12/A to Ext PW12/F. He has stated that on arrival of SHO and Dy. SP he handed over case file to them. He has stated that he prepared application for getting post mortem of body. He has stated that on dated 15.4.2008 he recorded the statement of Kimiti Jain as per his version. He has stated that on dated 16.4.2008 he moved an application to SMO Zonal hospital Una to get opinion regarding scarf and rope recovered from the place of incident vis-a-vis ligature marks found on the person of deceased Monika.

8.30. PW30 P.S.Thakur has stated that in the year 2008 he was posted as SHO police station Gagret. He has stated that on dated 5.4.2008 he received information that a lady had died by way of hanging. He has stated that SI Mohinder Singh had already proceeded to spot along with other police officials. He has stated that after reaching at the spot he recorded the statement of complainant Anil Gupta Ext PW1/A under Section 154 Cr.PC. He has stated that he inspected dead body and sent rukka to police station for registration of FIR. He has stated that he prepared site plan Ext PW30/A. He has stated that he took into possession scarf Ext P1 and Ext P2 from middle room of first floor in the presence of witnesses Anil Gupta and Pardeep Kumar vide seizure memo Ext PW1/B. He has stated that scarf Ext P1 and Ext P2 shown to him in Court are same which he recovered from the spot. He has stated that he recorded the statements of witnesses as per their respective versions. He has stated that co-accused Ashwani Kumar had given disclosure statement under Section 27 of Evidence Act in the presence of witnesses. He has stated that in pursuance of disclosure statement of co-accused Ashwani Kumar rope was recovered. He has stated that opinion of forensic medicine expert also obtained. He has stated that opinion regarding weapon of offence and ligature marks was also sought from medical officer who conducted post mortem. He has stated that after receipt of chemical examiner report he prepared challan. He has denied suggestion that co-accused Ashwani Kumar did not make any disclosure statement. He has stated that it came in the investigation that co-accused Ashwani Kumar and his parents have separate kitchen. He has stated that it came in investigation that on the day of incident deceased Monika and co-accused Ashwani Kumar were in the upper floor of residential house and his parents were in the ground floor of residential house. He has denied suggestion that he had conducted investigation in biased manner. He has denied suggestion that on dated 5.4.2008 complainant had manhandled co-accused Ashwani Kumar and thereafter he sustained injuries on his person. He has denied suggestion that he had created false evidence against accused persons.

9. Following documentaries evidence produced by prosecution. (1) Ext.PW1/A Statement of Anil recorded under Section 154 Cr.P.C. (2) Ext.PW1/B Recovery memo of scarf from residential house of appellant. (3) Ext.PW1/C Memo of disclosure statement given under Section 27 of Indian Evidence Act by appellant and recovery of scarft and rope. (4) Ext.PW1/D Recovery memo of rope as per dislosure statement given by appellant. (5) Ext.PW1/F Copy of petition filed under Section 125 Cr.P.C. by deceased and her minor daughter against appellant before learned SDJM Dalhousie. (6) Copy of complaint filed by deceased against appellant before State Women Commission. (7) Ext.PW1/G Memo of recoveries of documents. (8) Ext.PW1/H Copy of bill of purchase of mobile phone. (9) Ext.PW1/J Memo of recovery. (10) Ext.PW5/A Inquest report of deceased dated 5.4.2008. (11) Ext.PW12/A to Ext.PW12/F Photographs of dead body of deceased. (12) Ext.PW12/A/1 to Ext.PW12/F-1 Negatives of photographs of dead body of deceased. (13) Ext.PW15/A Application filed for post mortem of deceased. (14) Ext.PW15/B Report of SFSL H.P. Junga. (15) Ext.PW15/C Application filed for obtaining opinion of medical officer. (16) Ext.PW15/D Post mortem report of deceased Monika aged 32 years dated 6.4.2008. (17) Ext.PW16/A Application filed for medical examination of accused. (18) Ext.PW16/B to Ext.PW16/D

Medico legal certificates of accused persons. (19) Ext.PW20/B Opinion given by medical officer. (20) Ext.PW24/A Copy of rapat No. 7 dated 5.4.2008. (21) Ext.PW26/A FIR No. 58 of 2008 dated 5.4.2008 under Section 302 read with Section 34 IPC. (22) Ext.PW27/A Letter written by H.P. State Commission for Women. (23) Ext.PW28/A Application filed before Secretary H.P. State Commission for Women. (24) Ext.PW30/A Site plan. (25) Ext.PW30/K Sample of seal. (26) Ext.PW30/L Site plan. (27) Ext.PW30/M Chemical examiner's report issued by SFSL H.P. Junga.

10. Submission of learned Advocate appearing on behalf of the appellant that on the basis of facts proved on record possibility of deceased committing suicide by hanging could not be ruled out is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that deceased had died in her matrimonial home on 5.4.2008 during midnight. PW1 Anil Gupta brother of deceased has stated in positive manner that deceased had returned to her matrimonial house on 2.4.2008. PW1 has specifically stated that accused had demanded Rs.5 lacs (Rupees five lacs only). PW1 has stated in positive manner that when deceased was blessed with her daughter she was deserted by appellant and she lived in her parental house for about one year. PW1 has stated in positive manner that deceased had also filed maintenance petition against Ashwani Kumar in the criminal court situated at Dalhousie and also filed complaint before H.P. State Women Commission. PW1 has stated in positive manner that appellant also demanded golden ornaments from deceased. Testimony of PW1 is corroborated by PW2 Tarsem father of deceased. PW2 Tarsem has specifically stated in positive manner that after fifteen days of marriage deceased was harassed and maltreated by appellant for bringing insufficient dowry. PW2 has also stated in positive manner that appellant also used to beat the deceased. PW2 has stated that after the birth of female child the deceased was forced to leave her matrimonial house and she came in her parental house at Banikhet and resided there for about 1-1½ years. PW2 has stated in positive manner that maintenance petition was filed before criminal Court at Dalhousie. PW2 has stated in positive manner that appellant had demanded Rs.5 lacs (Rupees five lacs only) as dowry. Testimonies of PW1 and PW2 are corroborated by PW9 Dalip Singh who has stated that deceased personally told him that appellant used to maltreat her and used to demand dowry. Even PW19 K.K. Gupta Advocate has specifically stated that he has filed maintenance petition under Section 125 Cr.P.C. and further stated that application for maintenance was drafted at the instance of deceased Monika. Oral testimonies of PW1 Anil Gupta, PW2 Tarsem and PW9 Dalip Singh and PW19 K.K. Gupta Advocate are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of PW1, PW2, PW9 and PW19.

11. Testimonies of PW1, PW2 and PW9 are also corroborated by testimony of medical officer PW15 Dr. M.S. Dogra who has specifically stated that deceased died due to strangulation leading to asphyxia and death. Even as per post mortem report Ext.PW15/D placed on record deceased had died due to strangulation i.e. homicidal leading to asphyxia and death. As per testimony of PW15 medical officer who conducted post mortem of body of deceased no fracture of thyorid bone was detected. As per testimony of PW20 medical officer in case of hanging by way of suicide fracture of thyroid bone is common whereas in case of strangulation same is uncommon. It is held that as per testimonies of PW15 and PW20 medical officers it is proved on record beyond reasonable doubt that deceased died due to strangulation (Homicidal) leading to asphyxia and death.

12. Even as per testimony of PW16 Dr. Pankaj Kumar appellant Ashwani Kumar had sustained four injuries i.e. two abrasions, multiple scratches and contusion. No explanation given by the appellant how the appellant had sustained two abrasioned injures and multiple scratches upon his body.

13. Submission of learned Advocate appearing on behalf of appellant that present case is a case of suicide and is not a case of homicide and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Medical officers have ruled out the possibility of suicide in present case in positive manner and medical officers have stated in positive manner that deceased had died due to strangulation (Homicidal) leading to asphyxia and death. PW20 Dr. Piyush Kapila posted in IGMC Shimla as Forensic expert has specifically stated that ligature marks upon the neck were consistent with rope. PW20 Dr. Piyush Kapila has stated that force was applied. PW20 has specifically stated in positive manner that injuries mentioned in post mortem report upon the neck of deceased could be caused with rope Ext.P3.

14. Submission of learned Advocate appearing on behalf of appellant that as per testimony of PW4 Ms. Kritika daughter of deceased appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of PW4 Ms. Kritika minor. Testimony of PW4 Ms. Kritika is contrary to the opinion of medical officers placed on record. Medical officers have stated that present case is a case of homicide by way of strangulation. Testimony of PW4 was recorded by learned trial Court without oath. It is proved on record that parents of appellant at the time of incident were residing in ground floor of residential building and appellant along with deceased and PW4 Ms. Kritika were residing in first floor of residential building. We are of the opinion that PW4 is daughter of appellant and was directly under the control of appellant. We are of the opinion that tutoring of PW4 by appellant could not be ruled out in present case because testimony of PW4 is not corroborated with evidence of medical officers who have specifically stated that present case is a case of strangulation (Homicidal) leading to asphyxia and death and is not a case of suicide.

15. Even as per disclosure statement given by appellant rope Ext.P3 was recovered and rope Ext.P3 was having shreds of fiber of scarf. PW11 Pardeep Kumar has stated in positive manner that appellant had given disclosure statement in his presence.

16. Submission of learned Advocate appearing on behalf of appellant that appellant himself brought the deceased for her medical treatment to hospital and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. PW7 Dr. Ashish has stated in a positive manner when he appeared in witness box that when deceased was brought to hospital she was already dead.

17. Submission of learned Advocate appearing on behalf of the appellant that there is no direct evidence that appellant had committed the murder of deceased and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that criminal offence can be proved by way of direct evidence or by way of circumstantial evidence. In present case it is proved on record beyond reasonable doubt that deceased had died in her matrimonial house during night period in forewalls of residential room in which only appellant, deceased and her minor daughter Kritika were present. There is no possibility of committing offence of murder in present case by third person because approach of third person in residential house within forewall of residential room is ruled out. There is no evidence on record in order to prove that third person has entered into the residential house after breaking the window or door and committed murder of deceased. Deceased was lastly seen in the company of appellant only during the night period of 5.4.2008.

18. Submission of learned Advocate appearing on behalf of appellant that there are material contradiction and improvements in present case and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. We have

carefully perused the entire record carefully. There is no material contradiction in present case which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when statements of prosecution witnesses are recorded after a gap of sufficient time. In present case dead body of deceased was found in forewalls of residential house of appellant in the intervening night of 5.4.2008. Statements of prosecution witnesses were recorded on 17.12.2008, 18.12.2008, 19.12.2008, 18.2.2009, 19.2.2009, 20.2.2009, 30.3.2009 and 24.4.2009. It is well settled law that minor contradictions are bound to come in criminal case when testimonies of prosecution witnesses are recorded after a gap of sufficient time. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu*** that even if there are some omissions contradictions and discrepancies then entire evidence would not be discarded. It was held that undue importance should not be given to omissions, contradictions and discrepancies which do not go to the root of the case. ***See AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh, See AIR 1985 SC 48 titled State of U.P. vs. M.K. Anthony, See AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, See AIR 2007 SC 2257 titled State of Rajasthan vs. Om Parkash, See (2009)11 SCC 588 titled Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, See (2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others, See AIR 1988 SC 696 titled Appabhai and another vs. State of Gujarat, See AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, See (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others, See (2012)10 SCC 433 Kuriya and another vs. State of Rajasthan.*** It is well settled law that maxim *falsus in uno falsus in omnibus* is not applicable in criminal law. ***(See: AIR 1980 S.C.957 Bhe Ram Vs. State of Haryana, See AIR 1971 S.C. 2505 Rai Singh Vs. The State of Haryana. See AIR 2006 SC 321 titled Triloki Nath and others vs. State of U.P.)***

19. Submission of learned Advocate appearing on behalf of appellant that case by way of circumstantial evidence is not proved on record beyond reasonable doubt against appellant is rejected being devoid of any force for the reasons hereinafter mentioned. In present case following facts are proved on record. (1) That appellant Ashwani Kumar was lastly seen with deceased in residential house within four walls. (2) That injuries sustained by deceased as per testimonies of medical officers proved homicide by way of strangulation. (3) That there were strained relations between the deceased and appellant and there was litigation between deceased and appellant before criminal judicial Court at Dalhousie. (4) That rope was recovered as per disclosure statement given by appellant. (5) That appellant has also suffered injuries upon his body. (6) That as per chemical analyst report fiber found on rope matches with fibre of scarf used in commission of crime. (7) That subsequent conduct of appellant raising plea of suicide by deceased at her matrimonial house during midnight in four walls of residential house. It was held in case reported in ***2013 Cri.L.J. 2040, Apex Court titled Prakash vs. State of Rajasthan (DB)*** 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. It is also well settled law that circumstantial evidence combine all facts creating a net through which accused could not escape. ***See AIR 1992 SC 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.

20. Submission of learned Advocate appearing on behalf of appellant that deceased was not happy with her married life and she committed suicide due to depression and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. There is no direct evidence that deceased was suffering from mental depression. There is no medical evidence on record in order to prove that deceased was suffering from mental depression. On contrary deceased was B.Sc.,B.Ed. student and she was young lady of 32 years.

21. Submission of learned Advocate appearing on behalf of appellant that oral as well as documentary evidence adduced by prosecution are not sufficient for conviction is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that in criminal case conviction can be based on honest and trustworthy evidence of single witness. ***See AIR 1973 SC 944 titled Jose vs. State of Kerala.***

22. Facts of case law cited by learned Advocate appearing on behalf of appellant i.e. ***(2009)17 SCC 273*** titled ***Mani vs. State of Tamil Nadu***, ***(1980)1 SCC 530*** titled ***Pohalya Motya Valvi vs. State of Maharashtra***, ***(2001)9 SCC 129*** titled ***Suryanarayana vs. State of Karnataka***, ***1998(4) RCR 74 (SC)*** ***Panchhi and others vs. State of U.P.***, ***(1993) Supp 3 SCC 667*** titled ***Baby Kandayanathil vs. State of Kerala***, ***2998(2) RCR (Cri.) 74*** titled ***Nivrutti Pandurang Kotate vs. State of Maharashtra***, ***2008(4) RCR(Cri.) 183*** titled ***Golla Yelugu Govindu vs. State of A.P.***, ***(1997)5 SCC 341*** titled ***Dattu Ramrao Sakhare vs. State of Maharashtra***, ***(2006)13 SCC 643*** titled ***Acharaparambath Pradeeepan vs. State of Kerala***, ***(2004)1 SCC 64*** titled ***Ratansinh Dalsukhbai Nayak vs. State of Gujarat***, ***2006(10) SCALE 369*** titled ***Yuvaraj Ambar Mohite vs. State of Maharashtra***, ***(1997)5 SCC 341*** titled ***Dattu Ramrao Sakhare vs. State of Maharashtra***, ***(1992)4 SCC 225*** titled ***Prakash vs. State of Madhya Pradesh***, ***(1998)3 SCC 561*** titled ***State of U.P. vs. Nahar Singh (dead) and others***, ***2014 Cri.LJ 1217*** titled ***Donthula Ravindranath @ Ravinder Rao vs. State of Andhra Pradesh***, ***AIR 1994 SC 1539*** titled ***Niwas vs. Ram Bharose***, ***2013(3) RCR (Criminal) 120*** titled ***Umesh Singh vs. State of Bihar***, ***2010(1) RCR (Criminal) 88*** titled ***Suraj Singh vs. State of U.P.***, ***(2007)14 SCC 16*** titled ***Mahmood vs. State of U.P., (2002)3 SCC 57*** titled ***Allarakha K. Mansuri vs. State of Gujarat***, ***(1987)1 SCC 679*** titled ***Amar Singh vs. State of Punjab, (2012)10 SCC 433*** tiled ***Kuria vs. State of Rajasthan, AIR 1963 SC 200*** titled ***M.G. Agarwal vs. State of Maharashta, (2012) 10 SCC 464*** titled ***Munish Mubar vs. State of Haryana*** and facts of present case are entirely different. It is held that facts of cases cited by learned Advocate appearing on behalf of appellant are distinguishable and are not applicable in present facts and circumstances of case. It is held that above said rulings do not relate to the facts where deceased died due to strangulation (Homicidal) leading to asphyxia and death within forewalls of residential room during midnight.

23. Even as per site plan Ext.PW30/A homicidal death of deceased was committed in forewalls of room during midnight. Even as per State Forensic Scidence Laboratory report placed on record as per microscopic examination maroon coloured fibres

in rope matches with fibres removed from maroon scarf. In view of above stated facts point No.1 is answered in negative against the appellant.

Point No. 2 (Final Order)

24. In view of above stated facts and case law cited supra appeal filed by appellant is dismissed. Judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record and it is held that learned trial Court did not commit any miscarriage of justice to appellant. File of learned trial Court along with ceritified copy of this judgment be sent back forthwith. Appeal stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

R.P No.88 of 2015 a/w
R.P. Nos.89 and 90 of 2015.
Reserved on 7.10.2015
Date of decision: 27.10.2015.

Rev Petition No. 88 of 2015
Commissioner of Income Tax ...Petitioner
Versus
H.P. State Industrial Development Corpn Ltd ...Respondent

Rev Petition No. 89 of 2015
Commissioner of Income Tax ...Petitioner
Versus
H.P. State Industrial Development Corpn Ltd ...Respondent

Rev Petition No. 90 of 2015
Commissioner of Income Tax ...Petitioner
Versus
H.P. State Industrial Development Corpn Ltd ...Respondent

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- Review sought on the ground that provisions of Income Tax Act were not considered while deciding the main petition- record shows that provision of Section 115(JB) and the judgment of Hon'ble Supreme Court of India were taken into consideration- Review Petition does not lie on the ground that the decision is incorrect or erroneous on merit - no case for review was made out- petition dismissed. (Para-2 to 7)

Cases referred:
Indo Rama Synthetics India Ltd Vs. Commissioner of Income Tax, New Delhi (2011) 2 SCC 168
K.P. Singh Vs. High Court of HP & ors, Civil Review No.2 of 2012, I L R 2014 (VI) HP 142 (D.B.)
Rajinder & ors Vs. Gokal Chand, I L R 2015 (IV) HP 1373 (D.B.)

For the Petitioners: Mr.Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.
For the Respondents: Mr.Vishan Mohan and Mr. Aditya Sood, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

The Revenue has filed these review petitions by invoking the provisions of Section 114 read with order 47 Rule 1 of CPC to contend that there is an error apparent on the record in the judgments passed by this Court on 24.5.2014.

2. The review of judgment has primarily been sought on the ground that this court while passing the impugned judgment has not considered the relevant provisions of the Income Tax Act (for short the 'Act'), more particularly section 115 JB and has further failed to take into consideration the effect of the judgment rendered by the Hon'be Supreme Court in **Indo Rama Synthetics India Ltd** Vs. **Commissioner of Income Tax, New Delhi (2011) 2 SCC 168.** Though this provision had not only been cited, but argued at length.

3. Before adverting to the merits of such contention, scope of review is first required to be borne-in-mind.

4. This Bench had already considered the scope of judicial review in (i) **M/s Harvel Agua India Pvt Ltd** Vs. **State of HP & ors, Review Petition No.4084 of 2013** decided on 9.7.2014**;** (ii) **K.P. Singh** Vs**. High Court of HP & ors, Civil Review No.2 of 2012**, decided on 12.11.2014 and recently in **Rajinder & ors** Vs. **Gokal Chand, review petition No.91/2015** decided on 12.8.2015, wherein after referring to the case law, this Bench has culled out certain broad principles regarding maintainability/non maintainability of the review petition and the same are as under:

"(A) When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record'

(iii) Any other sufficient reason.

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negative.

(x) Review is not maintainable on the basis of a subsequent decision/judgment of a coordinate or larger Bench of the Court or of a superior Court.

(xi) While considering an application for review, court must confine its adjudication with regard to the material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(xii) Mere discovery of a new or important matter or evidence is not sufficient ground for review. The parties seeking review has also to show that such mater or evidence was not within its knowledge and even after exercise of due diligence, the same could not be produced before the Court earlier."

5. Adverting to the facts, it would be noticed that the submissions now being made by the petitioner are contradicted by the record. It is evident from the perusal of the judgment that not only Section 115 JB, but even the judgment rendered by the Hon'ble Supreme Court in Indo Rama's case (supra) has been considered in detail in paragraphs 25 to 33 of the judgment and it is after taking into consideration the aforesaid provision and judgment of the Hon'ble Supreme Court that the following conclusion has been arrived at:-

"34. Therefore, in view of the discussions above, it can be safely concluded that Section 115 JB of the Act, provides that any amount credited to the profit and loss account on account of amounts withdrawn from the reserve or provision had to be reduced from the book profit with an exception that if such reserve or provision is out of reserve created prior to or before 1.4.1997 and, such reserve has been created not by way of debit to the profit and loss account, then the same will not be permitted to be reduced from the net profit as per profit and loss account."

6. It is clear from the aforesaid discussion that the questions now sought to be raised in these petitions cannot be gone into because the power of review cannot be exercised on the ground that the decision is incorrect or erroneous on merit, as the same lies only within the ambit of higher court having appellate power. It is the appellate court which alone is in a position to correct the error committed by the subordinate courts by virtue of power of appeal conferred on the said court by some statute, of course subject to the exception that the error is otherwise apparent on the face of record and not an error which has to be fished out and searched. Under the guise of review, the parties are not entitled to re-hearing and this Court while exercising power of review cannot sit in appeal over its own order.

7. Having said so, it can safely be concluded that the petitioners have failed to make out a case within the four corners of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. Accordingly, we find no merit in these Review Petitions and the same are dismissed, leaving the parties to bear their costs.

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

CWP No. 14 of 2008 a/w CWP Nos.
9 and 17 of 2008
Judgment reserved on: 13.10.2015
Date of Decision : October 27, 2015.

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1. CWP No. 14 of 2008

Himachal Pradesh Housing and Urban Development Authority and another ...Petitioners

Versus

Roshan Lal ...Respondent

2. CWP No. 9 of 2008

Himachal Pradesh Housing and Urban Development Authority and another ...Petitioners

Versus

Abhi Ram ...Respondent

3. CWP No. 17 of 2008

Himachal Pradesh Housing and Urban Development Authority and another ...Petitioners

Versus

Chandu Ram ...Respondent

Constitution of India, 1950- Article 226- Tribunal had conferred work-charge status upon the employees on completion of 10 years of service- employer contended that in absence of work-charge establishment, no direction for conferring the status could have been given by the Tribunal- held, that employer had conceded before the Tribunal that work-charge status was required to be conferred upon the employees- parties are bound by pleading subject to the amendment- there is no infirmity in the order passed by Tribunal- petition dismissed.

(Para-4 to 8)

Cases referred:

Mool Raj Upadhayay vs. State of H.P. 1994 (2) SCC 316

Union of India and others vs. Jagdish Pandey and others (2010) 7 SCC 689

For the petitioners : Mr. Ajay Mohan Goel, Advocate.

For the respondent(s) : Ms. Babita, Advocate, vice Mr. Ashwani Kumar Gupta, Advocate, for respondent(s) in CWPs No.14 and 9 of 2008. Respondent in CWP No 17 of 2008, already ex-parte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioners by way of these writ petitions have called in question the orders dated 1.8.2007/3.8.2007 passed by the learned Himachal Pradesh State Administrative Tribunal whereby they have been directed to confer work-charge status upon the respondents on completion of 10 years of service in accordance with decision of the Hon'ble Supreme Court in ***Mool Raj Upadhayay*** vs. ***State of H.P. 1994 (2) SCC 316.***

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

3. Mr. Ajay Mohan Goel, learned counsel for the petitioners has vehemently argued that in absence of any work charge establishment, no directions for conferment of work charge status could have been issued by the learned Tribunal.

4. The argument though appears to be attractive, but then the same is not available to the petitioners in view of the defence already taken by it before the learned Tribunal. The petitioners had clearly conceded before the learned Tribunal that in terms of the instructions issued by the Government vide letter dated 3.4.2002, the work charge status was required to be conferred upon its employees on the completion of 8 years on 31.3.2000.

5. Here, it shall be apt to reproduce para 6 (ii) of their reply, which reads thus:

> *"6(ii). That in reply to this para, it is submitted that the State Government has issued instruction from time to time with regard to regularisation of daily waged workers. The same instruction also apply to the daily/contingent paid worker, like the applicant who has prayed for work charge status. According to the latest instruction issued by the department of Personnel vide notification No. PER (AP)-C-B(2)-2/97-Vol.IV) (Loose) dated 3.4.2002, copy of which is annexed as Annexure R-1, the daily waged/contingent paid workers who have completed eight years of continues service with a minimum of 240 days in a calendar year as on 31.3.2000 will be eligible for work charge category if not for regularisation. It has further been provided in these instructions that completion of required years of services makes such daily/contingent paid worker's case eligible for consideration for work charge status/regularisation, from the prospective effect i.e. from the date the order is issued after completion of codal formalities. The applicant did not complete eight years as on 31.3.2000 and hence he has not become eligible for work charge status. Person senior to the applicant are there to be given work charge status. The decision in Mool Raj Upadhaya vs. State of H.P. is not disputed, but in view of existing policy of the State Government, by which the daily/contingent paid worker who have completed eight years are being given work charge status, seniority wise therefore keeping in view the fact that the applicant did not completed 8 years on 31.3.2000 as such his case could not be considered for work charge status. However, as and when his turn comes as per the seniority, his case would be considered for work charge status."*

6. It is more than settled that the parties are expected to raise specific pleadings before the first forum for adjudication of the dispute and those pleadings then are the basis of the cases of the respective parties, even before the appellate/higher Courts. The parties would be bound by such pleadings, of course, subject to the right of amendment allowed in accordance with law. (Refer: ***Union of India and others*** vs. ***Jagdish Pandey and others (2010) 7 SCC 689).***

7. Once the petitioners themselves have conceded that its employees are entitled to the conferment of work charge status on completion of eight years, then we see no reason as to why these petitions have been filed, particularly, when the orders of the learned Tribunal, in fact, operate to the advantage of the petitioners because as against the period of eight years notified by the State Government, the learned Tribunal has directed the conferment of work charge status upon the respondents that too after completion of ten years of service.

8. Having said so, we find no merit in these petitions and the same are accordingly dismissed alongwith pending applications, leaving the parties to bear their costs.

The Registry is directed to place a copy of this judgment on the files of connected matters.

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

Ishwar Dass Prop. People Printing Press .....Appellant.

Versus

Kulbir Singh (dead through LRs. Maya Devi etc.) & ors. .....Respondents.

RSA No. 285 of 2005.
Reserved on: 26.10.2015.
Decided on: 27.10.2015.

Specific Relief Act, 1963- Section 38- Plaintiff purchased the suit land on 3.11.1983- he fixed boundary by placing stones with cement in the year 1984- plaintiff had left one karam on both sides of the boundary, while constructing the house - defendant threatened to occupy the vacant portion of the suit land on which plaintiff filed the suit for injunction- plaintiff had proved that he was owner in possession on the basis of the sale deed and had left one karam land – defendant had not joined the demarcation and had not filed any objection to the demarcation- demarcation was conducted in accordance with the law- appeal dismissed. (Para-11 to 14)

Case referred:
State of Madhya Pradesh vrs. Usha Devi, (2015) 8 SCC 672

For the appellant(s): Mr. Ashok Sood, Advocate.
For the respondent(s): Mr. Sanjeev Kuthiala, Advocate, for LRs. of respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Mandi, H.P. dated 10.3.2005, passed in Civil Appeal No. 101 of 2003.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of respondents-plaintiffs (hereinafter referred to as the plaintiff), namely, Kulbir Singh had instituted suit for permanent prohibitory injunction against the appellant and proforma respondents, namely, Balraj and Baldev. According to the averments made in the plaint, the suit land was purchased by the plaintiff vide registered sale deed dated 3.11.1983 from one Sh. Basant Singh, father of proforma respondents No. 2 & 3. He has affixed boundary by placing stones with cement and in the year 1984, the plaintiff had filled the plinth of his residential house after leaving one karam space on both sides of the boundary of the suit land. The plaintiff after raising loan completed his house in the year 1990. The vacant portion of the suit land was left by the plaintiff around his house for drainage, water tap etc. The appellant-defendant (hereinafter

referred to as the defendant), in collusion with defendants No. 2 & 3 threatened to forcibly occupy the vacant portion of the suit land by raising construction. The cause of action arose to the plaintiff on 17.9.1995 when defendant No. 1 started stacking bricks over the vacant portion of the suit land. It is, in these circumstances, the plaintiff has filed suit with prayer that decree for permanent prohibitory injunction be passed in favour of the plaintiff and against the defendants restraining them not to encroach or raise any sort of construction over the vacant portion of the suit land and defendants be also restrained from raising any construction over the land adjoining the suit land which may cause any obstruction in passage, path, drainage etc.

3. The suit was contested by the defendants. The defendants denied that the suit land was purchased by the plaintiff vide registered sale deed dated 3.11.1983 from one Basant Singh and after purchasing the suit land plaintiff has affixed boundary by placing stones with cement. It was denied that the vacant portion of the suit land which was left by the plaintiff was used by him for drainage, water tap etc. It was also denied that defendant No. 1 in connivance with defendants No. 2 & 3 was threatening to forcibly occupy the vacant land.

4. The replication was filed by the plaintiff. The learned trial Court framed the issues on 20.9.1997. The suit was decreed vide judgment dated 25.7.2003. The defendant-Ishwar Dass, feeling aggrieved, preferred an appeal against the judgment and decree dated 25.7.2003. The learned District Judge, Mandi, dismissed the same on 10.3.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on 28.9.2005. According to order dated 28.9.2005, various substantial questions of law, as detailed in the grounds of appeal, arose for determination in the appeal. The substantial questions of law have been framed at page No. 5 of the paper book.

6. Mr. Ashok Sood, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that both the Courts below have not correctly appreciated the oral as well as documentary evidence on record. According to him, the demarcation report Ext. PW-3/A was not in accordance with the procedure laid down by this Court. On the other hand, Mr. Sanjeev Kuthiala, Advocate has supported the judgments and decrees passed by both the Courts below.

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

8. Plaintiff has appeared as PW-1. He deposed that he had purchased the suit land from one Basant Singh in the year 1983. He has got demarcated the suit land and had also affixed his boundary. He has also laid the foundation of his house in the year 1984. He has left one karam space of land for drainage etc. He has purchased the suit land by way of registered sale deed. The tatima was also prepared. The old Kh. No. of the suit land was 169 and its area was 3-1-2 bighas. The defendant No. 1 in connivance with defendants No. 2 & 3 has started stacking bricks over the vacant land. PW-3 Kirpa Ram testified that he has carried out the demarcation of Kh. No. 1008/922 on 6.10.1995. The defendant No. 1 in connivance with defendants No. 2 & 3 has started stacking bricks over the vacant land. He testified that quarrel had taken place on 17.9.1995. He has proved copy of jamabandi for the year 1980-81 vide Ext. PB. The mutation was also attested in the name of the plaintiff. The copy of demarcation report is Ext. PW-3/A.

9. Defendant No. 1 has appeared as DW-1. He has testified that he had also purchased land from one Basant Singh. The plaintiff has constructed the house on the suit

land and no vacant land was left by the plaintiff. In his cross-examination, he admitted that the land qua which suit has been filed, the plaintiff was owner-in-possession of the same. He also admitted that the suit land was purchased by plaintiff in the year 1983. DW-2 Balraj Singh has deposed that the plaintiff has constructed the house on the land of his father. The land was purchased by the plaintiff from his father.

10. It is evident from the statement of DW-2 Balraj Singh that the plaintiff has purchased the land from his father and raised construction over the same. Mr. Ashok Sood, Advocate, has vehemently argued that the demarcation report Ext. PW-3/A is not in accordance with the procedure laid down by this Court. However, the fact of the matter is that PW-3 Kirpa Ram has visited the spot on 6.10.1995. The defendants No. 2 & 3 were present on the spot, however, they have not signed the statements. The demarcation report is Ext. PW-3/A.

11. It is duly proved by the plaintiff that he was owner-in-possession of the suit land. He has purchased the land from the father of defendants No. 2 & 3 on the basis of registered sale deed dated 3.11.1983. He has kept one karam of land vacant around the suit land for the purpose of draining etc. The defendant No. 1 in connivance with defendants No. 2 & 3 has staged bricks over the same. PW-3 Kirpa Ram has categorically stated in his demarcation report Ext. PW-3/A that defendant has not associated himself during the course of demarcation. It has also come on record that earlier the suit was filed by defendant No. 1 against the plaintiff and his wife Maya Devi stating that he had purchased some land from defendants No. 2 & 3. In that case it was pleaded that plaintiff and his wife were diverting the water of their entire kitchen towards the land of Somavati and were also interfering with her peaceful possession. The suit was also contested by the plaintiff and his wife and the learned trial Court dismissed the same on 22.9.2000. It has not come in the statement of defendant No. 1 that he preferred an appeal against the judgment dated 22.9.2000. Rather, he has not even divulged this fact in the present case.

12. Mr. Ashok Sood, Advocate, has also referred to sale agreement Ext. DW-2/A. However, the fact of the matter is that the same has not been registered.

13. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Usha Devi,*** reported in ***(2015) 8 SCC 672,*** have held that plaintiff has to succeed basing strength of his case and cannot depend upon weakness of defendant's case. It has been held as follows:

> "35. Once we have given our finding on the maintainability of the Suit, we need not to go into the other issues. But in view of the alternative argument advanced by the counsel, we are of the view that we should throw some light on those issues. It is the finding of the Trial Court that the lands were retransferred to the Holkar State in the year 1951, and re-transferring is without any authority and it is bad. The Trial Court held that though it is the specific case of the plaintiff that they are paying Tauzi, there is no evidence to show that they have paid Tauzi prior to 1951 and the correspondence of the plaintiff and her father shows that the Suit scheduled properties were not included in item no 14 of the list of properties and further held that Suit scheduled properties were allotted to the Forest Department. First coming to the issue of transfer of land to Forest Department, it is settled law that parties are governed by their pleadings and the burden lies on the person who pleads to prove and further plaintiff has to succeed basing on the strengths of his case and cannot depend upon the weakness of the defendant's case. The State having alleged several things, has failed to mark

any document to show that the properties were transferred to the Forest Department and the retransfer in the year 1951 was without any authority of law. Though the State has filed certain documents before us, but as they are not part of the evidence, we are not inclined to look at those documents."

14. The appellant has also moved an application under Order 26 Rule 9 CPC alongwith Order 41 Rule 27 CPC for demarcation of the suit land and also for adducing additional evidence bearing CMP No. 166 of 2012. The detailed reply was filed by the plaintiff to the same. The fact of the matter is that defendant No. 1 has not filed any objections to the demarcation report Ext. PW-3/A. The demarcation was carried out strictly as per the statement of PW-3 Kirpa Ram on 6.10.1995 and at this belated stage, the appointment of Local Commissioner cannot be ordered. The purpose of appointment of Local Commissioner is not to garner evidence on behalf of the parties. The purpose of application under Order 41 Rule 27 CPC is not to fill up the lacunae. It cannot be said that the defendant was not aware of the old musabis, registered sale deed or jamabandies etc., as mentioned in the application. Moreover, defendant No. 1 has also failed to link these musabis and jamabandies with the suit land. Accordingly, there is no merit in the application and the same is also dismissed.

15. The learned Courts below have correctly appreciated demarcation report Ext. PW-3/A. Ext PW-3/A is as per the laid down procedure. The substantial questions of law are answered accordingly.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Jyoti Bala ...Petitioner.

VERSUS

S.K.B.S. Negi and another ...Respondents.

COPC No.786 of 2015.
Decided on: October 27, 2015.

Contempt of Courts Act, 1971- Section 10- Petitioner contended that respondent had not complied with the direction of the Court- however, record shows that petitioner was not party to the writ petition and, therefore, she could not have preferred the writ petition- petition dismissed. (Para-2 and 3)

For the petitioner: Mr.Onkar Jairath, Advocate.
For the Respondents: Nemo

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Petitioner has invoked the jurisdiction of this Court under Section 10 of the Contempt of Courts Act, 1971, (for short, the Act), on the ground that the respondents have

not complied with the directions of this Court contained in the judgment, dated 22nd November, 2012, passed in CWP No.4872 of 2012, titled Anurag Singh vs. State of H.P. and another.

2. From the perusal of the record, it transpires that the petitioner herein was not a party in the writ petition. Thus, it is a moot question whether the petitioner has rightly preferred the instant contempt petition. The answer is in the negative. In case the petitioner was aggrieved, she could avail appropriate remedy by resorting to appropriate proceedings.

3. At this stage, the learned counsel for the petitioner stated that the petitioner has already filed a writ petition and the same is pending adjudication.

4. Viewed thus, the Contempt Petition is dismissed.

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

M/s Amy Agro Pvt. Ltd. ...Petitioner

Versus

State Bank of Patiala and others. . ...Respondents.

CWP No. 4099 of 2015
Judgment reserved on: 06.10.2015
Date of Decision : October 27, 2015.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Section 18 (1) - Debt Recovery- Tribunal refused to waive off the requirement of 25% of the notice amount on the ground that it had no discretion to reduce the amount- held, that condition of deposit of 25% of the amount is mandatory and without depositing the same appeal cannot be filed- therefore, there is no infirmity in the order passed by Tribunal- petition dismissed. (Para-5 to 14)

Cases referred:

Narayan Chandra Ghosh vs. UCO Bank, (2011) 4 SCC 548
M/s Vinay Container Services Pvt. Ltd. vs. Axis Bank, Mumbai (2011) Bom. 37
S.R.Forging Ltd. and another vs. UCO Bank and others (2013) 1 DRTC, 734.

For the Petitioner : Mr. Ajay Vaidya, Advocate.
For the respondents :

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Challenge in this writ petition is to the order passed by the Debt Recovery Appellate Tribunal, Delhi (for short 'Appellate Tribunal') on 20.8.2015, whereby it has refused to waive off the requirement of 25% of the notice amount as stipulated under Section 18 (1) of the Securitisation and Reconstruction of Financial Assets and Enforcement

of Security Interest Act (for short 'SARFAESI') on the ground that it has no discretion to reduce the amount.

The facts as are necessary for the adjudication of the case may be noticed.

2. On 25.8.2009 the petitioner was issued notice under Section 13 (2) of the SARFAESI Act. On 24.2.2010, a meeting was held between the respondent Bank and the Directors of the petitioner-Company and it is alleged that some arrangement was arrived at. The petitioner claimed that it had done the needful but the respondent-Bank did not perform their part as per the arrangement and accordingly vide notice dated 25.11.2010 the respondent took possession of the properties belonging to the petitioner. This resulted in filing of CWP No. 1585 of 2011 but the same was dismissed on 23.9.2011. The petitioner preferred an appeal being LPA No. 526 of 2011 which too was dismissed by this Court. After that the petitioner again approached this Court by filing CWP No. 4673 of 2012 and the same was disposed of by directing the Debt Recovery Tribunal to consider the application filed by the petitioner with regard to the procedure adopted for sale and also with regard to its claim for settlement under OTS Scheme etc. within two months.

3. The petitioner thereafter moved an application before the Debt Recovery Tribunal, Chandigarh (for short 'DRT') under Section 17 of the SARFAESI Act alongwith an application for condonation of delay which was dismissed on the ground of limitation. In the meanwhile, the properties of the petitioner were put to sale and the sale certificates to this effect are annexed with this writ petition as Annexures P-11 and P-12, respectively.

4. The petitioner against the aforesaid orders filed an appeal before the Debt Recovery Appellate Tribunal at New Delhi. However, vide impugned order dated 20.8.2015 the application filed for seeking exemption from depositing the amount as prescribed under Section 18 of the Act was ordered to be dismissed on the ground that the Tribunal has no jurisdiction to reduce the amount less than 25% of the notice amount.

5. It is therefore the interpretation of Section 18 of the SARFAESI Act that falls for consideration in this writ petition.

6. Section 18 of the SARFAESI Act, reads as under:

> "***18. Appeal to Appellate Tribunal .(****1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:*
>
> *Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:*
>
> *Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:*
>
> *Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.*
>
> *(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."*

7. The aforesaid provision came up for interpretation before the Hon'ble Supreme Court in ***Narayan Chandra Ghosh*** vs**.** ***UCO Bank, (2011) 4 SCC 548*** wherein it was held that the second proviso to Section 18 (1) is mandatory meaning thereby that the condition of pre-deposit under Section 18 (1) is mandatory and that there is a bar to the entertainment of an appeal under Section 18 unless this condition precedent is satisfied. It was held :

> "7. *Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.*
>
> *8. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.*
>
> *9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate*

Tribunal, was beyond the provisions of the Act, as is evident from the second and third proviso to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed."

8. Earlier to this, a Division Bench of the Bombay High Court in ***M/s Vinay Container Services Pvt. Ltd.*** vs. ***Axis Bank, Mumbai (2011) Bom. 37*** held that the pre-deposit is mandatory in terms of proviso to Section 18 (1) and the same is applicable even to an appeal against an interim order. The view taken by the Bombay High Court in ***M/s Vinay's*** case (supra), was followed by another Division Bench of the same Court in ***Keystone Constructions vs. State Bank of India and others,*** CWP No. 1382 of 2013, decided on 08.10.2013 and thereafter followed by a Division Bench of the Delhi High Court in ***Satnam Agri Products Ltd. and others*** vs. ***Union of India and others,*** Writ Petition (Civil) No. 7158 of 2014 decided on 10.12.2014.

9. Even otherwise, a plain reading of the aforesaid provision i.e. Section 18 shows that a person aggrieved by an order made by DRT under Section 17 of the Securitisation Act is entitled to prefer an appeal to the Appellate Tribunal and apparently, the provision does not make any distinction between a final order and interlocutory order. Second proviso mandates the deposit of 50% of the amount of debt due from the appellant. However, as per the third proviso, the same may be reduced by the Appellate Tribunal upto 25% for the reasons to be recorded in writing.

10. In light of the settled legal position noticed above and for the reasons stated supra, we are of the considered view that the condition of making pre-deposit in terms of Section 18 (1) of the Securitisation Act is mandatory for entertaining any appeal and there is no reason to exempt the appeals arising out of the orders passed by the DRT on interlocutory applications merely on the ground that the said orders do not have the effect of staying the action or measures taken by the secured creditor under Section 13 (4) of the Securitisation Act for enforcement of security interest.

11. Learned counsel for the petitioner would, however, contend that the impugned order is inequitable and unjust as the condition of pre-deposit would only arise in case the amount due remains unpaid and not when it has already been realized. In support of his submission, reliance is placed on the sale certificates (Annexures P-11 and P-12) to show that an amount of Rs.31,50,000/- and Rs.4,50,000/-, respectively has already been realised by the respondents from the sale of the properties belonging to the petitioner. He in order to buttress his submissions, has placed reliance upon the judgment rendered by the Allahabad High Court in ***Akash Ganga Airlines Ltd.*** vs. ***Debt Recovery Appellate Tribunal, Allahabad and others,*** W.P. No. 3973 of 2015, decided on 12.8.2015 and judgment rendered by the Punjab and Haryana High Court in ***S.R.Forging Ltd. and another*** vs. ***UCO Bank and others (2013) 1 DRTC, 734***.

12. We find no force in these submissions of learned counsel for the petitioner for the reason that this was not even the pleaded case of the petitioner before the Appellate Tribunal wherein he had sought exemption only on the ground that it was in serious financial scarcity and in dire need of financial assistance in order to meet its working capital requirement and other liabilities and had already incurred huge loss and debt because of

the arbitrary and illegal conduct of the respondents as would be clear from para-2 of the application, which reads thus:

> *"2. That appellant is already in serious financial scarcity, and is in dire need of the financial assistance in order to meet its working capital requirement and other liabilities. It had already incurred a huge loss and debts because of the arbitrary and illegal conduct of the respondents herein. Therefore considering the hardship of the appellant this Hon'ble Appellate Tribunal may kindly take a lenient view and dispense with the pre deposit of the amount under Section 18 of the Act."*

13. Now, coming to the judgments relied upon by the petitioner, it was noticed that in none of the aforesaid cases have the provisions of Section 18 (1) of the Act held to be directory or not mandatory for entertaining any appeal. Rather, it is after taking into consideration the ratio of the judgment of the Hon'ble Supreme Court in ***Narayan Chandra Ghosh*** (supra) that it was held that the principles laid down therein would not apply to a case when there is no amount due or where more than the due amount has already been realised by the financial institution.

14. The petitioner though has not cared to place on record the statement of account which may prima-facie establish that either the whole or more than due amount has been paid by the petitioner. But then, the petitioner itself has annexed the copy of recovery notice dated 25.8.2009 (Annexure P-3) issued by the respondent-Bank, which shows that a sum of Rs.47,66,781.66 paise (` Forty Seven Lacs Sixty Six Thousand Seven Hundred Eighty One and paise Sixty Six only) was due and payable by the petitioner as on 28.2.2009 and that too obviously the interest at the commercial rate must have mounted up on this principal amount. Therefore, no assistance whatsoever can be derived by the petitioner by placing reliance on the judgments referred to above as the same are inapplicable to the facts of the instant case.

15. In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed in limine alongwith pending applications, leaving the parties to bear their costs.

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

M/s Krishna Paper Board Industries ...Appellant.
Versus
Sh. Rakam Singh and another ...Respondents.

LPA No. 12 of 2009
Reserved on: 13.10.2015
Decided on: 27.10.2015

Constitution of India, 1950- Article 226- Respondent was engaged as a fitter- he sustained injuries and was permitted to join his service- he was retrenched subsequently- he raised an industrial dispute – Labour Court dismissed the petition- workman filed a writ petition which was allowed and his termination was declared illegal- order in the writ petition was challenged in the appeal- Labour Court returned the findings on the basis of evidence – it is

not the case that Labour Court had taken into account inadmissible evidence or had returned findings without any basis- held, that findings of fact reached by the Tribunal as a result of appreciation of evidence cannot be questioned in Writ proceedings- employee had not even joined the service despite the order in his favour- employer had specifically averred that employee had voluntarily left the services which was not denied specifically- held that award was passed by Labour Court rightly and the Writ Court had wrongly set the same aside- petition allowed. (Para-6 to 25)

Cases referred:

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

Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

Uttar Pradesh State Textile Corporation Limited versus Suresh Kumar, (2011) 15 Supreme Court Cases 180

Vijay S. Sathaye versus Indian Airlines Limited and others, (2013) 10 Supreme Court Cases 253

For the appellant: Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashisth, Advocate.

For the respondents: Mr. Deepak Kaushal, Advocate, for respondent No. 1.

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 22.10.2008, made by the learned Single Judge/Writ Court in CWP No. 1785 of 2007, titled as Rakam Singh versus Presiding Officer, H.P. Industrial Tribunal and another, whereby the writ petition filed by the respondent came to be allowed and the award made by the H.P. Industrial Tribunal-cum-Labour Court, Shimla (for short "Labour Court") was set aside (for short "the impugned judgment").

Brief facts:

2. Rakam Singh-respondent was engaged as Fitter by the writ respondent-appellant in the year 1996, sustained injuries, reported back on 07.11.1997, but was permitted to join on 17.11.1997. He raised a Demand Notice and Reference was made on 20.12.2001, which is as under:

> *"1. Whether the termination of Sh. Rakam Singh S/o Sh. Janga Ram w.e.f. 1.11.1999 by the General Manager, Krishna Paper Board Industries, Kala Amb District, Sirmour, H.P. without complying with the Section 25-F of the I.D. Act, 1947 is legal and justified? If not, to what service benefit and relief the concerned workman is entitled to?*
>
> *2. Whether the plea of the General Manager, Krishna Paper Board Industries, Kala Amb, District Sirmour that Shri Rakam Singh S/o Shri Janga Ram workman had left the job of huis own accord w.e.f. 1.11.1999 is justified? If not, its legal effects as per I.D. Act, 1947?"*

3. The respondent filed a claim and urged that his retrenchment w.e.f. 1.11.1999 was not in accordance with the Industrial Disputes Act, 1947 (for short "I.D. Act"), was resisted by the appellant. Parties led evidence and the Labour Court, vide award,

dated 05.07.2007, decided both the issues against the respondent and in favour of the appellant, reference was answered and the claim was dismissed.

4. The said award was the subject matter of the writ petition. The learned Single Judge/Writ Court, vide the impugned judgment, held that the respondent was not gainfully employed, declared his termination illegal and also directed his reinstatement with back wages.

5. Learned Senior Counsel for the appellant argued that the Writ Court has travelled beyond its power and competence by exercising the jurisdiction of the Appellate Court, which is not vested with it, and the impugned judgment is illegal. Further argued that the Writ Court has also not taken into account the conduct of the respondent while in service, during the pendency of the Reference and even before the Writ Court.

6. The question is - whether the Writ Court can set aside the findings of the Labour Court, which are based on evidence? The answer is in the negative for the following reasons:

7. The Labour Court determines the Reference after recording the evidence, oral as well as documentary and after hearing the parties, by making the award.

8. The Labour Court came to the conclusion that the respondent was gainfully employed with M/s Vashisht Chemist Kala Amb, M/s Saboo Cylinder Kala Amb & M/s Crystal Engineering Kala Amb and has left his job on his own. It is apt to reproduce para 9 of the award made by the Labour Court herein:

> *"9. From the scrutiny of the oral as well as documentary evidence, there is no dispute about the appointment of the petitioner by respondent. It has also been proved that the petitioner was appointed as Fitter and due to injury, he was referred for treatment to PGI Chandigarh where he remained admitted. The petitioner received 45% disability as per disability certificate Ex. PW-1/A. The fitness certificate is Ex. PW-1/C. The only plea of the petitioner is that he was nOt permitted to join back his duty despite medical certificate produced by him. The petitioner himself has admitted in his cross-examination that he was allowed to join on 17.12.1997. It has also been proved that the petitioner was doing the welding work but due to injury in his right eye, he was unable to do welding work. It has been alleged by the respondent that the petitioner is already gainfully employed with M/s Vashisht Chemist Kala Amb, M/s Saboo Cylinder Kala Amb and M/s Crystle Engineering Kala Amb and he himself has left the job. The case was listed for conciliation on 9.4.2007, 3.5.2007 and 22.6.2007 but the petitioner failed to appear on 3 dates and ultimately on 22.6.2007, he dis-appeared from the Court. It has been proved that after receiving injury, the petitioner is getting Rs. 600/- as pension from ESI. The petitioner has failed to prove that he has furnished his medical certificate alongwith his application when he reported for duties. He has also failed to prove that he has not been gainfully employed with the above named firms. It has been proved that the petitioner has left the job after receiving injury on his right eye, hence section 25-F of the ID Act, 1947 are not attract in the present case and issue No-1 is decided against the petitioner and in favour of the respondent."*

9. The Labour Court, after examining the evidence, held that the respondent has failed to prove the following points:

(i) That he has furnished the medical certificate alongwith the application/ joining report;

(ii) That he was not gainfully employed with any forum; and

(iii) That his services were terminated.

10. This finding has been returned on the basis of evidence. It was not the case of the respondent that the Labour Court has taken into account inadmissible evidence or has returned its findings without any basis.

11. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** held that the findings of fact reached by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:

> *"18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."*

12. The same view has been taken by the Apex Court in the case titled as **Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr.,** reported in **2014 AIR SCW 3298.**

13. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

14. The Labour Court has recorded in para 9 of the award, quoted hereinabove, that it tried to settle the dispute, learned counsel for the parties were directed to cause the presence of the parties and was listed for conciliation on 09.04.2007, 03.05.2007 and 22.06.2007, but the respondent failed to appear on the said dates. The respondent has not made any averment about the same in the writ petition. Thus, the conduct of the respondent assumes great importance.

15. The Apex Court in the case titled as **Uttar Pradesh State Textile Corporation Limited versus Suresh Kumar,** reported in **(2011) 15 Supreme Court Cases**

180, held that the conduct of an employee is also relevant. Para 7 of the judgment reads as under:

> *"7. The other question relates to the back wages for a period of one year and five months. We are of the opinion that the grant of back wages is a matter of discretion vested in the Court and the conduct of an employee is an extremely relevant factor on this aspect. The financial status of the employer must also be kept in mind. We are therefore of the opinion that the conduct of the Respondent and the financial status of the appellant does not justify the payment of any back wages."*

16. It is also apt to record herein that in terms of order, dated 18.03.2009, passed in the LPA, the impugned judgment was stayed so far it relates to payment of back wages only, but despite that fact, the respondent had not joined the duties. Thereafter, an application, being CMP No. 227 of 2012, was moved on 20.03.2012, by the appellant with the permission to bring on record the fact that the respondent was still working with M/s Shree Parwati Steel & Alloys, Village Kheri, Trilokpur Road, Kala Amb, District Sirmaur (H.P.). The respondent was asked to file reply vide order, dated 03.05.2012. It is pertinent to reproduce the relevant portion of the said order herein:

> *"**CMP No. 227 of 2012***
>
> *Reply to the application not filed. Be filed within three weeks from today. Respondent, Rakam Singh shall clearly indicate whether he has received any monetary benefit from M/S Shree Parwati Steel & Alloys, Village Kheri, Trilokpur Road, Kala-Amb, District Sirmaur (H.P.) and if so, for what purpose.*
>
> *List on 28th June, 2012."*

17. He has filed the reply/affidavit and has not denied the factum of receipts, dated 09.10.2008, 09.11.2008 and 08.12.2008 filed alongwith CMP No. 227 of 2012. In this backdrop, relevant portion of the reply to paras 11 and 12 in CMP No. 227 of 2012 is reproduced herein:

> *".....It is further denied that the respondent has actively worked anywhere else including M/s. Parvati Steels & Alloys and the Annexure 'M' belongs to some other person. Moreover, on face of the Annexure 'M' prima-facie it is not clear that the same are salary slips or the payment for some other purpose."*

18. It was for the respondent to explain as to whether these receipts are salary slips or receipts of any other dues. He has replied evasively, thus, is admission on his part, or is suggestive of the fact that he has concealed the material facts.

19. In the writ petition, the appellant has specifically denied para 3 of the writ petition wherein the respondent has averred that his services were orally terminated on 01.11.1999 without issuing any notice to him. It is apt to reproduce para 3 of the reply on merits filed by the writ respondent-appellant herein:

> *"3. That the contents of para 3 as alleged are wrong, hence denied. In fact the petitioner at his own on 31.10.1999 left the job. His services were never terminated by the replying respondent. It is humbly submitted that at the time when the petitioner showed his intention not to work he was paid all his wages upto 31.10.1999 on 1.11.1999 whereas the replying respondent used to pay salary to his*

workers by 7th of every month. Since the petitioner showed his intention to leave the job from 1.11.1999 he was paid the entire wages on 1.11.1999 itself. Further averments in this paragraph so far approaching the Labour Tribunal by the petitioner are matter of record. However, it is denied that services of the petitioner were orally terminated by the replying respondent."

20. The respondent has neither filed any rejoinder nor any affidavit in response to the averments contained in para 3 of the reply, have remained unrebutted. The said pleadings are corroborated by the evidence recorded by the Labour Court read with the findings recorded by it.

21. Learned Senior Counsel for the writ respondent-appellant, while relying upon the judgment rendered by the Apex Court in the case titled as **Vijay S. Sathaye versus Indian Airlines Limited and others,** reported in **(2013) 10 Supreme Court Cases 253,** argued that the respondent had chosen to remain absent for a long period, thus, it was a case of voluntary abandonment of service.

22. It is apt to reproduce paras 11 to 13 of the said judgment herein:

"11. Even otherwise, the petitioner was asked to continue in service till the decision is taken on his application. However, he did not attend the office of the respondents after 12.11.1994. In view of the above, as the petitioner had voluntarily abandoned the services of the respondents, there was no requirement on the part of the respondents to pass any order whatsoever on his application and it is a clear cut case of voluntary abandonment of service and the petitions are liable to be dismissed.

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. v. Workmen, AIR 1961 SC 1567, this Court held as under:

> *".....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. Registrar, Coop. Societies, AIR 1974 SC 1896."

23. The appellant has specifically averred before the Labour Court that the services of the respondent were not terminated, but he had left the job of his own and has further stated that the averments contained in the claim of the respondent were contradictory. It is apt to reproduce paras 4 and 5 of the reply filed by the appellant before the Labour Court herein:

"4. Contents of para No. 4 of the petition are palpably false and the same are denied as such. The petitioner has himself contradicted his averments of this paragraph int he succeeding paragraph No. 5 of the

petitioner wherein he has alleged that he was verbally retrenched with effect from 1-11-1999. This mean that upon his a report, he was taken in service with effect from 17-12-1997 and remained employed till 31-10-1999. The petitioner has paid for this period his wages.

5. Contents of para 5 of the petition are incorrect. Hence the same are denied. The petitioner himself left the job on 31-10-1999 and received his full and final settlement of wages on 1-11-1999. In pursuance whereof, the petitioner was paid his bonus on 6-11-1999. Simultaneously, the petitioner applied for pension under E.S.I Scheme claiming therein to be disabled to do his job and subsequently, he was granted disability pension from E.S.I of which, he is still in receipt of. Now, the petitioner has become dishonest and wants to claim alleged re-instatement with alleged consequential benefits, whereas the facts are otherwise as submitted in the preceding paragraphs."

24. The Writ Court was not within its power, competence and jurisdiction, in view of the discussions made hereinabove, to overturn the findings of the Labour Court and grant the relief, which is not permissible in view of the given facts of the case.

25. Having glance of the above discussions, the Labour Court has made the award, which is well reasoned, speaking one and based on evidence, thus, merits to be upheld.

26. Keeping in view the discussions made hereinabove, the impugned judgment is set aside, the appeal is allowed, the writ petition is dismissed and the award made by the Labour Court is upheld.

27. Accordingly, the appeal is allowed alongwith all pending applications.

****

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

Mamta Devi ...Petitioner

Versus

Union of India and others. ...Respondents

CWP No. 8960 of 2013
Judgment Reserved on 15.10.2015
Date of decision: 27th October, 2015

Constitution of India, 1950- Article 226- Petitioner filed an application for establishment of Kisan Sewa Kendra, which was rejected on the ground that property offered by the petitioner was not suitable for establishing Kisan Sewa Kendra and the offered plot was against the IRC (Indian Road Congress) 2009 norms- held, that merely because IRC guidelines have no statutory value do not mean that they cannot be taken into consideration while deciding the suitability- however, petitioner cannot claim any negative parity by saying that respondent had violated the norms of IRC 2009 in other cases as well- the purpose of prescribing 100

meters distance of the road intersection was to ensure safety, therefore, petitioner cannot have any reason to complain - petition dismissed. (Para-4 to 11)

Cases referred:
State of Haryana and others Vs. Ram Kumar Mann, (1997) 3 SCC 321
National Institute of Technology Vs. Chandra Shekhar (2007) 1 SCC 93
State of Punjab & others Vs. Col. Kuldeep Singh, AIR 2010 SC 1937,

For the Petitioner:	Mr.Inder Sharma, Advocate.
For the Respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India with Mr.Angrez Kapoor, Advocate, for respondent No. 1.
	Mr. K.D. Sood, Senior Advocate with Mr.Arjun K. Lal, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

By medium of this petition, the following reliefs have been prayed for:-

"(i) That writ in the nature of certiorari may kindly be issued, whereby quashing and setting aside the impugned office order dated 20.03.2013 issued by the respondent No. 2, Annexure P-4, being illegal and arbitrary.

(ii) That the respondents may kindly be directed to consider the case of the petitioner by giving/inserting the marks in the column of Capability to provide land and infrastructure/facilities (Max.35), in the statement of the performance of candidates, Annexure P-2, in which, no mark has been given to the petitioner for the offered plot i.e. Khasra No. 1761/1, 3353/1, 1758/1, 3352/1758/1, 3349/1754/1, situated in Mohal Kummi, Tehsil Sadar, District Mandi, H.P."

2. It is the case of the petitioner that her application for the establishment of Kisan Sewa Kendra (KSK) retail outlet in rural areas was rejected by the committee pointing out that the property offered for setting up of KSK was not suitable due to intersection at a distance of 60 meters from the offered plot as against the IRC (Indian Road Congress) 2009 norms, which prescribe minimum distance of 100 meters from the road intersection. The petitioner has challenged rejection of her case on various grounds, as taken in the memo of petition.

3. Respondents have filed their reply, wherein they have extensively referred to the selection guidelines in order to justify their action.

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

4. Learned counsel for the petitioner vehemently argued that the IRC guidelines themselves have no statutory value and therefore, cannot be enforced. I am not impressed by such submissions, for the simple reason that even if the guidelines have no statutory value, it may not give a vested right to any third party to complain a breach of guidelines, calling for any interference by this Court. However, the guidelines shall be taken as valid and rejection if made on the basis of such guidelines, then the Court would normally not interfere, especially when the decision is backed by an appraisal of the situation in light of

the guidelines. Judicial intervention would be possible only where the guidelines itself are shown to be arbitrary and without any relevance for issue of safety or other parameters that may go into reckoning for the location of a retail outlet. Since there is no challenge to the guidelines itself to be arbitrary, this Court cannot take a decision rendered on the basis of guidelines to be not justified.

5. The only other argument available with the petitioner is that the respondents have themselves allotted outlets to various persons whose distance is in contravention to the IRC 2009 where retail outlets of not only less than the prescribed distance, but even far less than what was available in the case of the petitioner have been sanctioned.

6. I am not impressed with this argument, for the simple reason that the petitioner cannot claim negative parity for grant of benefit, merely because some benefit is incorrectly or wrongly granted to other persons. The claim of parity does not apply to a wrong decision.

7. In ***State of Haryana and others Vs. Ram Kumar Mann, (1997) 3 SCC 321,*** it was held that a wrong order cannot be the foundation for claiming equality. It was further held that a wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality and two wrongs can never make a right. It was also held that a right agitated before the Court must be founded upon enforceable right to entitle one to the equality treatment for enforcement thereof. It is apt to reproduce para 3 of the judgment, which reads thus:-

> *"3. The question, therefore, is whether the view taken by the High Court is correct in law. It is seen that the respondent had voluntarily resigned from the service and the resignation was accepted by the Government on 18.5.1982. On and from that date, the relationship of employer and the employee between the respondent and the State ceased and thereafter he had no right, whatsoever, either to claim the post or a right to withdraw his resignation which had already become effective by acceptance on 18-5-1982. It may be that the Government for their own reasons, had given permission in similar case, to some of the employees mentioned earlier, to withdraw their resignations and had appointed them. The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similar circumstanced person claim equality under Section 14 for reinstatement? Answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle lion to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never made a right. Under these*

circumstances, the High Court was clearly wrong in directing reinstatement of the respondent by a mandamus by a mandamus with all consequential benefits."

8. In ***National Institute of Technology Vs. Chandra Shekhar (2007) 1 SCC 93,*** the Hon'ble Supreme Court after placing reliance upon the judgment of State of Haryana Vs. Ram Kumar (supra) and lot of other judgments, has held that a wrong decision by the Government would not give a right to enforce a wrong order and claim parity or equality. The relevant portion of the judgment reads as under:-

"10. Merely because in some cases the norms may not have been followed that cannot be a ground to hold that departure from norms should be continued. There are serious allegations about respondent having manipulated and fabricated documents to substantiate his stand. We need not go into these allegations. But as has been fairly accepted by the learned counsel for the respondent, there is no official communication from IIT Madras to support the respondent's stand that he was asked by the authorities of the said institute not to attend the programme. There should have been some material to support the stand. Unfortunately, for the respondent there is none. On the other hand admittedly after April, 2005 the respondent had abandoned the programme. It is also on record that the appellant notwithstanding these facts had asked the respondent to report back to IIT, Madras to continue studies in terms of High Court's direction. But that does not seem to have been done by the respondent."

9. In ***State of Punjab & others Vs. Col. Kuldeep Singh, AIR 2010 SC 1937***, the Hon'ble Supreme Court held that Article 14 of the Constitution of India does not envisage for negative equality and is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality cannot be claimed in illegality and therefore, cannot be enforced by a citizen or Court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial Forum, others cannot invoke the jurisdiction of higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order. A wrong order/decision in favour of a particular party, does not entitled any other person to claim benefit on the basis of wrong decision. It is apt to reproduce para 14 of the judgment, which reads thus:-

"14. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Administration & Anr. V. Jagjit Singh & Anr., AIR 1995 SC 705 : (1995 AIR SCW 493); Smt. Sneh Prabha Vs. State of U.P. & Ors., AIR 1996 SC 540: (1995 AIR SCW 4449); Jalandhar Improvement Trust Vs. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306 : (2000 AIR SCW 2389); Union of India & Ors. Vs. Rakesh Kumar, AIR 2001 SC 1877: (2001 AIR SCW 1458); Yogesh Kumar & Ors. Vs. Government of NCT Delhi & Ors. AIR 2003 SC 1241: (2003 AIR SCW 1630); Union of India & Anr. V. International Trading Company & Anr, AIR 2003 SC 3983: (2003 AIR SCW 2828); M/s Anand Button Ltd. Vs. State of Haryana & Ors. AIR 2005 SC 565; (2005 AIR SCW 67); K.K. Bhalla Vs. State of M.P. & Ors. AIR 2006 SC 898: (2006 AIR SCW 345); and Maharaj Krishan Bhatt & Anr. Vs. State of Jammu & Kashmir & Ors. (2008) 9 SCC 24) : (AIR 2009 SC (Supp) 615 : 2008 AIR SCW 5421)."

10. Now adverting back to the facts, it would be noticed that the land offered by the petitioner was not found suitable, since there is a road intersection at the distance of 60 meters from the offered plot/land. Clause 4.5.1 (ii) of the IRC 12-2009 reads thus:-

"4.5.1 Non-Urban (rural stretches)

xxxxxxxxxxxxxxxxxxxxxxxxxxxxx

2) Hilly/Mountainous Terrain:

(i) intersection with NHs/SHs/MDRs 300m

(ii) Intersection with all other roads and tracks 100 m"

11. It was not even disputed by the learned counsel for the petitioner that the very purpose of prescribing 100 meters of distance is to ensure safety. If that is so, the petitioner has no reason to complain.

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

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

Mumtaz Ahmad ...Petitioner.

Versus

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

CWP No. 3635 of 2015
Judgment reserved on : 16.10.2015
Date of decision: October 27, 2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Imam of Masjid- he submitted a conditional resignation which was accepted – however, the petitioner was permitted to work as an honorary Imam and in lieu thereof he was allowed to retain the accommodation- some news item appeared against the petitioner after which a decision was taken to discontinue the services of the petitioner from the post of honorary Imam and to vacate the accommodation- petitioner filed a representation but when no action was taken, he filed the present petition- record shows that contention raised by petitioner had already been rejected in RFA no. 484 of 2011, hence, present proceedings would be barred by the principle of res-judicata- petitioner filed a writ petition after eight years without explaining delay- petition dismissed. (Para-5 to 16)

Cases referred:

Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu (2014) 4 SCC 108

K.S. Bhoir vs. State of Maharashtra and others, AIR 2002 SC 444

Sudhir Kumar Consul vs. Allahabad Bank (2011) 3 SCC 486

For the Petitioner : Ms. Anjana Khan, Advocate.

For the Respondents : Mr. V.K.Verma and Ms. Meenakshi Sharma, Addl. A.Gs. with Ms. Parul Negi, Deputy Advocate General, for respondent No. 1.

Mr. B.S. Attri, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The facts leading to the filing of this petition are that the petitioner was appointed as Imam of the Masjid at Boileauganj and was alleged to be working as such without any complaint from any quarters till 22.7.2003 when for the personal reasons he was constrained to submit a conditional resignation which was duly accepted and he was permitted to work as an honorary Imam and in lieu thereof allowed to retain the accommodation in his possession with all facilities.

2. It is further averred that the conditional resignation offered by the petitioner was duly accepted by the Punjab Wakf Board on 31.7.2003. In the year 2006-2007, the properties under the supervision and control of the Punjab Wakf Board came to be transferred to the Himachal Pradesh Wakf Board as per the provisions of Wakf Act, 1995. Thereafter, in the year 2007 and onwards, due to some inimical causes and political vendetta, certain persons started malicious campaign against the petitioner and even got certain news papers and fabricated clips displayed on the television channel accusing the petitioner that he in his capacity and position as Chairperson of the Haj Committee, had misused his position. It is further alleged that these were only bald allegations, because no FIR or daily diary report was ever lodged against the petitioner. However, these did lead to passing of a resolution by the Wakf Board on 5.2.2007 wherein a decision to discontinue the services of the petitioner from the post of Honorary Imam was taken and he was further directed to vacate the accommodation.

3. The petitioner claims that he repeatedly represented the matter between the years 2007 to 2015 but when nothing fruitful was done by the respondents, he was constrained to file the present writ petition praying therein the following substantive reliefs:

> *"1. That the resolution dated 5th February, 2007 (Annexure P-3) may kindly be set aside and quashed.*
>
> *2. That the respondent may kindly be directed to allow the petitioner continue as honorary Imman in Boileauganj Mosque with accommodation and other facilities provided to him since long and still residing there.*
>
> *3. That the entire proceedings initiated on the basis of said resolution may kindly be declared null and void."*

4. The respondents in their reply have raised preliminary objections regarding the very maintainability of this petition. It is averred that the eviction proceedings initiated against the petitioner have attained finality upto this Court and as such, the petitioner is estopped to invoke the extraordinary jurisdiction of this Court. It is averred that the petitioner is estopped to file the present writ petition on account of his act, conduct, acquiescence, delay and laches. It is also averred that vide judgment dated 27.8.2011 passed in Civil Suit No. 7-S/1 of 2008 titled H.P. Wakf Board vs. Maulana Mumtaz Ahmad, the Wakf Tribunal, Shimla had decreed the suit for possession of the guest house/mosque, residential accommodation (hujra) alongwith all the articles against the petitioner. He was also directed to pay use and occupation charges at the rate of Rs.600/- per day on account of the premises being unauthorisedly occupied by him after his removal as an Honorary Imam. The findings in Civil Suit No. 7-S/1 of 2008 were unsuccessfully challenged by the petitioner in RFA No. 484 of 2011 and the same have now attained finality.

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

5. It is more than evident from the records that the contentions being raised in this petition have already been considered and adjudicated upon by this Court in RFA No. 484 of 2011. It is apt to reproduce para 14 of the judgment, which reads thus:

> *"14. What emerges from the facts enumerated hereinabove, is that the defendant was terminated as honorary Imam on 29.1.2006, vide resolution No. 4/2006. He was directed to vacate the accommodation on 14.2.2007. The defendant has attained the age of 62 years. It is the duty cast upon the Board to protect its property. The defendant, till date, has not assailed his termination as Imam of the mosque. The status of the defendant after order dated 14.2.2007, was of a mere trespasser. He was in unauthorized occupation of the mosque. He has no vested right to reside in the accommodation after his removal as Imam. He had also been using the portion of the premises of the mosque as school of Mohammadan studies without the permission of the plaintiff. He had also been using the protion of the mosque as guest house and charging money from the occupants. The accommodation where the defendant was running guest house is two storeyed. It cannot be believed that the defendant was not charging any amount from the occupants of the guest house. The property is situated in Boileauganj area. It is a commercial area. The Court below has rightly come to the conclusion tat the plaintiff was entitled for use and occupation charges at the rate of Rs.600/- per day. The learned District Judge (Wakf Tribunal) has correctly appreciated the evidence. The defendant was removed as Imam of the mosque."*

6. Indisputably, the aforesaid findings have attained finality and, therefore, the instant petition is clearly barred by the principles of *res judicata*. The principles as envisaged under Section 11 CPC are equally applicable to writ petitions. Section 11 of the Code embodies the rule of conclusiveness as evidence, or bars the plea of an issue tried in an earlier proceedings in which the matter is directly and substantially in issue and have become final. In a later proceedings between the same parties or their privies in a competent court to try such subsequent proceedings, in which the issue has been directly and substantially raised and decided in the former of proceedings would operate as *res judicata*. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to provide multiplicity of proceedings and accords finality to an issue which directly and substantially had arisen in the former of proceedings between the same parties or privies, decided and became final, so that the parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy as well as private justice. Doubtless the principle of *res judicata* is a fundamental doctrine of law, that there must be an end to litigation.

7. That apart, it would be noticed that vide resolution passed on 5.2.2007 not only services of the petitioner as honorary Imam were discontinued but he had further been directed to vacate the accommodation etc. but despite this, he did not choose to question this action separately and only defended the proceedings initiated by the respondents before the Wakf Tribunal which ultimately culminated into decision rendered by this Court on September 10, 2014 in RFA No. 484 of 2011.

8. Indisputably, the petitioner has slept over the matter for quite a considerable long time and has knocked the door of the Court after a gap of 8 long years and above all, there is clear unexplained delay and laches in filing of the writ petition.

9. It is more than settled that this Court in exercise of its discretion will not ordinarily assist the tardy and indolent or acquiescent and lethargic. The petitioner cannot be permitted to have a belated resort to the extraordinary remedy, that too, once the issue has already been finally adjudicated upon by a co-ordinate Bench of this Court in RFA No. 484 of 2011 decided on September 10, 2014.

10. In ***Chennai Metropolitan Water Supply and Sewerage Board and others*** vs***. T.T. Murali Babu (2014) 4 SCC 108,*** the Hon'ble Supreme Court has dealt with the doctrine of delay and laches in the following manner:

> "*16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis.*
>
> *17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons – who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."*

11. Ms. Anjana Khan, learned counsel for the petitioner would however argue that in case the petitioner, who is aged person, is ordered to be evicted, it is not he alone

who would suffer, but even 80 children, who are being provided Islamic education in the school (Madarsa) and otherwise are very poor and have come from different parts of the State, would also suffer.

12. Mr. B.S.Attri, learned counsel for respondents No.2 and 3 has vehemently contested the aforesaid position and argued that the running of Madarsa in the mosque by the petitioner is itself totally unauthorized as the same is being run without any consent or permission from the respondent-Board. It is further argued that under the garb of running Madarsa in the mosque, the petitioner is unauthorisedly collecting donations, Jakat from various persons and organizations in order to collect money for his vested interest. The petitioner is also illegally collecting money from the children who are unauthorisedly kept in the mosque on the pretext of running Madarsa.

13. Be that as it may, the power of this Court to exercise extraordinary jurisdiction under Article 226 of the Constitution is to ensure that rule of law prevails and not to issue directions or writ to perpetuate illegality or to act in disregard to the settled decisions, statutory provisions, regulations and policy decisions etc. and in such situation, this Court can only sympathise with the plight of such students who for no fault of their own are being dislodged. Here, it shall be apt to reproduce the following passage from the judgment delivered by the Hon'ble Supreme Court in ***K.S. Bhoir*** vs. ***State of Maharashtra and others, AIR 2002 SC 444*** wherein it was held as under:

> "11..... *In such a situation one can sympathise with the plight of such students who for no fault of their own were to be dislodged. However, the compassion and sympathy has no role to play where a rule of law is required to be enforced*....."

14. Similarly, in ***Sudhir Kumar Consul*** vs**. *Allahabad Bank (2011) 3 SCC 486*** the Hon'ble Supreme Court held as under:

> *"31. We have sympathies for the appellant but, in a society governed by the rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service."*

15. Lastly, Ms. Anjana Khan, learned counsel for the petitioner would argue that the use and occupation charges demanded by the respondents at the rate of Rs.600/- per day are highly exorbitant and, therefore, the demand of the respondents should be quashed and set-aside especially when the petitioner is a senior citizen aged 71 years.

16. Even this argument is not available with the petitioner for the simple reason that the findings in this regard on the aforesaid issues have already been returned against him in RFA No. 484 of 2011 as is evident from the perusal of para 14 of the judgment (quoted supra) and the same have admittedly attained finality.

17. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed alongwith pending application(s) if any, leaving the parties to bear their costs.

****

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

Private Bus Operator Welfare Society ...Petitioner.
Versus
State of H.P. and others ...Respondents.

CWP No. 3231 of 2014
Judgment reserved on : 15.10.2015
Date of decision: October 27, 2015.

Constitution of India, 1950- Article 226- Petitioner, a registered society, claimed that drivers and conductors of the society are harassed at the instance of the Regional Manager, H.R.T.C- respondent No. 6 is deputing conductor to check the papers of the bus of the society – respondent stated in the reply that direction had been issued to stop checking papers of buses- petitioner relied upon news paper clipping in support of its plea- held, that news item is in the nature of hearsay secondary evidence and does not have any evidentiary value- however, it was admitted in the letter written by respondent that employees of the HRTC had been deployed at the Bus Stand to check over timing and route permit – further held that employees of the HRTC have not been conferred with any jurisdiction or Authority to check the documents - respondent No. 6 and its employees restrained from checking papers of the vehicle of the private bus operators. (Para-6 to 18)

Case referred:
Laxmi Raj Shetty and another vs. State of Tamil Nadu AIR 1988 SC 1274

For the Petitioner : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. V.K.Verma and Ms. Meenakshi Sharma, Addl. A.Gs. with Ms. Parul Negi, Deputy Advocate General, for respondents No. 1 to 4.
Mr. G.S. Rathore, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner claims to be a society registered under the Societies Registration Act and its members are plying their buses on the routes granted to them by the Regional Transport Authority, Hamirpur (respondent No.4). The grievance put forth is that the drivers and conductors of the petitioner-Society are being harassed at the instance of the Regional Manager, Himachal Road Transport Corporation (for short HRTC). It is further mentioned that contrary to all Acts, Rules and norms, the respondent No.6 is deputing its conductors to check the papers of the buses including those of the petitioner-Society. It is further alleged that this highhandedness on the part of the employees of respondent No.6 has been reportedly brought to the notice of respondents No. 2 to 4, but to no avail.

2. In order to support its contention, the petitioner has also annexed various cuttings from the newspaper reports. Lastly, it is contended that even though there is a police post inside the Bus Stand, Hamirpur, but the officials generally turn their eyes or act

as a mute spectators and being constrained by this state of affairs, the petitioner is compelled to approach this Court for the grant of following reliefs:

> *"(i) Writ in the nature of mandamus thereby restraining respondent No.6 from checking the paper of private operators i.e. petitioner Society and the respondents No. 2 and 3 be directed to depute the police personnel to regulate the time table of all buses and further respondent No.3 be directed to register case against the erring officials who figured in the newspaper cutting dated 29/30.3.2014 including the respondent No.6 for causing obstruction to ply buses by the petitioner-Society.*
>
> *(ii) Respondent No.4 be directed to take suitable action against the erring official including the respondent No.6 and further be directed to collect the arrear of SRT from the respondent No.6.*
>
> *(iii) Respondent No.5 be directed to take action against the respondent No.6 alongwith all the drivers and conductors who figures in the photographs of the newspaper cuttings published on 29th and 30th March, 2014 and the respondent No.6 be further directed to submit the duty rosters of these drivers and conductors figuring in the news papers for the months of March to April, 2014.*
>
> *(iv) The record pertaining to the arrear of SRT of respondent No.6 may very kindly be summoned from the office of respondent No.4 and after perusing the same, the respondent No.4 be directed to treat the respondent No.6 on similar footing like the private bus operators or any other order or direction, as the Hon'ble Court may deem just and proper in the facts and circumstances of the case, in the interest of justice, equity and fair play."*

3. Respondents No. 1, 2 and 4 i.e. Principal Secretary (Transport), Deputy Commissioner, Hamirpur and Regional Transport Authority, Hamirpur in their joint reply have stated that after going through the various newspaper reports, respondents No. 5 and 6 had been telephonically directed to stop the checking with the further directions that if they have any knowledge of plying of any private bus illegally then the same may be brought to the notice of the respondent No.4 and action will be taken against the offenders /illegal operation as per the provisions of Motor Vehicles Act, 1988 (hereinafter referred to as the "Act of 1988") and Central Motor Vehicle Rules, 1989.

4. The respondent No.3, who is the Superintendent of Police, Hamirpur, in his reply, has stated that there is a police assistance room inside the bus stand, Hamirpur and the same has been established for the assistance of the public. In addition to the police assistance room, traffic police is also deployed for the regulation of traffic in the city, who regularly check the vehicles and prompt action is taken against the violators in accordance with law. It is categorically stated that the petitioner have never reported any incident which is within the cognizance of the police.

5. Respondents No. 5 and 6, who are the Managing Director and Regional Manager, Himachal Road Transport Corporation, Hamirpur, respectively, have filed the joint reply wherein it has been averred that insofar as the HRTC, Hamirpur Bus Stand is concerned, the same is the property of the Bus Stand Management and Development Authority (for short BSM&DA) and the Regional Manager is the nodal officer and it is incumbent upon the Department to maintain proper management at Bus Stand so as to prevent any illegal activities and illegal parking there.

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

6. The petitioner in support of the allegations made in the petition regarding the highhandedness and illegal activities of the employees of respondents No. 5 and 6 has taken me through the various newspaper reports annexed with the petition. However, the moot question is as to whether these newspaper cutting reports have any evidentiary value or are merely hearsay?

7. The issue is no longer resintegra and came up before the Hon'ble Supreme Court in ***Laxmi Raj Shetty and another*** vs. ***State of Tamil Nadu AIR 1988 SC 1274*** wherein it was categorically held that the newspaper item being in the nature of hearsay secondary evidence in itself have no evidentiary value, unless proved by evidence aliunde. It is apt to reproduce paras 25 and 26 of the judgment and relevant portion whereof reads thus:

> *"25. ….. We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78 (2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein.*
>
> *26. It is now well settled that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported…."*

8. In view of the aforesaid exposition of law, the petitioner was required to substantiate the averments made in the petition by some contemporaneous material on the record. However, to the benefit of the petitioner, the respondents No. 5 and 6 in their preliminary objection No.3 have themselves admitted that the District Administration i.e. Superintendent of Police, Hamirpur (respondent No.3) had also contacted the respondent No.5 to deploy HRTC staff at Bus Stand for the proper management of HRTC buses and private concern and have also placed on record the copy of letter dated 13.1.2014 (Annexure R-2). It is apt to reproduce para-3 of the preliminary objection as under:

> "*3. That HRTC Hamipur Bus Stand is property of the BSM & DA and Regional Manager being Nodal Officer of BSM & DA, it is incumbent upon the department to maintain proper management at Bus Stand and do not allow any illegal activities & illegal parking there. The District Administration i.e Superintendent of Police Hamirpur (Respondent No.3) has also contacted respondent No. 5 to deploy HRTC staff at Bus Stand for the proper management of HRTC buses and private concern, at the bus stand which is evident from the letter dt. 13-01-2014 attached herewith as Annexure R-2 for the kind perusal of this Hon'ble Court. <u>As per letter dated 13-1-2014, the respondent No.3 has requested Regional Manager HRTC to deploy HRTC staff at Bus stand Hamirpur to implement the timing schedule of private and HRTC buses at the earliest so that proper law and other could be maintain in and around the bus stand in question. These letters clearly shows that respondent No.3 came in action only on the request of replying respondent because the private bus operator did not show their schedule time and route permits to the HRTC staff deployed for the said purpose as the result they use to park the buses for more time as provided in the joint time table which resulted into congestion and unauthorized parking. The respondent No. 5 also requested the respondent No.3 as per letter dated 24.10.2013 annexed</u>*

herein as Annexure R-3. These letter clearly shows that the HRTC employee are not harassing any private operator as alleged in the petitioner on the contrary they are just assisting in removing the traffic congestion inside the bus stand Hamirpur at the request of respondent No.3 which is evident from letter dated 13-01-2014. As such the Writ Petition is totally wrong and without any merits same is liable to be dismissed as based on wrong facts."

9. Here, it is also relevant to take note of the contents of the letter dated 13.1.2014 (Annexure R-2) which has been written by respondent No.3 to respondent No.6 and reads thus:

"No. Reader/14-309

From

The Superintendent of Police,
Hamirpur, District Hamirpur.

To

The Regional Manager,
HRTC, Bus Stand, Hamirpur.
Dated: Hamirpur, the 13th January, 2014.

Subject: Regarding deployment of HRTC staff at Bus Stand, Hamirpur.
Sir,

It has been brought to the notice of undersigned that HRTC and Private Buses remained parked at Bus Stand Hamirpur without route permit and time which leads to traffic jam in and outside the Bus Stand. Private bus drivers leave the bus stand very late and consume the time of HRTC buses. Even o HRTC staff has been deployed at bus stand Hamirpur to check over the timing and route permit of Private buses, causing problem to maintain proper law and order to traffic police. Besides, this traffic police has to do the duty of HRTC staff. I/C traffic Hamirpur have made written representation to this effect with your office number of times but no action has been taken so far.

Keeping in view of above, you are requested to deploy HRTC staff at bus stand Hamirpur to implement the timing schedule of private and HRTC buses at the earliest so that proper law and order would be maintain in and around the bus stand under intimation to this office.

Yours faithfully,
Sd/-
Superintendent of Police,
Hamirpur, District Hamirpur."

10. From the aforesaid averments as also the contents of letter dated 13.1.2014 (Annexure R-2), it is evidently clear that the HRTC staff has infact been deployed at the bus stand Hamirpur to check not only the timings of the buses but even the route permits of the private buses. Once this is the admitted position then the next question that arises for consideration is as to whether these officials have been vested with any power or authority under the law to carry out such checking. The answer to this is obviously in the negative.

11. It is not in dispute that the HRTC is a creation of Road Transport Act, 1950, whereas the BSM&DA is a creation of the Himachal Pradesh Bus Stand and Management Development Act, 1999 (hereinafter referred to as the "Act of 1999") and are, therefore, two separate and distinct legal identities.

12. That apart, after the enforcement of the Act of 1999, all properties and other assets vested in the Government for the purposes of Bus Stand administered earlier by the Himachal Road transport Corporation and other local authorities, immediately before the enactment of the Act, now stand vested in the BSM&DA as is evident from Section 10 (a) of the Act which reads thus:

> *"Section 10 (a), which relates to the transfer of assets and liabilities of the Government to the authority i.e. BSM&DA clearly state that all properties and other assets vested in the Government for the purposes of Bus Stand administered by Himachal Road transport Corporation and other local authorities, immediately before such date shall vest in the Authority."*

13. In addition to the aforesaid it would be noticed that Chapter VIII of the Motor Vehicles Act, 1988 deals with 'Control of Traffic'. Sections 130, 132 and 133 thereof, read as follows:

> "130. Duty to produce license and certificate of registration.-
>
> *(1) The driver of a motor vehicle in any public place shall, on demand by any police officer in uniform, produce his licence for examination:*
>
> *Provided that the driver may, if his licence has been submitted to, or has been seized by, any officer or authority under this or any other Act, produce in lieu of the licence a receipt or other acknowledgement issued by such officer or authority in respect thereof and thereafter produce the licence within such period, in such manner as the Central Government may prescribe to the Police officer making the demand.*
>
> *(2) The conductor, if any, of a motor vehicle on any public place shall on demand by any officer of the Motor Vehicles Department authorized in this behalf, produce the licence for examination.*
>
> *(3) The owner of a motor vehicle (other than a vehicle registered under Section 60, or in his absence the driver or other person-in-charge of the vehicle, shall, on demand by a registering authority or any other officer of the Motor Vehicles Department duly authorized in this behalf, produce the certificate of insurance of the vehicle and, where the vehicle is a transport vehicle, also the certificate of fitness referred to in Section 56 and the permit; and if any or all of the certificates or the permit are not in his possession, he shall, within 15 days from the date of demand, submit photo copies of the same, duly attested in person or send the same by registered post to the officer who demanded it.*
>
> *Explanation.- For the purposes of this sub-section, "certificate of insurance" means the certificate issued under sub-section (3) of section 147.*
>
> *4. If the licence referred to in sub-section (2) or the certificates or permit referred to in sub-section (3), as the case may be, are not at the time in the possession of the person to whom demand is made, it shall be a sufficient compliance with this section if such person produces the licence or certificates or permit within such period in such manner as the Central Government may prescribe, to the police officer or authority making the demand:*

Provided that, except to such extent and with such modifications as may be prescribed, the provisions of this sub-section shall not apply to any person required to produce the certificate of registration or the certificate of fitness of a transport vehicle.

132. Duty of driver to stop in certain cases.

(1) The driver of a motor vehicle shall cause the vehicle to stop and remain stationary so long as (may for such reasonable time as may be necessary, but not exceeding 24 hours)

a) when required to do so by any police officer not below the rank of a Sub- Inspector in uniform, in the event of the vehicle being involved in the occurrence of an accident to a person, animal or vehicle or of damage to property, or;

b) when required to do so by any person-in-charge of an animal if such person apprehends that the animal is, or being alarmed by the vehicle will become, unmanageable, or and he shall give his name and address and the name and address of the owner of the vehicle to any person affected by any such accident or damage who demands it provides such person also furnishes his name and address.

(2) The driver of a motor vehicle shall, on demand by a person giving its own name and address and alleging that the driver has committed an offence punishable under Section 184 give his name and address to that person. (3) In this section, the expression "animal" means any horse, cattle, elephant, camel, ass, mule, sheep or goat.

133. Duty of owner of motor vehicle to give information.

The owner of a motor vehicle, the driver or conductor of which is accused of any offence under this Act shall, on the demand of any police officer authorized in this behalf by the State Government, give all information regarding the name and address of, and the licence held by the driver or conductor, which is in his possession or could by reasonable diligence be ascertained by him."

14. It would be evident from the perusal of the aforesaid Sections that a complete mechanism has been provided under the Act clearly specifying therein the authorities which can demand the production of the documents. Even if it is assumed that the aforesaid provisions are not applicable inside the bus stand (as is alleged by the respondents) even then, it is absolutely clear that atleast the employees of the HRTC have no jurisdiction or authority to check the documents and at best, it would be the employees of the BSM&DA, who alone, apart from the authorities specified under the Act of 1988 would have the authority to check the documents of these buses.

15. Now, insofar as the claim of the petitioner regarding the collection of arrears of SRT from the respondent No.6 is concerned, suffice it to say that the petitioner has no locus standi to claim such a relief and moreover similar contention has also not found favour before the Hon'ble Supreme Court in Special Leave to Appeal (C) Nos. 27504-27505 of 2015 arising out of judgment passed by this Court on 28.5.2015 in CWP No. 1297 of 2015 and other connected matters in case titled Niji Bus Operator Kalyan Sabha etc. vs. State of H.P. and others.

16. The other claim raised with respect to display of time table is rendered infructuous in view of the directions to this effect issued by a learned Division Bench (of

which I was a member), in Niji Bus Operator case (supra) wherein it is categorically directed as follows:

> "(iii) *The respondents are directed to draw up the time table(s) in such a manner so as to ensure equitable distribution of passengers between the buses run by the HRTC and the private operators so that there is no unnecessary heart burning amongst the private operators."*

17. In view of the aforesaid discussion, this petition partly succeeds and accordingly the respondent No.6 and its employees/officials are restrained from checking the papers of the vehicles of the private bus operators including the petitioner society.

18. However, before parting, it needs to be clarified that merely because respondent No.6 and its employees/officials have been restrained from carrying out the checking of papers of vehicles belonging to the private bus operators including the petitioner, this in no manner shall entitle the petitioner or any private operators to park their buses in such a manner which may cause obstruction to the free flow of traffic. The private bus owners including the petitioner shall maintain proper discipline and decorum at the bus-stand and shall produce before the competent authority the documents as and when so demanded.

The petition is disposed of in the aforesaid terms, so also the pending application(s) if any, leaving the parties to bear their costs.

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

Pushpa Sharma .....Petitioner.

versus

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

CWP No.4253 of 2015
Decided on: 27.10.2015.

Constitution of India, 1950- Article 226- Petitioner had filed a writ petition for quashing of the order of allotment- main relief was sought against respondent No. 5, a co-operative society- held, that a co-operative society does not fall within the definition of State or instrumentality of the State and no writ petition lies against it- petitioner permitted to withdraw the petition with liberty to initiate appropriate proceedings. (Para-2 to 4)

Cases referred:

Sanjeev Kumar and others vs. State of H.P. and others, Latest HLJ 2014 (HP) 1061
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993(2) Sim.L.C. 243
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)
Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala and others, 2013 AIR SCW 5683

For the Petitioner: Mr.Tara Singh Chauhan, Advocate.
For the respondents: M/s V.S. Chauhan, Addl.A.G., J.K. Verma, Dy.A.G. and Ramesh Thakur, Asstt.A.G., for respondents No.1 to 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Petitioner has invoked the jurisdiction of this Court for quashing the order of allotment of tender in favour of private respondent on the grounds taken in the memo of the writ petition. The main relief sought is against the Cooperative Society/respondent No.5.

2. This Court in CWP No.6709 of 2013, titled **Sanjeev Kumar and others vs. State of H.P. and others**, decided on 4.8.2014, **reported in Latest HLJ 2014 (HP) 1061**, while replying on the earlier decision of this Court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993(2) Sim.L.C. 243,** which decision was also affirmed by the Hon'ble Full Bench of this Court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** has held that the cooperative societies cannot be termed as "State" within the meaning of Article 12 of the Constitution.

3. The Apex Court, in the decision rendered in **Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala and others, 2013 AIR SCW 5683,** after discussing the entire law on the subject, has also held that a Cooperative Society does not fall within the expression "State" or an "instrumentality of the State", within the meaning of Article 12 of the Constitution of India.

4. At this stage, the learned counsel for the petitioner seeks permission to withdraw the writ petition with liberty to the petitioner to seek appropriate remedy by resorting to appropriate proceedings. Prayer allowed. The writ petition is dismissed as withdrawn, with liberty as prayed for.

5. Pending CMPs, if any, also stand disposed of.

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

Rajinder Kumar ..... Petitioner.

Versus

Union of India and others .... Respondents

CWP No. 204 of 2009.
Judgment reserved on 12.10.2015
Date of decision: 27th October, 2015.

Constitution of India, 1950- Article 226- Petitioner was working as an extra department agent on behalf of respondent - respondent notified vacancy relating to the cadre of postman- petitioner appeared in the examination and qualified- respondent did not depute the petitioner and other selected persons for training- this mistake was brought to the notice of the department who found that petitioner and other selected persons had not qualified and only one candidate 'N' had qualified who was already deputed for training- petitioner contended that department had wrongly held without hearing him that marks were not correctly recorded and there are some interpolations and mistakes on the face of the record- Tribunal held that no opportunity of hearing was required and mistakes were apparent on the face of the record – held, that mere selection does not create any indefeasible right to

claim appointment- Competent Authority can reject the recommendation - a selected candidate cannot plead violation of the principle of natural justice- appeal dismissed.

(Para-5 to 15)

Cases referred:

Dir. S.C. T.I. for Med. Sci. & Tech. & Anar. Versus M. Pushkaran, 2007 AIR SCW 7560
Raj Rishi Mehra and others versus State of Punjab and another, 2013 AIR SCW 4883
Dr. H. Mukherjee versus Union of India and others with another matter, 1994 Supp (1) SCC 250
Major General H. M. Singh VSM versus Union of India and another, 2014 AIR SCW 758
R. Vishwanatha Pillai versus State of Kerala and others, AIR 2004 SC 1469
State of Punjab versus Jagir Singh, 2004 AIR SCW 5421
Dr. (Mrs.) Gurjeewan Garewal versus Dr. (Mrs.) Sumitra Dash and others 2004 AIR SCW 2755

For the petitioner:	Mrs. Ranjana Parmar, Sr. Advocate with Ms. Komal Kumari, Advocate.
For the respondents:	Ms. Rita Goswami, Central Government Counsel, with Ms. Komal Chaudhary, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this writ petition is the order dated 1.9.2008, Annexure P8, passed by the Central Administrative Tribunal, Chandigarh Bench, whereby the Original Application filed by the petitioner came to be dismissed, for short "the impugned judgment".

Briefs facts.

2. The petitioner was working as Extra- Departmental Agent with the respondent-department w.e.f. 11.12.1984. Respondent-department, on 14.6.2007, has notified the vacancy position, relating to the cadre of the postman and the examination was held on 22.7.2007, in which the writ petitioner and other persons/employees participated. The result was declared on 4.1.2008, Annexure P2, wherein writ petitioner, along with two other persons, particulars of whom are given in the writ petition and the reply, had made the grade. Writ respondents, without any reason, are stated to have not deputed the writ petitioner and one another selectee for training which is *sina qua non*, after declaration of the result, in order to enable the selectees to reap the fruits of selection to enter and join the service as postman by promotion, constraining the writ petitioner to file Original Application before the Central Administrative Tribunal, Chandigarh Bench, which was dismissed vide order dated 1.9.2008, Annexure P8, impugned in this writ petition.

3. The mistake was brought to the notice of the department by way of a complaint, which was examined by the department and it was found that the writ petitioner and another selectee, in fact, had not made the grade and only one candidate, namely, Mool Raj, who was deputed for training, had made the grade.

4. The petitioner, by the medium of this petition has averred that the respondents, without hearing the petitioner and another selectee declared that the marks recorded were not in accordance with the answers and there are some interpolations and mistakes on the face of the record and withdrew the selection, so far as it related to petitioner and another selectee.

5. The star ground urged before the Tribunal was that the writ petitioner was not heard. The Tribunal had discussed the said issue in the judgment and held that granting any opportunity of hearing to the petitioner was not required for the simple reason that the merit awarded was not in accordance with the answers and virtually, there were interpolations in the answer sheets. The Tribunal has further recorded that the same question had arisen before the Tribunal in another Original Application which was dismissed, which is discussed in para 4.2 of the impugned judgment. Further, it is held that the selection and appointment made without following rules or which is made by committing illegality or irregularity or mistake(s) the principle of natural justice cannot be pressed into service. The said fact has been discussed in paras 5.1 and 5.2 of the impugned judgment.

6. It is worthwhile to mention herein that the Tribunal has also perused the papers, particularly the paper "C" and recorded that the mistakes were apparent on the face of the answer sheet. It is profitable to reproduce para 5 of the impugned judgment herein.

> *"5.The enquiry report and the original answer sheets were produced before us. It was found that there were apparent inconsistencies in the award of marks to the applicants. Paper "C" comprising of Hindi and English dictations was set up for a maximum 50 marks. As per records, in Hindi dictation applicants no. 1 and 2 have been shown to be given 23 marks each against more than 30 and 50 spelling mistakes respectively. It was also found that with the similar level of mistakes, the number of marks awarded to other candidates who had been declared failed was much less. Similarly, in English dictation for applicant no. 1 it is stated that no a single sentence was found to be correct still 17 marks had been awarded. With similar observations, the marks given to other candidates who had been declared failed, was much much less. Incase of applicant no.2, it was observed in the enquiry report that few sentences were correct, but there were lot of cuttings and over writings. However, 15 marks had been awarded to him."*

7. It is beaten law of the land that mere selection does not create any indefeasible right to claim appointment.

8. The apex Court in cases titled ***Dir. S.C. T.I. for Med. Sci. & Tech. & Anar. Versus M. Pushkaran*** reported in ***2007 AIR SCW 7560*** and ***Raj Rishi Mehra and others versus State of Punjab and another*** reported in ***2013 AIR SCW 4883***, held that the Court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of malafide or arbitrariness on the part of the employer. It is apt to reproduce paras 16, 17 and 18 of the judgment rendered in ***Dir. S.C.T.I's*** case supra.

> *"16.It is, therefore, evident that whereas the selectee as such has no legal right and the superior court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of mala fide or arbitrariness on the part of the employer. Each case, therefore, must be considered on its own merit."*

> *17. In All India SC & ST Employees" Association and Another v. A. Arthur Jeen and Others [(2001) 6 SCC 380], it was opined:*
>
> *"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in Shankarsan Dash Vs. Union of India.*
>
> *[See also Malkiat Singh (supra), Pitta Naveen Kumar and Others v. Raja Narasaiah Zangiti and Others (2006) 10 SCC 261, State of Rajasthan & Ors. V. Jagdish Chopra 2007 (10) SCALE 470, Union of India & Others v. S. Vinodh Kumar & Others, 2007 (11) SCALE 257 and State of M.P. & Ors. v. Sanjay Kumar Pathak & Ors. 2007 (12) SCALE 72]*
>
> *18. The application of law would, therefore, depend upon the fact situation obtaining in each case. The judgment of the High Court in view of the aforementioned authoritative pronouncements cannot be said to be perverse. The respondent was to be offered with the appointment at a point of time when no policy decision was taken. There was, thus, no reason not to offer any appointment in his favour. Why the select panel was ignored has not been explained. Even the purported policy decision was not in their contemplation. We, therefore, do not see any reason to interfere with the impugned judgment."*

9. The competent authority can reject the recommendations and selectee cannot plead breach of principle of natural justice. The same question arose before the apex Court in case titled ***Dr. H. Mukherjee versus Union of India and* others with another matter** reported in ***1994 Supp (1) SCC 250.*** It is apt to reproduce relevant portion of para 9 of the said judgment herein:

> *"9…….Therefore, neither of the two decisions on which reliance is placed come to the rescue of respondent No. 1. It seems well settled that the function of the Public Service Commission being advisory, the Government may for valid reasons to be recorded on the file, disapprove of the advice or recommendation tendered by the Commission, which decision can, if at all, be tested on the limited ground of it being thoroughly arbitrary, mala fide or capricious."*

10. Similar question also arose before the apex Court in case titled ***Major General H. M. Singh VSM versus Union of India and another*** reported in ***2014 AIR SCW 758.*** It is apt to reproduce para 12 of the said judgment herein.

> *"12. Dissatisfied with the dismissal of Writ Petition No. 15508 of 2008, the appellant filed an intra court Writ Appeal No. 779 of 2009. In the process of adjudicating upon the controversy raised in the abovementioned Writ Appeal, a Division Bench of the High Court framed two questions for its consideration. Firstly, whether the appellant Major General H.M. Singh had any fundamental right for promotion solely on the basis of the*

recommendation of the Selection Board. And secondly, whether Appointments Committee of the Cabinet was liable to accept the recommendation made by the Selection Board in favour of the appellant, and consequently, order the appellant's promotion to the rank of Lieutenant General. Relying on paragraph 108 of the Regulation of Army which delineates the constitution and duties of the Selection Board, the Division Bench concluded that the recommendations of the Selection Board were merely recommendatory in nature, and therefore, answered the first question in the negative. The Division Bench further held, that a legitimate claim for the promotion would arise, only if a recommendation made by the Selection Board gets the approval of the Appointments Committee of the Cabinet. Relying on the judgments rendered by this Court in Dr. H. Mukherjee Vs. Union of India and others, 1994 Supp1 SCC 250, Union of India and others Vs. N.P. Dhamania and others, 1995 Supp1 SCC 1, and Food Corporation of India and others Vs. Parashotam Das Bansal and others, 2008 5 SCC 100, the Division Bench of the High Court further concluded, that the Appointments Committee of the Cabinet was not bound by the recommendation of the Selection Board. It accordingly held, that for justifiable reasons, the Appointments Committee of the Cabinet had the right to either accept, or to refuse the recommendation of the Selection Board. In sum and substance it came to be concluded, that unless it was shown that the determination of the Appointments Committee of the Cabinet suffered from arbitrariness or malafides and capriciousness, the same could not be interfered with. The Division Bench of the High Court having found none of the above noted vices in the determination of the Appointments Committee of the Cabinet, answered the second question also in the negative."

11. The apex Court in another judgment in case ***R. Vishwanatha Pillai versus State of Kerala and others,*** reported in ***AIR 2004 SC 1469*** held as under:

"15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis

of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view of the finding recorded by the Scrutiny Committee and upheld up to this Court he has disqualified himself to hold the post. Appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all."

12. The principle of natural justice can be pressed into service where any indefeasible right is taken away and the action of the authority is arbitrary, or actuated with *mala fides* or caprice. The issue involved in this petition is that because of the mistakes, the petitioner found the place in the select list which was brought to light through a complaint and after conducting inquiry the allegations contained in the complaint were found correct. Thus, there is no question of providing any opportunity of being heard or it cannot be said that the said act is violative of principle of natural justice.

13. The apex Court in case ***State of Punjab versus Jagir Singh***, reported in ***2004 AIR SCW 5421*** has laid down the test and discussed when the principle of natural justice can be pressed into service.

14. The apex Court in another case titled ***Dr. (Mrs.) Gurjeewan Garewal versus Dr. (Mrs.) Sumitra Dash and others*** reported in ***2004 AIR SCW 2755*** in paras 11 and 15 has held as under.

"11. The first question for consideration is the correctness of the decision by High Court. Relying upon the decisions of this Court in Jai Shanker, State of Assam v. Akshaya Kumar, Deokinandan Prasad and Uptron India Ltd. (all cited supra) the High Court went on to find that respondent No. 1 was not given an opportunity of hearing. Is the High Court correct in its approach? To judge this issue, primarily, the general nature of cases upon which the High Court placed its reliance need to be looked into. It is pertinent to note that all these cases emanate due to the violation of Art. 311 of the Constitution.

12 to 14.... ....

15. In this background the view subscribed by the High Court, that the 1st respondent was not given an opportunity of hearing and since her removal is bad under Art. 311, is not correct. The premise in which the High Court has proceeded is faulty. High Court has not examined the applicability of Art. 311 in the present case. This results in its wrong conclusion. Therefore, the cases relied upon by the High Court Jai Shanker, State of Assam v. Akshaya Kumar, Deokinandan Prasad and Uptron India Ltd. (all cited supra) are not applicable in the present context. All of them are distinguishable."

15. The impugned judgment is well reasoned. No interference is required.

16. Having said so, the writ petition is dismissed along with pending applications, if any.

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

Sumit Gupta and others .....Petitioners.

Versus

State of Himachal Pradesh & others .....Respondents.

CWP No.2439 of 2015.
Judgment reserved on : 12.10.2015.
Date of Decision : 27.10. 2015.

Constitution of India, 1950- Article 226- Applications for allotment of licences for Retail sale of Country Liquor and IMFL were invited- petitioners were declared successful – they deposited 5% of licence fee which was duly accepted by respondent- respondent, however, notified the retail units afresh including the outlets already allotted to the petitioners – respondent contended that no offer was received for many units and, therefore, they were re-clubbed with other units and a fresh advertisement was issued – allotment in favour of petitioner was not confirmed by Excise and Taxation Commissioner- held, that when allotment in favour of the petitioner was not confirmed and the decision to re-club the units was taken in the interest of revenue, no fault can be found with the same - mere deposit of 5% of the amount by petitioner will not give rise to any right of allotment- since, allotment had not been confirmed, therefore, there was no requirement of following the principles of natural justice- petition dismissed. (Para-2 to 15)

Cases referred:

M/s Rishi Pal and Co. versus State of Himachal Pradesh and others AIR 1999 SC 541
Hem Raj versus State of Himachal Pradesh and others 2015 (1) Him. L.R. (DB) 561
Satish Singh versus State of H.P. and others, I L R 2015 (IV) H.P. 1165 (D.B.)
Commissioner of Excise and another versus Manoj Ali and another, (2006) 13 Supreme Court Cases 88

For the Petitioners	:	Mr. Sanjeev Kuthiala, Advocate.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, for respondents No.1 to 4. Mr. Arvind Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The brief facts giving rise to this writ petition are that a public notice was issued by respondents No.2 and 3 under the aegis of respondents No.4 inviting applications

for allotment of license of Retail sale of L-14 (Country Liquor) as also L-2 Indian Made Foreign Liquor (IMFL) for the year 2015-2016 within the State of Himachal Pradesh. Since the process of allotment was not completed within the stipulated time, therefore, the respondents vide public notice dated 26.3.2015 invited applications for the allotment of remaining licenses for the aforesaid outlets.

2. The petitioners successfully participated in the draw of lots held on 30.3.2015. Petitioners No.1 and 2 were successful allottees with respect to vends situated at Ajauli Unit bearing Unit Nos. 31, 32, 33 and 37 of District Una, whereas, petitioner No.3 was the successful allottee of Bangana bearing Unit Nos. 46 and 48. The petitioners No.4 and 5 on the other hand were successful allottees with respect to the Unit at Khad bearing Unit No.14. It is not in dispute that all the petitioners being successful allottees had deposited 5% of the license fee alongwith basic fee which was duly accepted by the respondents. It is also not in dispute that the petitioners have thereafter furnished the bank guarantee(s) as also surety bond (s).

3. The grievance of the petitioners is that despite having been successful in the draw of lots and having completed all the codal formalities, the outlets were not allotted to them. Rather, the respondents unilaterally issued public notice in the newspaper on 1.4.2015 and notified the retail units afresh including the outlets already allotted in favour of the petitioners. It is contended that the entire exercise was undertaken only in order to benefit the private respondent No.5 whose father infact is running liquor vend throughout Una.

4. The official respondents in the reply have sought to justify their action, by contending that there were no offers for 34 Units pertaining to District Una having license fee over 40 crores rupees and consequently no takers. After considering the viability of these Units, possibility of their allotment in combination with other units/vends was explored and public notice dated 26.3.2015 was issued by respondent No.2 for inviting applications for the allotment of remaining licenses of the retail outlets. However, 07 units having license fee of Rs.6,88,89,269/- could only be allotted in the draw of lots held on 30.3.2015 and large number of units having license fee of over 33 crore rupees remained un-allotted. These 07 units/vends were not confirmed by the Excise & Taxation Commissioner (respondent No.2) and thereafter these units were re-clubbed in the interest of revenue and new unit No.53 was constituted and public notice dated 31.3.2015 was thereafter issued seeking fresh applications for allotment of the newly constituted unit.

5. It is the further case of the respondents that separate notices were issued to the petitioners intimating that the units allotted to them have not been confirmed by the Excise and Taxation Commissioner and their units have been re-clubbed with newly constituted unit for which the draw of lots would be held on 1.4.2015. The petitioners were also advised to file fresh applications for allotment of newly constituted unit and as such, the petitioners were given due opportunity to participate in the allotment process. It is further stated that the allotment thereafter made in favour of respondent No.5 was strictly in conformity with law.

6. Respondent No.5 has filed separate reply wherein, it has been averred that allotment made in his favour is strictly in accordance with law.

7. We have heard the learned counsel for the parties and have gone through the entire record of the case carefully.

8. It is not in dispute that all allotments of the vends/units are subject to confirmation by the Excise and Taxation Commissioner-cum-Financial Commissioner

(Excise), in terms of Condition No.1.3 of Chapter-I of the Announcements of Excise Allotments for the year 2015-16 which reads as under:-

> "***1.3 All the allotments of the vends/units or renewal of licenses of the vends/units shall be subject to confirmation by the Excise & Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh, who reserves the right to reject any allotment/renewal without assigning any reason for doing so."***

9. It is while exercising the powers under the aforesaid clause that respondent No.2 did not confirm the allotment made in favour of the petitioners despite their having paid 5% of the licence fee and completed certain other formalities. It is further not in dispute that the decision taken by respondent No.2 for grouping of vends was taken in order to safeguard the government revenue. Once it is so, then no exception can be taken against this action of respondent No.2 in view of the judgment rendered by the Hon'ble Supreme Court in **M/s Rishi Pal and Co. versus State of Himachal Pradesh and others AIR 1999 SC 541,** wherein Condition No.1.3 (supra) has been upheld. Needless to say that the judgment in **M/s Rishi Pal's case** (supra) has thereafter been followed by this Court in **Hem Raj versus State of Himachal Pradesh and others 2015 (1) Him. L.R. (DB) 561** and in **CWP No.2220/2015 titled as Satish Singh versus State of H.P. and others,** decided on 05.08.2015.

10. The learned counsel for the petitioners would vehemently argue that once the petitioners have deposited 5% of the licence fee alongwith basic fee and had even furnished the bank guarantee(s) and surety bond (s), the respondents were estopped from re-grouping the vends and thereafter allotting the same to respondent No.5.

11. Even this plea is not available to the petitioners as similar contentions have already been considered and thereafter rejected in **Hem Raj's case** (supra) and it was held:-

> ***"6. For reiteration, in the face of Unit No.23 standing obliteration it would be an abuse of the equitable principle of promissory estoppels to stretch it to a scenario as in the instant case when with the unit qua which it is canvassed to be purportedly generated has faded into oblivion by a tenable act of the respondents. In other words, it would be a travesty of the rules permitting exercise of un-circumscribed powers embedded in the authority concerned to create/constitute new units by regrouping of hitherto units in case merely on the strength of deposit of license fees by the petitioner herein of renewal of an extinct liquor vend/unit, the equitable principle of promissory estoppel is permitted to sprout. The latter rule is a rule of equity and is unavailable to be drawn, when rules as in the instant case governing the issuance of liquor license to the aspirants exist. Even otherwise, the act of the respondents in rendering extinct Unit No.23 by resorting to by its tenable act of regrouping create a new unit No.45 is buoyed or fostered by a profiteering motive of the Government Annexures P-9 and P-10 portray that since no application for renewal of license in respect of four units namely Kunihar, Darlamore, Bhararighat and Dumehar having a license fee of Rs.4.23 crores were received, as such, for want of receipt of application for renewal of units aforesaid which application if received would have reared a revenue of Rs.4.23 crores to the State exchequer the legally authorized step of the respondent to regroup of the units aforesaid with Unit No.23 and thereby create/constitute newly ascribed unit No.45 is to be presumed to be a***

legally warranted step prodded by statistical data. The petitioner has omitted to display any material portraying that no statistical data loses of revenue to the respondents existed before they proceeded to obliterate units aforesaid and on regrouping/realigning thereof theirs having constituted a new Unit No.45 in which the participation of the petitioner herein too was elicited. For lack of adduction on record of the aforesaid material an invincible conclusion which ensues is that the respondents in resorting to the act of regrouping/realigning of Units and on such regrouping, ascribing a new unit number had carried out a stretched and thoughtful exercise. Preponderantly then, when the said exercise is not imaginative or conjectural rather is obviously to buoy revenue or obviate loss to the exchequer in the sum of Rs.4.23 Crores, it cannot be construed to be smacking of any malafides or arbitrariness."

12. Mr. Sanjeev Kuthiala, learned counsel for the petitioners has thereafter vehemently argued that the entire exercise of the respondents was contrary to the principles of natural justice and undertaken only with an intent to confer undue benefit upon respondent No.5.

13. We again find no force in this submission for the simple reason that prior to issuing the public notice, all the petitioners were duly informed through individual notices to this effect and it is only thereafter that respondent No.5 in an open draw was declared to be successful allottee. Therefore, it can be safely concluded that the entire process of inviting applications for allotment of remaining units has been carried out by the respondents in a just and legal manner and there is no reason to conclude that any undue advantage thereby has been conferred upon respondent No.5.

14. Learned counsel for the petitioners would then place reliance upon the judgment of Hon'ble Supreme Court in case titled ***Commissioner of Excise and another versus Manoj Ali and another, (2006) 13 Supreme Court Cases 88,*** to contend that initiation of proceedings for cancellation of a licence leads to serious consequences and the Commissioner of Excise being a statutory authority, was duty bound to oversee strict observance of the terms and conditions of the licence as per the provision of the Excise Act and the Rules framed thereunder by the licensee and his conduct should have been above board. He further contends that the exercise of statutory function cannot be and should not be arbitrary and capricious. Whereas in the instant case, respondent No.2 by not accepting the bid of the petitioners has acted in a most arbitrary and capricious manner and, therefore, the decision taken by respondent No.2 to re-allot the said liquor units should be set aside and the petitioners should be allowed to run the liquor vends as allotted to them.

15. We for more than one reason find no force in the aforesaid submission. Firstly, the issue in hand regarding regrouping of vends in order to safeguard government revenue is already covered by the judgment of the Hon'ble Supreme Court in **M/s Rishi Pal and Co.** (supra) and secondly this Court in **Satish Singh's case** (supra) has clearly held that there is no provision either in the policy or the rules which may stipulate automatic or deemed confirmation of any application for renewal as the same has been specifically made subject to the confirmation by the Financial Commissioner. In such circumstances, we fail to see as to how the principles of natural justice have been violated.

16. Having said so, we find no merit in this writ petition and the same is accordingly dismissed alongwith all pending application (s), if any, leaving the parties to bear their own costs.

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

Union of India and others .....Petitioners.
versus
Ram Kishore .....Respondent.

CWP No.2055 of 2008
Reserved on : 12.10.2015
Pronounced on: 27.10.2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as postman who died while in the service- petitioner applied for grant of appointment on compassionate ground- Selection Committee found that petitioner was not living in indigent circumstances and the case was rejected- Administrative Tribunal issued a direction to consider the case in the next meeting – it was contended on behalf of the Department that family of the employee had received the terminal benefit and was getting the family pension, family was having additional income from landed property and the case was rightly rejected- scheme provided that a balanced and objective examination of financial condition of the family is required- no maximum income slab was provided in the scheme which can be made the basis for rejecting the claim on compassionate ground- grant of terminal benefits and income from the family pension cannot be equated with the employment assistance on compassionate ground and case could not have been rejected on the basis of same- there is no infirmity in the order passed by Tribunal- petition dismissed. (Para-4 to 18)

Case referred:
Surinder Kumar vs. State of H.P. and others, ILR 2015 V H.P. 840 (D.B.)

For the Petitioners: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Ajay Chauhan, Advocate.
For the respondent: Mr.Mukul Sood, Advocate, vice Mr.Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Subject matter of this writ petition is the order, dated 29th May, 2008, passed by the Central Administrative Tribunal, Chandigarh Bench, (for short, the Tribunal), in Original Application No.836/HP/2006, titled Ram Kishore vs. Union of India and others, whereby the Original Application filed by the Applicant (respondent herein) was allowed with a command to the original respondents (writ petitioners herein) to consider the case of the original applicant (writ respondent herein), for grant of compassionate appointment, (for short, the impugned order).

2. Feeling aggrieved, the writ petitioners (original respondents before the Tribunal) filed the instant writ petition challenging the impugned order on the grounds taken in the memo of writ petition.

3. Heard learned counsel for the parties.

4. Facts of the case, as pleaded in the Original Application, are that the father of the writ respondent was working as Postman, who died on 5.2.2003, while in service. The writ respondent applied for grant of employment on compassionate ground, as per the policy occupying the field. The said request of the writ respondent was considered by the Circle Selection Committee in its meeting held on 18th May, 2004 and the said Committee, after examining the case of the petitioner, was of the opinion that the family of the deceased employee was not living in indigent circumstances and accordingly, the case of the writ respondent was rejected, constraining him to invoke the jurisdiction of the Tribunal by filing the Original Application.

5. The Tribunal, vide the impugned order, allowed the Original Application. It is apt to reproduce paragraph 5 of the impugned order hereunder:

> *"The OA is therefore, disposed of with a direction to the respondents to consider the case of the applicant in the next meeting and in case the case comes under the deserving category further action for issue of offer of appointment be taken. In case the applicant is not found within the deserving category in the next meeting, the same drill be repeated in the next meeting to ascertain the merit of the applicant under the existing norms for compassionate appointment. The decision arrived at be communicated to the applicant."*

6. During the course of hearing, the learned Assistant Solicitor General of India argued that the family of the deceased employee had already received the terminal benefits and was also getting family pension. It was also submitted that, In addition to it, the family of the writ respondent was having additional income from the landed property. It was, therefore, submitted that the Circle Committee had rightly rejected the case of the writ respondent and accordingly prayed that the impugned order deserves to be set aside.

7. Before we deal with the above submission of the learned Assistant Solicitor General of India, we may refer to the aim and object behind making the Scheme for providing employment on compassionate ground.

8. It is well settled principle of service jurisprudence that every appointment against a public post must be made strictly in consonance with the mandatory provisions of Articles 14 and 16 of the Constitution of India and as per the Rules occupying the field. Any selection/appointment made de hors the Rules, is illegal. However, an exception has been carved out for providing employment on compassionate ground. The aim and object of granting appointment on compassionate ground is to provide help to the family/dependants of an employee, who dies in harness, in tiding over the crisis which they suddenly met on the death of the bread-earner of the family. The other object of promulgating such a scheme is to save the dependants of the deceased-employee from social evils and to come to their rescue in the hour of need, particularly, to those families which, on the death of their breadwinner, fall on the earth and lose everything.

9. The Central Government and the State Governments, in order to achieve the above purpose, have made Rules/Regulations/Policies/Schemes for making appointment on compassionate ground. The Corporations and the Semi Government Departments, including Banks etc., have either adopted those Schemes or have framed their own Schemes.

10. In order to provide employment assistance on compassionate ground, the Central Government has framed a Scheme for making appointments on compassionate ground, which was notified vide Office Memorandum dated 9th October, 1998, annexed with the writ petition as Annexure P-2, (hereinafter referred to as the Scheme).

11. Clause 5 of the Scheme deals with the eligibility. It is apt to reproduce the said clause hereunder:

*"5. **ELIGIBILITY***

(a) The family is indigent and deserves immediate assistance for relief from financial destitution; and

(b) ……"

12. A reference may also be made to Clause 16 of the Scheme, hereunder:

*"16. **GENERAL***

(a) ……. ……. ……

(b) ……. ……. ……

(c) The Scheme of compassionate appointments was conceived as far back as 1958. Since then a number of welfare measures have been introduced by the Government which have made a significant difference in the financial position of the families of the Government servants dying in harness/retired on medical grounds. An application for compassionate appointment should, however, not be rejected merely on the ground that the family of the Government servant has received the benefits under the various welfare schemes. While considering a request for appointment on compassionate ground a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family, ages of the children and the essential needs of the family, etc."

13. Thus, the Scheme itself envisages that the Government is under obligation not to reject the application for employment on compassionate ground summarily and in view of the fact that the family of the deceased-employee had received benefits under various welfare schemes. The Scheme also postulates that a balanced and objective examination of the financial condition of the family is required. It is also clear from the perusal of the Scheme, Annexure P-2, that it nowhere prescribed any maximum income slab for adjudging the eligibility of a person for employment on compassionate ground, except that a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities etc., as discussed above.

14. The main ground urged before us for denying the employment assistance to the writ respondent was that since the family of the deceased employee had already received the terminal benefits to the tune of Rs.3,29,990/-, was getting family pension amounting to Rs.3429/- per month and also having yearly income to the tune of Rs.6600/- from the landed property, therefore, the employment on compassionate ground has rightly not been granted to the writ respondent.

15. From a perusal of the Scheme supra (Annexure P-2), it is manifestly clear that no maximum income slab is provided in the said Scheme, which can be made the basis for rejecting a claim for employment assistance on compassionate ground.

16. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income

slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

> *"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
>
> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.*
>
> *48. While reaching at this conclusion, we are supported by the decision of the Apex Court in* ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:*
>
> > *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*
>
> *49. The Apex Court in* ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*
>
> > *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
> >
> > > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a*

member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.

Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."

4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.

16. In ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under*

Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-

> *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."*

Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground." Emphasis applied.

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).*** *Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.*

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law……."

17. Applying the tests to the instant case, there is no force in the submissions made by the learned Assistant Solicitor General of India, supra, and the same are repelled being devoid of any force.

18. The Tribunal has rightly discussed the facts and the law applicable, and thus, the impugned order is legally correct, needs no interference.

19. Having said so, the writ petition merits to be dismissed and the same is dismissed, alongwith pending CMPs, if any. Consequently, the impugned order is upheld. Writ Petitioners are directed to comply with the directions contained in the impugned order within three months from today.

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

Bhagi Rath Sharma .....Appellant

Versus

State of HP and others ...Respondents.

LPA No. 5 of 2010

Date of decision: 28th October, 2015.

Constitution of India, 1950- Article 226- Petitioner was promoted temporarily for the period of three months – it was specifically provided in the appointment order that the order will not confer any right upon the petitioner- petitioner accepted the offer and continued in service- subsequently he filed a writ petition challenging the order which was dismissed- held, that petitioner has no cause as he was appointed temporarily and no rights were conferred upon him- appeal dismissed. (Para-2 to 5)

For the appellant: Mr.Lalit Sharma, Advocate.

For the respondents: Mr.Shrawan Dogra, Advocate General, with M/s V.S. Chauhan, Addl. AG, J.K. Verma, Deputy Advocate General and Ramesh Thakur, Assistant Advocate General, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This Letters Patent Appeal is directed against the judgment dated 5.10.2009, passed in CWP (T) No. 3837 of 2008, by the learned Single Judge of this Court, whereby the writ petition filed by the writ petitioner came to be dismissed, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. It appears that writ petitioner was temporarily promoted vide order dated 13.8.1987, which reads as under:

"OFFICE ORDER.

Sh. Bhagi Rath Sharma, statistical Assistant in the pay scale of Rs.570-15-600-20-700/25-850-30-1000-40-1080, presently posted at Sheep Brooding

Farm, Tehsil Distt. Hamirpur (HP) is hereby promoted as Technical Assistant in the pay scale of Rs.700-25-850/30-1000/40-1200 for a period of three months vice Sh. K.D. Sharma, Tehsil Disttt. Purely temp. as Statistical officer for 3 months in the first instance, and posted ion the Directorate of Animal Husbandry, HP Shimla. The above promotion is purely temporary and will not confer any right/benefit to the above official in the matter of seniority or continuance etc. as such. The above temporary promotion will take effect from the date of actually joining on the higher post."

3. The order itself clearly provides that promotion was ad hoc and temporary one and did not confer any right, title or benefit to the petitioner. The petitioner-appellant herein without any murmur accepted this order and continued as such till 31st October, 1996 when he was asked to work against the previous post. He had questioned the said order on the grounds taken in the memo of writ petition.

4. The respondents have filed the reply to the writ petition and averred that after making exercise for promotion, regular promotions were made and there was no place for him. Accordingly, he was reverted to his original post.

5. The Writ Court has discussed all these aspects right from paras 9 to 16 of the impugned judgment. Even otherwise, the petitioner has no cause because it was temporary promotion and has not conferred any right title or interest on him.

6. Having said so, the appeal is dismissed along with pending applications, if any, and the impugned judgment is upheld.

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

Gian Chand ...Petitioner.

VERSUS

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

CWP No.4266 of 2015.
Decided on: October 28, 2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as semi skilled worker who died in the service- petitioner filed an application for appointment which was rejected on the ground that family income of the petitioner exceeded ceiling fixed by the Government- held, that grant of terminal benefits and income from the family pension cannot be equated with the employment assistance on compassionate ground - when no income ceiling has been fixed in the scheme, the claim of the petitioner cannot be rejected on that ground- respondent directed to examine the case of the petitioner and to pass an order within a period of 6 weeks. (Para-2 to 5)

Case referred:
Surinder Kumar vs. State of H.P. and others, ILR 2015 (V) H.P. Page-840 (D.B.)

For the petitioner: Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate.

For the Respondents: Mr. Shrawan Dogra, Advocate General with M/s V.S. Chauhan, Additional Advocate Genral, J.K. Verma, Deputy Advocate General and Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Issue notice. Mr.Ramesh Thakur, learned Assistant Advocate General, waives notice for the respondents.

2. The grievance projected in this writ petition by the petitioner is that the father of the petitioner, who was working with the respondents as semi skilled worker, died on 11.11.2000, while in service, constraining the petitioner to file an application for appointment on compassionate ground, which was rejected on the ground that the family income of the petitioner exceeds the ceiling fixed by the Government.

3. Short point involved in this writ petition is whether the compassionate appointment can be denied on the ground of income slab.

4. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

> *"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
>
> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.*
>
> *48. While reaching at this conclusion, we are supported by the decision of the Apex Court in* ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the*

service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:

> *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*

49. The Apex Court in ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
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> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.*
>
> *Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."*
>
> *4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to*

appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

> *"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.*
>
> *16. In* ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-*
>
> > *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."*
>
> *Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."* *Emphasis applied.*

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).***

Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law....."

5. Having said so, the writ petition is allowed, impugned order Annexure P15 is quashed and set aside, and the respondents are directed to examine the case of the petitioner in light of the judgment referred to above and pass appropriate order within a period of six weeks from today.

6. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

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

LPA No. 495 of 2012 a/w LPAs No. 4018 of 2013 and 125 of 2015.
Date of decision: 28th October, 2015.

LPA No. 495/2012.

H.P. Khadi & Village Industries Board .....Appellant

Versus

Sh. Haria Ram and others ...Respondents.

LPA No. 4018/2013.

State of HP and others .....Appellant

Versus

Surinder Kumar Sood ...Respondent.

LPA No. 125/2015.

State of HP and another .....Appellant

Versus

HP PWD Store Clerk Association ...Respondent.

Constitution of India, 1950- Article 226- Writ Court had directed the respondent to frame the scheme to provide promotional avenues to the petitioner and similarly situated persons- held, that State can be directed to consider framing of policy or scheme and a direction cannot be issued to the State to frame scheme- order modified and the State directed to consider the framing of policy within a period of 12 weeks. (Para-2 to 6)

Cases referred:

Raghunath Prasad Singh versus Secretary Home (Police) Department government of Bihar and others 1988 (Supp) SCC 519

Council of Scientific and Industrial Research and another versus KGS Bhatt and another (1989) 4 SCC 635

State of Tripura and others versus K.K. Roy (2004) 9 SCC 65

Food Corporation of India and others versus Parashotam Das Bansal and others (2008) 5 SCC 100

A. Satyanarayana and others versus S. Purushotham and others (2008) 5 SCC 416

For the appellant(s): Mr.Shrawan Dogra, Advocate General, with M/s V.S. Chauhan, Addl. AG, J.K. Verma, Deputy Advocate General and Ramesh Thakur, Assistant Advocate General for the appellants in LPAs No. 125/2015 and LPA No. 4018 of 2013.

Ms. Rita Goswami, Advocate, for the appellant in LPA No. 495 of 2012.

For the respondent(s): Ms. Ranjana Parmar, Sr. Advocate with Ms. Komal Kumari, Advocate, for respondents in LPA No. 495 of 2012.

Mr. P.P. Chauhan, Advocate, for the respondent in LPA No. 125 of 2015.

Mr. A.K. Gupta, Advocate, forf respondent in LPA No. 4018/2013.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

LPA No. 495 of 2012 is directed against the judgment dated 21.8.2012, passed in CWP No. 1328/2012, LPA No.4018/2012, is directed against the judgment dated 27.12.2012, passed in CWP No. 2867 of 2012 and LPA No. 125 of 2015 is directed against the judgment dated 13.5.2014, passed in CWP No. 1871 of 2012, by the learned Single Judge of this Court, whereby the respondents were directed to frame a Policy/Scheme.

2. It is apt to reproduce paras 4 of the impugned judgment made in CWP No. 1328 of 2012 dated 21.8.2012, subject matter of LPA No. 495 of 2012 herein.

> *"4.In view of the definitive law laid down by their Lordships in (2008) 5 SCC 1000 (supra), the respondents are directed to frame a scheme within a period of 8 weeks from today to provide promotional avenues to the petitioners and similarly situate persons."*

3. It is moot question whether the Court can issue writ of mandamus commanding/directing the State or the other instrumentalities to frame a Policy/ Scheme. However, the learned counsel for the writ petitioners respondents herein have relied upon the judgments delivered by the apex Court in ***Raghunath Prasad Singh versus Secretary Home (Police) Department government of Bihar and others*** reported in 1988 (Supp) SCC 519, ***Council of Scientific and Industrial Research and another versus KGS Bhatt and another*** reported in (1989) 4 SCC 635, ***State of Tripura and others versus K.K. Roy*** reported in (2004) 9 SCC 65, ***Food Corporation of India and others versus Parashotam Das Bansal and others*** reported in (2008) 5 SCC 100 and ***A. Satyanarayana and others versus S. Purushotham and others*** reported in (2008) 5 SCC 416.

4. In the given circumstances, at the best the Court can direct the State to consider for framing a Policy or Scheme and cannot direct the State to frame a Scheme or Policy.

5. Having said so, the impugned judgments are modified by providing the respondents to consider the framing of the policy within the stipulated period, as early as possible, preferably within 12 weeks from today.

6. Accordingly, the LPAs are disposed of along with pending applications, if any, and the impugned judgments are modified as indicated hereinabove.

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

Prithvi Chand and others .....Appellants.
Versus
Divisional Commissioner and others .....Respondents.

LPA No.153 of 2015
Decided on: 28.10.2015.

Constitution of India, 1950- Article 226- Appeal is covered by the judgment of High Court in case titled as **Saraswati Devi and others vs. State of H.P. and others, LPA No.53 of 2008 decided on** 23rd September, 2015 (I L R 2015 (V) HP 641 (D.B.))- order upheld and appeal dismissed. (Para-3)

Case referred:
Saraswati Devi and others vs. State of H.P. and others, I L R 2015 (V) HP 641 (D.B.)

For the appellants: Mr.Naveen K. Bhardwaj, Advocate.
For the respondents: Mr.Shrawan Dogra, Advocate General, with M/s V.S. Chauhan, Addl.A.G., J.K. Verma, Dy.A.G. and Ramesh Thakur, Asstt.A.G., for respondent No.1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral):

By the medium of instant appeal, the appellants, (respondents No.2 to 4 before the Writ Court), have challenged the judgment, dated 20th June, 2015, passed by a learned Single Judge of this Court in CWP No.8873 of 2014, titled Bachitar Singh and others vs. Divisional Commissioner, Mandi and others, whereby the writ petition filed by the writ petitioners (respondents No.2 to 4 herein) came to be allowed, Annexures P-5 and P-9, annexed with the writ petition, and subsequent proceedings carried out by the authorities, were quashed and set aside, (for short, the impugned judgment).

2. We have gone through the impugned judgment. The writ Court has clearly observed in paragraph 3 of the impugned judgment that the appellants herein were caught by the law of limitation.

3. The issue raised in the instant appeal has already been settled by this Court vide judgment dated 23rd September, 2015, passed in **LPA No.53 of 2008, titled Saraswati Devi and others vs. State of H.P. and others**, and applying the ratio of the said judgment to the case in hand, the impugned judgment is legal and speaking one, needs no interference.

4. Having said so, there is no merit in the appeal and the same is dismissed, alongwith pending CMPs, if any.

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

Rashpal Singh son of Harcharan Singh and others. ....Petitioners.

Vs.

Smt. Rimpi wife of Rashpal Singh and others. ....Non-petitioners.

Cr.MMO No. 208 of 2015.
Order reserved on: 30.9.2015.
Date of Order: October 28, 2015.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offence punishable under Section 498-A read with Section 34 IPC- parties entered into a compromise and prayed for quashing of proceedings- it was duly proved on record that matter was compromised between the parties without any pressure – offence relates to the private dispute and it would be unfair to continue the criminal proceedings after the compromise- petition allowed and the proceedings quashed. (Para-7 to 11)

Cases referred:

Gian Singh Vs. State of Punjab, 2012 (10) SCC 303
State of Madhya Pradesh Vs. Manish and others, 2015 (8) SCC 307

For the petitioners: Mr.M.L.Sharma, Advocate.
For Non-petitioner-1: Mr.Vijay Arora, Advocate.
For non-petitioner-2. Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 read with Article 227 of Constitution of India.

Brief facts of case:

2. Non-petitioner No.1 Smt. Rimpi wife of Rashpal Singh filed FIR No.77 of 2013 dated 28.4.2013 under Section 498-A and 34 IPC against petitioners. Thereafter investigation was conducted and report of police officer on completion of investigation under section 173 code of criminal procedure 1973 was filed before the Court of learned Additional Chief Judicial Magistrate Nalagarh District Solan HP. Learned trial Court listed the criminal case for consideration upon charge for 6.1.2016. Thereafter out of court settlement was executed inter se the parties placed on record as Annexure P2. It is pleaded that in view of out of Court settlement inter se the parties permission to compound case be granted while exercising inherent powers under Section 482 Cr.PC.

3. Per contra response filed on behalf of non-petitioner No.1 namely Smt. Rimpi pleaded therein that out of court settlement has been executed inter se the parties. It is further pleaded that Rash Pal Singh and Smt.Rimpi have obtained mutual divorce on dated 8.8.2015. It is further pleaded that non-petitioner No.1 Smt.Rimpi has no objection if proceedings before learned Additional Chief Judicial Magistrate Nalagarh District Solan HP in criminal case No. 106/2 of 2013 are quashed.

4. Per contra separate response filed on behalf of non-petitioner No. 2. It is pleaded that FIR was filed by non-petitioner No.1 and after investigation of case report of police officer on completion of investigation was filed before learned Additional Chief Judicial Magistrate Nalagarh for trial. It is further pleaded that appropriate order be passed.

5. Court heard learned Advocate appearing on behalf of petitioners, learned Advocate appearing on behalf of non-petitioner No.1 and learned Assistant Advocate General appearing on behalf of non-petitioner No.2 and also perused record carefully.

6. Following points arise for determination in the present petition.

(1) Whether petition filed under Section 482 Cr.PC read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?.

(2) Final Order.

Findings upon point No.1.

7. Submission of learned Advocate appearing on behalf of petitioners that out of Court settlement has been executed inter se the parties and permission to compound case while exercising inherent powers under Section 482 Cr.PC be granted is accepted for the reasons hereinafter mentioned. It is proved on record that compromise deed Ext P2 placed on record was executed between petitioners and non-petitioner No.1. There is recital in compromise deed that parties have compromised the dispute amicably. There is further recital in compromise deed Ext PW2 placed on record that parties would maintain peace in future and would also maintain good relations with each other in future. There is further recital in compromise deed Ext P2 placed on record that compromise has been executed inter se the parties without any pressure from any side.

8. Three Judges bench in case reported in 2012 (10) SCC 303 titled Gian Singh Vs. State of Punjab and another held that power of High Court in quashing criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from power of criminal court of compounding offences under Section 320 Cr.PC. It was held by Hon'ble Apex Court of India that before exercise of inherent power under Section 482 Cr.PC High Court must have due regard to nature and gravity of crime and its societal impact. It was held that heinous and serious offences i.e. (1) Criminal offence of mental depravity (2) Criminal offence of murder (3) Criminal offence of rape (4) Criminal offence of dacoity (5) Criminal offence under Prevention of Corruption Act (6) Criminal offences committed by public servants while discharging their official duties could not be quashed even if out of Court settlement is executed between the victim family and offender. It was held that such offences are not private in nature and have a serious impact on society. It was held that criminal offences arising from commercial, financial, mercantile, civil partnership or criminal offences arising out of matrimonial dispute or family disputes where wrong is basically private or personal in nature and where parties have resolved entire dispute High Court may quash criminal proceedings. Also see 2015 (8) SCC 307 titled State of Madhya Pradesh Vs. Manish and others.

9. In the present case final investigation report filed under section 173 code of criminal procedure 1973 for trial of criminal offence under Section 498A and 34 IPC which is basically private and personal in nature and parties have resolved their entire dispute as per compromise deed Ext P2 placed on record.

10. It is held that in view of out of Court settlement compromise deed Ext P2 placed on record it would be unfair or contrary to interest of justice to continue with criminal proceeding. It is held that continuation of criminal proceeding would tantamount to abuse of process of law. It is held that in order to ensure ends of justice it is appropriate that criminal case should put to an end. Point No.1 is answered in affirmative in favour of petitioners.

Point No.2 (Final Order).

11. In view of my findings upon point No.1 petition is allowed and proceedings of criminal case No. 106/2 of 2013 titled State Vs. Rashpal Singh and others pending before learned Additional Chief Judicial Magistrate Nalagarh District Solan HP quashed. Record of learned trial Court along with certified copy of order be sent back forthwith for compliance. Petition is disposed of. All pending applications if any also disposed of.

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

Sunil Kumar ...Petitioner.

VERSUS

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

CWP No.4254 of 2015.
Decided on: October 28, 2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as Beldar on daily wages who died while in the service- petitioner filed an application for appointment on compassionate ground which was rejected on the ground that family income of the petitioner

exceeded ceiling fixed by Government- held, that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground- when no income ceiling has been fixed in the scheme, the claim of the petitioner cannot be rejected on that ground - respondent directed to examine the case of the petitioner and to take a suitable decision in accordance with the law. (Para-2 to 4)

Case referred:
Surinder Kumar vs. State of H.P. and others, ILR 2015 (V) H.P. Page-840(D.B.)

For the petitioner:	Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with M/s V.S. Chauhan, Additional Advocate Genral, J.K. Verma, Deputy Advocate General and Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Issue notice. Mr.Ramesh Thakur, learned Assistant Advocate General, waives notice for the respondents.

2. The grievance projected in this writ petition by the petitioner is that the father of the petitioner, who was working with the respondents as Beldar on daily waged basis, died on 9.1.2010, while in service, constraining the petitioner to file an application for appointment on compassionate ground, which was rejected on the ground that the family income of the petitioner exceeds the ceiling fixed by the Government.

3. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

> *"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
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> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the*

employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.

48. While reaching at this conclusion, we are supported by the decision of the Apex Court in ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:*

> *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*

49. The Apex Court in ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
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> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.*
>
> *Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."*

4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.

16. In ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-*

"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events.

It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."

Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."

Emphasis applied.

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).*** *Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.*

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law……."

4. Having said so, the writ petition is allowed, impugned order Annexure P5 is quashed and set aside, and the respondents are directed to examine the case of the petitioner in light of the judgment referred to above and pass appropriate order within a period of six weeks from today.

5. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

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

Abhishek Thakur and another .....Petitioners.
Versus
General Manager, SBI and others .....Respondents.

CWP No.1540 of 2009
Decided on: 29.10.2015.

Constitution of India, 1950- Article 226- Father of the petitioner no. 1 and husband of petitioner no. 2 expired on 1.8.1999 while in service- petitioner No. 2 applied to the respondent for appointment on compassionate ground, but her application was rejected in the year 2000- petitioner No. 1 also applied for appointment on compassionate ground which application was also rejected on 23.6.2005- writ petition was filed on 12.5.2009- held, that the purpose of compassionate appointment is to provide immediate succor to the family- when the first application was rejected in the year 2000, and the writ was filed in the year 2009, petitioners are caught by the doctrine of delay, laches and waiver- the very purpose of granting appointment on compassionate ground had lost efficacy by efflux of time. (Para-3 to 5)

For the Petitioners: Mr.Rakesh Chandel, Advocate.
For the respondents: Mr.Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of this writ petition, the petitioners have sought writ of mandamus commanding the respondents either to grant appointment on compassionate ground or to reconsider the case of the petitioners for appointment on compassionate ground, on the ground taken in the memo of writ petition.

2. Facts of the case, as pleaded, are that father of petitioner No.1 and husband of petitioner No.2, expired on 1st August, 1999, while in service with the respondent-Bank. In March, 2000, petitioner No.2 i.e. widow of the deceased employee and mother of petitioner No.1, applied to the respondent-Bank for appointment on compassionate ground, which application came to be rejected by the respondent-Bank on 20th September, 2000.

3. Thereafter, on 15th September, 2004, petitioner No.1, being the son of the deceased employee, applied seeking appointment on compassionate ground, which application was also rejected by the respondent-Bank on 23rd June, 2005. Petitioner No.1 remained contended with the order of rejection and suddenly, thereafter on 12th May, 2009, filed the instant writ petition. It is not understandable that once the claim of petitioner No.2 i.e. widow stood rejected in the year 2000, how the claim projected by petitioner No.1, (son), was tenable. Be that as it may.

4. The aim and object of providing compassionate appointment to the dependants of a deceased-employee is to provide immediate succour to the family, which, on the sudden death of the employee, may find itself in a state of destitution. In the instant case, after the death of the employee in the year 1999, the widow applied for appointment on compassionate ground at the first instance, which application was rejected in the year 2000.

Thereafter, in the year 2004, the son of the deceased employee applied for appointment, which application was also rejected by the respondent-Bank in the year 2005. The petitioners remained silent till the year 2009, when they filed the instant writ petition. The petitioners are caught by the doctrine of delay, laches and waiver.

5. Viewed thus, read with the conduct of the petitioners, we are of the opinion that the very purpose of granting compassionate appointment has lost its efficacy by efflux of time.

6. Having said so, there is no merit in the writ petition and the same is dismissed, alongwith pending CMPs, if any.

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

Bakshi Ram .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 191 of 2015.
Reserved on: October 28, 2015.
Decided on: October 29, 2015.

Protection of Children from Sexual Offences Act, 2012- Section 6- **Indian Penal Code, 1860-** Section 376(2i)- Prosecutrix complained of pain in her private part- she revealed on inquiry that accused had touched her private part with his private part- Medical Officer found the injuries on the person of the prosecutrix and did not rule out the possibility of sexual assault- presence of prosecutrix was admitted by the defence witness – considering the age of the accused, sentence reduced to four years rigorous imprisonment along with fine of Rs. 5,000/-. (Para-20 to 25)

Cases referred:
T.K. Gopal alias Gopi v. State of Karnataka (2000) 6 SCC 168
Karamjit Singh v. State (Delhi Admn.) AIR 2000 SC 3467

For the appellant: Mr. Neel Kamal Sharma, Advocate.
For the respondent: Mr. M.A.Khan, addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.5.2015, rendered by the learned Special Judge, Mandi, H.P. in Sessions Trial No. 07/2014, whereby the appellant-accused (hereinafter referred to as accused) who was charged with and tried for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as the POCSO Act), read with Section 376 (2)(i) of IPC, for committing aggravated penetrative sexual assault upon the victim aged about 4 years on

20.11.2013 at about 3:30 PM, was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 10,000/- for the commission of offence under Section 6 of the POCSO Act read with Section 376(2)(i) IPC and in default of payment of fine he was further ordered to undergo simple imprisonment for two months. The victim was also held entitled to a sum of Rs. 25,000/- as compensation under the Victim Compensation Scheme.

2. The case of the prosecution, in a nut shell, is that PW-15, victim (name withheld), is the minor daughter of PW-13 and PW-16 and granddaughter of PW-14. In the month of November, 2013, PW-13, father of the victim was serving at Chandigarh. On 20.11.2013 at about 8:30 PM, the victim complained pain in her private part and requested her mother to apply some medicine. On enquiry, the victim disclosed that the accused had touched his private part with her private part. The mother of the victim informed her husband. She also made enquiry from the accused who threatened that the victim shall be defamed in case the occurrence comes to light. Application Ext. PW-9/A was moved before the Executive Magistrate, Sarkaghat by the grandfather of the victim. Thereafter, the police visited the spot and recorded the statement of PW-16 vide Ext. PW-9/B. On the basis of the statement, FIR Ext. PW-9/C was registered. The victim was produced before the Medical Officer and MLC Ext. PW-16/A was obtained. The statement of victim Ext. PW-12/A was recorded and also videographed. The bed sheet was taken into possession. The date of birth certificate of the victim Ext. PW-4/B was obtained according to which the victim was born on 14.10.2009. The statement of the victim was also recorded before the ACJM, Sarkaghat vide Ext. PX under Section 164 Cr.P.C. The accused was arrested and produced before the Medical Officer. He issued MLC Ext. PW-2/B. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 17 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. He examined three witnesses in his defence. The learned Trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. Neel Kamal Sharma, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. He also contended that it is not believable that a man aged 83 years old would commit rape on minor 4 years old. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, appearing for the State has supported the judgment of the learned trial Court dated 26.5.2015.

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

6. PW-2 Dr. Neeraj Sharma, deposed that accused was produced before him by the police. He issued MLC Ext. PW-2/B. In his opinion, there was nothing to suggest that the accused was not capable of performing an attempt of sexual assault.

7. Dr. Shweta examined victim and issued MLC Ext. PW-3/B. The victim was complaining of pain in vulval region with alleged history of hurting vulval region and touching of the part with his penis by a person known as “Palku Ke Dada”. She noticed following injuries on the private part of the victim:

> “1. Contusion bluish in colour 1 cm x 1 cm, present on the labia minora on each side.
>
> 2. Redness alongwith tenderness present in vulval region.
>
> 3. Slight bleeding occurred while taking vulval swab.

4. Hymen intact.

No other internal injury was present.

No evidence of any type of injury all over the body."

She gave her final opinion in red circle "B" of MLC Ext. PW-3/B. According to her, the possibility of sexual assault could not be ruled out in this case. The injuries observed by her in the vulval region are possible in case of sexual assault. In young children, hymen is deeply situated and vagina is small. It is not necessary that the hymen would be torn in an attempt of sexual assault. The hymen would not be torn in case if there was slight penetration.

8. PW-12 LC Anjana Kumari deposed that SHO directed her to accompany Parkash to PP Hatli for further verification of the complaint. Thereafter, she alongwith the IO went to the house of the victim. The IO recorded the statement of the mother of the victim vide Ext. PW-9/B in her presence. Thereafter, they came back to the Police Post Hatli. On 23.11.2013, she produced the child before the doctor alongwith her mother for medical examination. She recorded the statement of the child vide Ext. PW-12/A. The victim identified the place of commission of offence. She identified a place in the verandah of second floor of the house. The victim also identified the bed. She also identified the bed sheet which was taken into possession vide memo Ext. PW-12/B in the presence of Rup Lal.

9. PW-13 Raj Kumar deposed that he was working at Chandigarh. On 20.11.2013, he received a telephonic call from his wife to the effect that their daughter had complained of pain in her private part. She also disclosed that the child disclosed her that grandfather of Palku had touched her private part with her private part and due to this she was feeling pain. He reached his village on 22.11.2013 in the evening.

10. PW-14 Parkash Chand deposed that he moved an application Ext. PW-9/A before the Executive Magistrate Sarkaghat. He visited the Police Station. The police official recorded statement of his daughter-in-law. They were called to the Police Station for medical examination of his granddaughter. The enquiries were also made by the police from the victim. The victim identified the spot and bed sheet where accused had made an attempt of sexual assault. His daughter-in-law also produced clothes of victim to the police.

11. The statement of PW-15, victim was recorded without oath. She identified the accused sitting in the Court. He had touched her private part with his private part. In her cross-examination, initially she stated that her grandfather and mother had tutored her to make allegations against the accused. But, in a Court question put to her, she reiterated that the occurrence had taken place with her and she had not falsely stated at the instance of grandfather and mother. She also denied the suggestion that nothing has happened with her and she was told to make this statement by her grandfather and mother.

12. PW-16 Punam Devi is the mother of the victim. According to her, on 20.11.2013, her minor daughter aged 4 years disclosed at about 8:30-9:00 PM that she was feeling pain in her private part and requested her to apply some medicine. She enquired from her daughter for the pain and she disclosed that accused touched her private part with his private part. Thereafter, she informed her husband. On 21.11.2013, she enquired from the accused and he threatened that his daughter shall be defamed and he would not loose anything. She disclosed this fact to her grandfather on 21.11.2013. On 22.11.2013, her father-in-law made complaint. The police came to her house in the evening. They recorded her statement Ext. PW-9/B. On 23.11.2013, they were called for medical examination of the

child. Her daughter was medically examined. She has denied the suggestion in her cross-examination that they used to send their child for playing in the house of the accused.

13, PW-17 SI Sunil Kumar, deposed that the statement of the victim was recorded vide Ext. PW-9/B. Thereafter, the victim was ordered to come to hospital for medical examination. Rukka was sent to the Police Station Sarkaghat and FIR Ext. PW-9/C was registered. The victim was examined. The statement of the victim was also recorded vide Ext. PW-12/A. The videography was also undertaken. The victim identified the place of occurrence.

14. The accused has also examined DW-1 Rup Lal. He deposed that daughter-in-law of Prakash had called Village Panchayat. He came to the house of Parkash. 5 ladies and 2-3 other persons were already present in the house of Parkash. He inquired from them and they disclosed that it was a case of rape. The daughter-in-law of Parkash disclosed that rape had occurred 3-4 days prior to the incident. She also stated that they will not take any action. The police never came in his presence in the house of Parkash. In his presence, two police officials in civil uniform and one lady police official made inquiries from the mother of the victim about the clothes.

15. DW-2 Manorma Devi is the daughter-in-law of accused. According to her, she had gone to her fields and came back at about 4:00 PM. Her three children were playing in the compound. Accused was sitting on the stairs. The victim alongwith her brother was also playing in the ground. She offered tea to her children. The verandah is open on all four sides. The verandah is visible from the compound. There are 5 houses adjoining to their houses. Parkash is not residing in his house. The relations between accused and Parkash are strained due to enmity.

16. DW-3 Amar Nath deposed that accused Bakshi Ram is having good character and good image in the eyes of other villagers. The police had come to the village in his presence in the evening. He did not remember the date and month. The police made enquiries. The victim refused to make statement and statement of the mother of the victim was recorded by the police. In his cross-examination, he admitted that he has not made statement in this case before the police or any Authority.

17. PW-15, victim (name withheld) has categorically stated in her examination-in-chief that the grandfather of Palku had touched his private part with her private part. She has reiterated that the occurrence had taken with her and she has not falsely stated at the instance of grandfather and mother. She also denied the suggestion that nothing has happened with her and she was told to make this statement by her grandfather and mother. PW-16 Punam Devi has corroborated the statement of the victim. She deposed that on 20.11.2013, her minor daughter aged 4 years disclosed at about 8:30-9:00 PM that she was feeling pain in her private part and requested her to apply some medicine. She enquired from her daughter for the pain and she disclosed that accused toughed her private part with his private part.

18. PW-14 Parkash Chand deposed that he moved an application Ext. PW-9/A before the Executive Magistrate Sarkaghat to the effect that accused had sexually assaulted his granddaughter and tried to commit rape. Thereafter, he visited the Police Station. The police official recorded statement of his daughter-in-law. The enquiries were also made by the police from the victim. PW-13 Raj Kumar, father of the victim has also deposed the manner in which he was narrated the incident by his wife.

19. PW-3 Dr. Shaweta has noticed contusion bluish in colour 1 cm x 1 cm, present on the labia minora on each side. She also noticed redness alongwith tenderness

present in the vulval region. There was slight bleeding while taking vulval swab. According to her final opinion, as per MLC Ext. PW-3/B, the possibility of sexual assault could not be ruled out in this case. The accused, as per the statement of PW-2 Dr. Neeraj Sharma, was capable of performing sexual act.

20. The statement of the victim was also recorded under Section 164 Cr.P.C. vide Ext. PX. She has categorically stated in Ext. PX that the grandfather of Malku has touched his private part with her private part. The witness produced by the accused DW-2 Manorma Devi has admitted that her children were playing in the compound. The victim alongwith her brother was also playing in the ground. Thus, she has admitted the presence of the victim in the compound. DW-1 Rup Lal has also deposed that the daughter-in-law of Parkash disclosed that rape had occurred 3-4 days prior to the incident. DW-3 Amar Nath in his cross-examination, as noticed hereinabove, has categorically stated that he has never made any statement before the police or any Authority. The victim was born on 14.10.2009, as per Ext. PW-4/B. The prosecution has proved the case against the accused beyond reasonable doubt.

21. The accused was 83 years of age while recording his statement under Section 313 Cr.P.C. on 23.3.2015. No doubt, the accused has committed the heinous crime but the punishment in criminal cases is both, punitive and reformative. The purpose is that the person found guilty of committing the offence is made to realize his fault and is deterred from repeating such acts in future. The purpose is also to enable the person to relent and repent for his action and make himself acceptable to the society. The persons who commit rape are psychologically sadistic persons.

22. Their Lordships of the Hon'ble Supreme Court in **T.K. Gopal alias Gopi v. State of Karnataka** reported in (2000) 6 SCC 168, have held that those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them. In some States in U.S.A., therefore, emphasis was laid on psychotherapic treatment of the offender while he was under detention. In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate; the traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person, who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation. Their lordships have held as under:

> "[13] In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate; the traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation.
>
> [14] Under the punitive approach, the rationalisation of punishment is based on retributive and utalitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the

punishment should act as a deterrent not only to the offender but also to others in the community.

[15] The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including the family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy (See : Sunil Batra (I) v. Delhi Administration, AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1979 (1) SCR 392 : (1978 Cri LJ 1741); Sunil Batra (II) v. Delhi Administration, AIR 1980 SC 1579 : (1980) 3 SCC 488 : 1980 (2) SCR 557 : (1980 Cri LJ 1099); Charles Sobraj v. Superintendent, Central Jail, Tihar, AIR 1978 SC 1514 : (1978 Cri LJ 1534) and Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608 : AIR 1981 SC 746 : 1981 (2) SCR 516 : (1981 Cri LJ 306) etc.).

[16] Sexual offences, however, constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them.

[17] In some States in the USA, therefore, emphasis was laid on psychotherapic treatment of the offender while he was under detention. For that purpose, Psychopath Sexual Offenders Laws have been enacted in certain jurisdiction in USA. These laws treat the sex offenders as neurotic persons and psychotherapic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the sense that they would not be released till they are cured. But the provision for indefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the States, this provision was dropped from the Statute.

[18] Here, in India, statutory provision for psychotherapic treatment during the period of incarceration in the jail is not available in India, but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime."

23. Their Lordships of the Hon'ble Supreme Court in **Karamjit Singh v. State (Delhi Admn.)** reported in AIR 2000 SC 3467, have held that punishment in criminal cases is both, punitive and reformative. The purpose is that the person found guilty of committing

the offence is made to realise his fault and is deterred from repeating such acts in future. The reformative aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. Within the parameters of law, an attempt has to be made to afford an opportunity to the individual to reform himself and lead life of a normal, useful member of society and make his contribution to in that regard . denying such opportunity to a person who has been found to have committed offence in the facts and circumstances placed on record would only have a hardening attitude towards his fellow beings and towards society at large. Their lordships have held as under:

> "[7] The punishment prescribed under Ss. 3, 4 and 6 of the TADA Act are imprisonment for a term of not less 5 years to life imprisonment and also fine. On a reading of these statutory provisions it is manifest that the Parliament has considered the culpability dealt with in these provisions as serious threats to society and the country, and, therefore, has provided stringent punishment for the offences. Punishment in criminal cases is both punitive and reformative. The purpose is that the person found guilty of committing the offence is made to realise his fault and is deterred from repeating such acts in future. The reformative aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. In determining the question of proper punishment in a criminal case the Court has to weight the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case. An act of balancing is what is needed in such a case, a balance between the interest of the individual and the concern of the society weighing the one against the other. Imposing a hard punishment on the accused serves a limited purpose but at the same time, it is to be kept in mind that relevance of deterrent punishment in matters of serious crimes affecting society should not be undermined. Within the parameters of the law an attempt has to be made to afford an opportunity to the individual to reform himself and lead life of a normal, useful member of society and make his contribution in that regard. Denying such opportunity to a person who has been found to have committed offence in the facts and circumstances placed on record would only have a hardening attitude towards his fellow beings and towards society at large. Such a situation, has to be avoided, again within the permissible limits of law."

24. In the present case also, as noticed hereinabove, accused is more than 83 years of age. He has no criminal background. His conduct in the Jail is satisfactory since nothing adverse has been brought to our notice by the State.

25. In view of the discussion and analysis made hereinabove, the present appeal is partly allowed. The sentence imposed vide judgment dated 26.5.2015 rendered by learned Special Judge, Mandi, H.P., in Sessions Trial No. 07/2014, is reduced to rigorous imprisonment for 4 years instead of 10 years rigorous imprisonment, alongwith a fine of Rs.5,000/-.

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

Lekh Ram .....Petitioner.
Versus
Union of India and others .....Respondents.

CWP No.1932 of 2009
Reserved on : 15.10.2015
Pronounced on: 29.10.2015.

Constitution of India, 1950- Article 226- Petitioner was charge-sheeted on the ground that he had received an illegal gratification for recruitment in the army- an inquiry was conducted- petitioner had also written a letter of pardon and had asked for mercy- the Inquiry Officer recommended the punishment of reduction to lower stage- held, that there was no material on record to show that a false complaint was made against the petitioner- order passed by the Tribunal was speaking one- petition dismissed. (Para-5 to 14)

For the Petitioner: Mr.Sanjeev Kuthiala and Ms.Ambika Kotwal, Advocates.
For the respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Subject matter of the writ petition is the order, dated 7th January, 2009, passed by the Central Administrative Tribunal, Chandigarh Bench, (for short, the Tribunal), in Original Application No.36/HP/2007, titled Lekh Ram vs. Union of India and others, whereby the Original Application filed by the Applicant (writ petitioner herein) was dismissed, (for short, the impugned order).

2. Feeling aggrieved, the petitioner (Original Applicant before the Tribunal) filed the instant writ petition challenging the impugned order on the grounds taken in the memo of writ petition.

3. Respondents-Department have filed the reply to the writ petition and have explained about the conduct of the petitioner during the period of his employment.

4. Heard learned counsel for the parties.

5. Facts of the case are that the writ petitioner Lekh Ram was facing charge-sheet on the ground that he had received Rs.6,000/- as illegal gratification from one Ranjit Singh in order to ensure that his son would be recruited in the Army. The said Ranjit Singh made a complaint after noticing that despite making payment of Rs.6,000/-, his son was not appointed. The department, after receiving the complaint, suspended the writ petitioner on 16th August, 1999, which suspension order was revoked on 6th July, 2002.

6. Thereafter, charge-sheet was served upon the petitioner on 21st February, 2003, which was challenged by the writ petitioner before the Tribunal by filing Original Application i.e. OA No.558/HP/2003, was disposed of by the Tribunal with a direction to the respondents to consider the question of getting the inquiry conducted from some

independent agency, after due notice to the petitioner, and conclude the same within four months. It appears that Director Recruitment was appointed as inquiry officer, inquiry was conducted and the petitioner was also heard.

7. The petitioner was asked to engage a defence assistant, a dismissed employee was engaged by him, which was not as per the mandate of CCS (CCA) Rules and was given ample opportunity to engage defence assistant. Despite granting sufficient opportunities, the writ petitioner failed to engage the defence assistant.

8. The complainant i.e. Ranjit Singh appeared before the Inquiry Officer and admitted all the contents of his complaint, including the petitioner having received Rs.6,000/- as illegal gratification.

9. The petitioner had virtually confessed his guilt by writing a letter of pardon and asked for mercy. The letter of pardon is reproduced in paragraph 7 of the impugned order.

10. The Inquiry Officer, after concluding the inquiry and examining the material, took a lenient view and punishment of reduction to lower stage was imposed. The petitioner filed an appeal before the Appellate Authority, which was also dismissed, constraining the petitioner to approach the Tribunal by the medium of Original Application and seek quashment of both the orders, i.e. order of the Disciplinary Authority and that of the Appellate Authority.

11. Respondents filed the reply and after examining the pleadings, the Tribunal dismissed the Original Application, vide the impugned order, which is the subject matter of the writ petition.

12. The petitioner had denied the letter of pardon and specifically pleaded that it was managed. In order to determine the said issue, the petitioner was asked by the respondents to submit his finger prints so that the same could be compared and got verified. Despite three opportunities, the petitioner refused to give his finger prints, as has been discussed in detail in paragraph 4 of the impugned order.

13. Keeping in view the pleadings of the parties, the other attending circumstances, read with the statement of the complainant Ranjit Singh, which has not been shattered in his cross examination, and the findings of the Inquiry Officer, the impugned order is legal one. It is apt to record herein that no material was brought on record which could have been made the basis for holding that the complainant Ranjit Singh had made a false complaint.

14. In view of the above discussion, we are of the opinion that the impugned order is speaking one and needs no interference.

15. Having said so, there is no merit in the writ petition and the same is dismissed, alongwith pending CMPs, if any.

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

Himachal Road Transport Corporation and another ...Appellants.

Versus

Krishan Kumar and others ...Respondents.

FAO No. 424 of 2008
Decided on: 30.10.2015

Motor Vehicles Act, 1988- Section 166- Compensation in the sum of Rs.1,39,500/- along with interest @ 7.5% per annum was awarded from the date of petition in favour of claimants- record shows that Tribunal had awarded meager amount but the claimants had not questioned the same- therefore, appeal dismissed. (Para-1 to 6)

For the appellants: Mr. Ramesh Sharma, Advocate.

For the respondents: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 1 to 4.
Nemo for respondent No. 5, set ex-parte.
Mr. Dinesh Thakur, Advocate, for respondent No. 6.
Mr. Vikas Rajput, Advocate, for respondent No. 7.
Mr. B.M. Chauhan, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award, dated 29.02.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 99/99, 42/2005, titled as Sh. Krishan Kumar Kaushal and others versus The Managing Director HRTC and others, whereby compensation to the tune of Rs.1,39,500/- with interest @ 7.5% per annum from the date of the petition came to be awarded in favour of the claimants (for short "the impugned award").

2. At this stage, Mr. B.M. Chauhan, learned counsel for the insurer-respondent No. 8, stated at the Bar that two appeals, being FAOs No. 402 and 403 of 2008, arising out of the same accident, have already been settled wherein the appellants have been held liable and only an amount of Rs.500/- has been deducted from the amounts awarded by the Tribunal. His statement is taken on record. Mr. Ramesh Sharma, learned counsel for the appellants, has also admitted this fact.

3. In the given circumstances, it can be safely said that it is the liability of the appellants to satisfy the impugned award, as rightly held by the Tribunal, needs no interference.

4. The only question is - whether the amount awarded is excessive or otherwise?

5. I have gone through the impugned award. The Tribunal, while making discussions in paras 24 to 29, has awarded a meager amount. However, the claimants have not questioned the same, needs to be upheld.

6. Having said so, the impugned award is upheld and the appeal is dismissed, as indicated hereinabove.

7. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

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

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

Kanso Devi and others .....Appellants
Versus
Laxman Singh & another ..... Respondents

FAO No.536 of 2008
Date of decision: 30.10.2015

Motor Vehicles Act, 1988- Section 166- Deceased was aged 45 years – Tribunal had applied multiplier of '12', whereas multiplier of '13' will be applicable- claimants pleaded that deceased was earning Rs. 7,000/- per month- owner stated that deceased was getting Rs. 3,900/- per month as salary and Rs. 60/- per day which means that deceased was getting Rs. 5700/- per month- 1/5th amount is deducted towards personal expenses- thus, claimants have lost the dependency to the extent of Rs. 4600/- per month and they are entitled in the sum of Rs. 7,17,600/- (4600 x 12 x 13) – a sum of Rs. 10,000/- each awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'. (Para-10 to 15)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellants: Mr. H.C. Sharma, Advocate.
For the respondents: Nemo for respondent No.1.
Mr. B.M. Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 10th June, 2008, passed by the Motor Accident Claims Tribunal-III, Shimla, (for short, "the Tribunal") in MAC Petition No.69-S/2 of 2006/05, titled Kanso Devi and others vs. Laxman Singh and another, whereby a sum of Rs.4,00,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

2. The insurer and the owner of the vehicle have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Only the claimants have questioned the impugned award on the ground of adequacy of compensation. Thus, the only question needs to be answered in this appeal is – Whether the amount of compensation awarded by the Tribunal is inadequate.

4. To determine the above issue, it is necessary to have a flash back of the facts of the case, the womb of which has given birth to the instant appeal.

5. Facts, as pleaded, are that on 8th September, 2005, the deceased Rameshwer, driver of Tipper No.HP-26-0343, was unloading the said Tipper. In the process, the rear side of the Tipper got locked as a result of which the said Tipper rolled down the road and fell into Satluj River and the said Rameshwer died in the accident. Claimants, being mother, widow and sons/daughters of the deceased Rameshwer, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act), for grant of compensation to the tune of Rs.12.00 lacs, as per the break-ups given in the Claim Petition.

6. Respondents i.e. the owner of the offending vehicle and the insurer resisted the claim petition by filing replies.

7. On the pleadings of the parties, the following issues came to be framed by the Tribunal:

> "1. Whether on 8.9.2005 Sh.Rameshwer died due to latent defect in vehicle No.HP-26-0343? 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 vehicle No.HP-26-0343 was not holding a valid and effective driving licence at the time of accident? OPR
>
> 4. Whether the vehicle was being driven without fitness certificate? OPR
>
> 5. Relief."

8. Parties led evidence and the Tribunal under issue No.1 held that the accident had occurred due to the latent defect in the vehicle and thus, saddled the insurer with the liability. Insurer has failed to prove issues No.3 and 4. Therefore, the findings returned by the Tribunal on issues No.1, 3 and 4 are upheld, though not in dispute.

9. As aforesaid, the dispute in the present appeal is viz. a viz. part of issue No.2 i.e. whether the amount awarded by the Tribunal is inadequate. The answer is in the affirmative for the following reasons.

10. Admittedly, the age of the deceased, at the time of accident was 45 years. The Tribunal has fallen in error in applying the multiplier of 12, whereas, in terms of Schedule-II of the Act and the dictum of the Apex Court in ***Sarla Verma (Smt.) and others*** versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104,*** which decision was upheld by the larger Bench of the Apex Court in ***Reshma Kumari & others*** versus ***Madan Mohan and another***, reported in ***2013 AIR (SCW) 3120***, multiplier of 13 was applicable. Thus, it is held that multiplier of 13 is just and appropriate in the instant case.

11. The claimants have specifically pleaded that the deceased was a driver by profession, was earning Rs.7,000/- per month. However, as per the owner of the offending

vehicle (original respondent No.1), the deceased was getting Rs.3,900/- per month as salary and in addition to that, Rs.60/- per day as charges of meals i.e. Rs.1800/- per month. Thus, the total monthly income of the deceased can be said to be not less than Rs.3900 + Rs.1800 = Rs.5700/-.

12. The Tribunal has also fallen in error in deducting 1/3rd amount towards the personal expenses of the deceased, while keeping in view the number of dependants, as has been held by the Apex Court in ***Sarla Verma's case (supra),*** 1/5th from the total income of the deceased was to be deducted towards his personal expenses.

13. In view of the above discussion, it can safely be concluded that the claimants lost source of dependency to the tune of Rs.4560/-, say Rs.4600/- per month. Thus, the total loss of source of dependency to the claimants is worked out to Rs.4600 x 12 x 13 = Rs.7,17,600/-.

14. The Tribunal has awarded Rs.25,600/- under the head 'loss of consortium', which amount is also on the lower side. In view of the recent judgment of the Apex Court, a sum of Rs.10,000/- each is awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

15. Thus, a sum of Rs.7,57,600/- is awarded in favour of the claimants. The enhanced amount of compensation will carry interest at the rate of 7.5% per annum from the date of the impugned award till deposit.

16. The appeal is allowed and the impugned award stands modified, as indicated above.

17. The enhanced amount, alongwith interest, be deposited by the insurer within a period of six weeks from today and on deposit, the amount be released in favour of the claimants strictly in terms of the impugned award.

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

The New India Assurance Company Ltd. .....Appellant.

Versus

Smt. Cheeno alias Manisha and others .....Respondents

FAO (MVA) No. 577 of 2008

Date of decision: 30th October, 2015

Motor Vehicles Act, 1988- Section 166- Deceased was 25 years of age- Tribunal had applied multiplier of '17'- held, that multiplier of '15' is applicable and compensation of Rs. 24,000/-x15 = Rs. 3,60,000/- + Rs. 65000/-= Rs. 4,25,000/- along with interest @7.5% awarded from the date of claim petition till its realization. (Para- 3 to 6)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Sat Prakash, Advocate, for respondents No. 1 and 2.
Mr. Vivek Singh Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral)

This appeal is directed against the judgment and award dated 2.8.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba in MAC No. 31/2008/07, titled Smt. Cheeno alias Manisha and another versus Sh. Vipan Kumar and others, for short "the Tribunal", whereby compensation to the tune of Rs.4,73,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. The learned counsel for the appellant argued that the Tribunal has fallen in an error in applying the multiplier of "17" whereas multiplier of "15" was applicable and wrongly awarded Rs.15,000/- under the head "funeral expenses" and Rs.50,000/- on account of loss of love, affection and loss of estate.

4. I have gone through the record and the impugned award. The deceased was 25 years of age at the time of the accident. Multiplier of "15" was applicable in view of the 2nd Schedule of the Motor Vehicles Act, for short "the Act, read with **Sarla Verma and others versus Delhi Transport Corporation and another** reported in **AIR 2009 SC 3104** and upheld in **Reshma Kumari and others versus Madan Mohan and another**, reported in **2013 AIR SCW 3120**.

5. Having said so, the Tribunal has fallen in an error in applying the multiplier of "17" and amount awarded under the other heads is just and appropriate and cannot be said to be excessive.

6. Viewed thus, the claimants are entitled to compensation to the tune of Rs.24,000/-x15= Rs.3,60,000/- plus Rs.65000/-. Total Rs.4,25,000/- along with interest @7.5% from the date of claim petition till its realization.

7. Registry is directed to release the amount, in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account and excess amount, if any, be released to the insurance company, through payee's cheque account.

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

9. Send down the record, forthwith, after placing a copy of this judgment.

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

FAO No.509 of 2008 and
FAO No.136 of 2010
Decided on : 30.10.2015

1.	**FAO No.509 of 2008**	
	New India Assurance Company Ltd.	.....Appellant
	Versus	
	Gayatri Devi and others	..... Respondents
2.	**FAO No.136 of 2010**	
	Gayatri Devi and another	.....Appellants
	Versus	
	Pinki Devi and others.	..... Respondent

Motor Vehicles Act, 1988- Section 166- Driver of the vehicle was competent to drive the light motor vehicle – the vehicle in question was also a light motor vehicle – it was contended that driving licence did not bear the endorsement- held, that driver having a driving licence to drive light motor vehicle is not required to have endorsement of PSV and the plea of the Insurance Company that driver did not have a valid driving licence cannot be accepted. (Para- 8 to 13)

Motor Vehicles Act, 1988- Section 166- Driver was earning Rs. 4,000/- per month as salary and he was getting Rs. 100/- per day as daily allowance- therefore, income of the deceased was Rs. 7,000/- per month - after deducting 1/3rd amount, loss of dependency is Rs. 4600/- per month- the age of the deceased was 41 years and multiplier of '12' is applicable- therefore, compensation of Rs. 7,17,600/- (Rs. 4600 x 12 x 13) awarded towards loss of income. (Para-15 to 17)

Cases referred:

Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

FAO No.509 of 2008:

Presence for the parties:

Mr.B.M. Chauhan, Mr.Praneet Gupta, Mr.J.L. Bhardwaj, Mr.Sanjeev Bhushan, Senior Advocate, with Mr.Pankaj Kumar, Advocate, Mr.Manoj Thakur, Advocate, Mr.Nishant Kumar, Advocate, for respective parties.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are the outcome of one award, dated 31st May, 2008, passed by the Motor Accident Claims Tribunal, Solan, (for short, the Tribunal), in Claim Petition No.40-S/2 of 2006, titled Gayatri Devi and another vs. Pinki Devi and others, whereby compensation to the tune of Rs.5,36,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the

impugned award). In addition, Rs.1,000/- was also awarded as costs. Accordingly, both the appeals are taken up together for final disposal.

2. FAO No.509 of 2008 has been filed by the insurer challenging the impugned award on the ground that the Tribunal has fallen in error in saddling the insurer with the liability since the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle. The claimants have laid challenge to the impugned award by filing FAO No.136 of 2010 on ground of adequacy of compensation.

3. In order to determine the above questions, brief resume of the facts of the case is required.

4. Claimants pleaded that on 4th April, 2006, driver Tota Ram had driven a Tempo Trax, bearing No.HP-32B-0282, rashly and negligently and collided with the Swaraj Majda and caused the accident, as a result of which the deceased Ganesh Datt, who was driving Swaraj Majda bearing No.HP-14-6535, sustained injuries and succumbed to the same lateron. FIR No.56 of 2006 was registered at Police Station, Garshankar, under Sections 337, 304-A IPC. Thus, the claimants, being the widow and the son of deceased Ganesh Datt, filed the Claim Petition claiming compensation to the tune of Rs.30.00 lacs, as per the break-ups given in the Claim Petition.

5. The claim petition was resisted by the original respondents and on the pleadings of the parties, the Tribunal framed the following issues:

> "1. Whether the deceased Ganesh Datt had died on account of rash/negligent driving of the Tempo Trax by the respondent No.4? OPP
>
> 2. If issue No.1 is proved, to what amount of compensation the petitioners are entitled and from whom? OPP
>
> 3. Whether the accident has been caused on account of rash/negligent driving of Swaraj Mazda by the respondent No.1? OPR4
>
> 4. Whether the deceased driver was not holding valid and effective driving licence at the time of accident, if so its effect? OPR3
>
> 5. Whether the vehicle driven by the deceased was without documents, if so its effect? OPR-3
>
> 6. Whether the respondent No.4 did not possess a valid and effective driving licence, if so, its effect?
>
> 7. Whether the vehicle driven by the respondent No.4 was not having any route permit? OPR5
>
> 8. Relief."

6. Parties have led their evidence and the Tribunal after examining the evidence came to the conclusion that driver of the Tempo Trax, namely, Tota Ram had driven the said vehicle rashly and negligently and had caused the accident.

7. Feeling aggrieved, the insurer and the claimants have challenged the impugned award, as discussed above.

8. The driver and the owner of the offending vehicle have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

9. Admittedly, the driver of the offending vehicle I.e. Tempo Trax, was competent to drive a light motor vehicle and the vehicle in question was also a light motor vehicle.

10. The learned counsel for the insurer argued that the driver was not having valid and effective driving licence since the driving licence did not bear endorsement to drive the offending vehicle. The argument is devoid of any force for the following reasons.

11. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and another vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle. Further held that Tempo Trax is a Light Motor Vehicle.

12. The Apex Court in latest decision, in **Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186,** has held that the driver who is having valid and effective driving licence to drive a Light Motor Vehicle is not required to have endorsement to drive a light commercial vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :*
>
> > *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*
>
> *No contrary view has been brought to our notice.*
>
> *11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."*

13. Having said so, the argument of the learned counsel for the appellant is turned down and the appeal filed by the appellant-insurer i.e. FAO No.509 of 2008 is dismissed.

14. Coming to FAO No.136 of 2010 filed by the claimants for enhancement of compensation, it is clear from a perusal of the impugned award that the Tribunal has fallen in error in assessing just compensation for the following reasons.

15. Admittedly, the age of the deceased at the time of death was 41 years. As per schedule 2 appended with the Motor Vehicles Act, 1988 and as also as per the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another,**

2013 AIR (SCW) 3120, multiplier 13 was applicable. Thus, the Tribunal has fallen in error in applying the multiplier 10. Therefore, it is held that multiplier of 13 is just and appropriate in this case.

16. The claimants have specifically pleaded in the claim petition that the deceased was driver by profession and was earning Rs.4,000/- per month as salary. In addition, he was also getting Rs.100/- per day as daily allowance. Thus, the total income of the deceased can be said to be not less than Rs.7,000/- per month. Accordingly, it is held that the income of the deceased is Rs.7,000/- per month at the time of accident.

17. After deducting 1/3rd amount towards the personal expenses of the deceased, it can safely be held that the claimants lost source of dependency to the tune of Rs.4667/-, say Rs.4600/- per month. Thus, the total loss of source of dependency to the claimants is worked out to Rs.4600 x 12 x 13 = Rs.7,17,600/-.

18. The Tribunal has awarded Rs.15,000/- as conventional charges and Rs.5,000/- under the head 'funeral expenses, which amount is also on the lower side. In view of the recent judgment of the Apex Court, a sum of Rs.10,000/- each is awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

19. Thus, a sum of Rs.7,17,600/- + Rs.40,000/- = Rs.7,57,600/- is awarded in favour of the claimants. The enhanced amount of compensation will carry interest at the rate of 7.5% per annum from the date of the impugned award till deposit.

20. The appeal is allowed and the impugned award stands modified, as indicated above.

21. The enhanced amount, alongwith interest, be deposited by the insurer within a period of six weeks from today and on deposit, the amount be released in favour of the claimants strictly in terms of the impugned award.

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

Smt. Promila Sharma .....Appellant

Versus

The New India Assurance Co. Ltd. And others ....Respondents

FAO (MVA) No. 301 of 2009.
Judgment reserved on 16.10.2015
Date of decision: 30th October, 2015.

Motor Vehicles Act, 1988- Section 166- Deceased was a business man- by guess work it can be estimated that he was earning Rs. 6,000/- per month- he was a bachelor- half of the amount is to be deducted towards personal expenses- he was aged 26 years and multiplier of '16' is applicable- thus, claimants are entitled to a sum of Rs. 3000x12x16= Rs. 5,76,000/- Rs. 10,000/- each awarded under the head "loss of estate", "love and affection" and "funeral expenses" - thus claimants are entitled total compensation of Rs. 6,06,000/-, with interest @7.5% per annum from the date of claim petition till its realization.

(Para-21 to 24)

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimants had failed to prove rash and negligent driving of the driver- claimants had specifically averred that driver had driven the vehicle rashly and negligently- claimants had also examined the witnesses to prove as to how the accident had taken place – Tribunal had decided the claim petition as if it was a civil suit- witnesses of the respondent stated that accident was outcome of sudden tyre bursting - held, that tyre bursting is an example of rash and negligent driving - had the driver taken due care and caution, he would have managed the speed of the vehicle and avoided the accident causing the death of the deceased. (Para- 10 to 16)

Cases referred:

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

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

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others, I L R 2015 (V) HP 207

Tulsi Ram versus Smt. Veena Devi and others, I L R 2015 (V) HP 557

Anil Kumar versus Nitim Kumar and others, : I L R 2015 (IV) HP 445 (D.B.)

Sarla Verma and Ors versus Delhi Transport Corporation and anr. reported in AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and anr. reported in 2013 AIR (SCW) 3120

For the appellant: Ms. Shilpa Sood, Advocate.

For the respondents: Mr. B.M. Chauhan, Advocate, for respondent No.1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,

Subject matter of this appeal is the judgment and award dated 25.5.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, hereinafter referred to as "the Tribunal", for short, in M.A.C. No. 7-S/2 of 2007, titled Smt. Promila Sharma versus The New India Assurance Company Ltd. and others, whereby the claim petition filed by the claimant was dismissed, hereinafter referred to as "the impugned award", for short.

2. It appears that the claimant had invoked the jurisdiction of the Motor Accident Claims Tribunal, Shimla, for the grant of compensation to the tune of Rs.40 lacs, as per the break-ups given in the claim petition, on account of death of her son, namely Pradeep Kumar. It is averred in the claim petition that on 28.7.2006, the deceased was traveling in Mahindra Pick Up No. HP-27-A-0885 owned by respondent No.2 Sh. Jagdish Dutt Sharma, father of the deceased. Respondent No. 3 Sukh Dev was driving the said vehicle. The vehicle was loaded with grit belonging to the deceased to be supplied and delivered by him at Government Senior Secondary School Kanam. It is stated that when the vehicle reached at Hairpin bend on the Kanam-Spillo Road, respondent No. 3 lost control over it, due to excessive speed and the vehicle went off the road and fell down in the khud. DDR No. 15 dated 28.7.2006 is stated to have been registered in police station Pooh. The deceased sustained injuries. Immediately he was taken to CHC Spillo from where he was

referred to Shimla but on the way to Shimla he succumbed to the injuries. The claimant is stated to be 26 years of age and was earning Rs.3 lacs per annum from various sources, details of which are given in para 6 of the claim petition.

3. The claim petition was resisted and contested by respondent No.1 and following issues came to be framed on 11.12.2007.

(i) Whether Sh. Pradeep Kumar died because of the rash and negligent driving of the vehicle No. HP-27-A-0885 by the respondent No.3 as alleged? OPP.

(ii) If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties.

(iii) Whether the petition is not maintainable in the present form? OPR.

(iv) Whether the driver of the offending vehicle was not holding and possessing a valid and effective driving licence to drive it. If so, its effect? OPR.

(v) Whether the vehicle was being plied in violation of the terms and conditions of the Insurance Policy. If so, its effect? OPR.

(vi) Whether the vehicle was being plied without valid registration cum fitness certificate and route permit etc. as alleged? OPR.

(vii) Whether the petition is bad for non-joinder of the necessary parties? OPR.

(viii) Whether the petition is collusive as alleged. If so, its effect? OPR.

(ix) Relief.

4. The claimant examined three witnesses, namely Rajesh Kumar (PW1), HHC Gian Chand (PW2) and Sh. Kunj Lal (PW4) and stepped herself into the witness box as PW3.

5. The respondents, on the other hand examined two witnesses, namely HC Vinod Kumar (RW1) and S.I. Brij Lal (RW2).

6. The Tribunal, after scanning the evidence held that the claimant has failed to prove that the driver had driven the vehicle rashly and negligently, decided issue No. 1 against the claimant and dismissed the claim petition.

7. Issues No. 4 to 7 were not pressed and issues No. 3 and 8 were decided in favour of the respondents, keeping in view the findings returned on issue No.1. It was held that issue No. 2 has become redundant.

8. Feeling aggrieved, the claimant has questioned the impugned award, on the grounds taken in the memo of appeal.

9. At the outset, I am of the considered view that the Tribunal has fallen in an error in dismissing the claim petition for the following reasons.

10. The claimant has specifically averred in the claim petition that the driver had driven the vehicle rashly and negligently which resulted into the death of Pradeep Kumar. Smt. Promila Sharma claimant, PW1 Rajesh Kumar, PW2 Gian Chand and PW4 Kunj Lal have given details how the accident has occurred and Tribunal has discussed their

evidence. But despite that decided the claim petition as if it was a civil suit. The witnesses of respondents H.C. Vinod Kumar (RW1) and S.I. Brij Lal (RW2) have also deposed that the accident was outcome of sudden tyre bursting. Tyre bursting is also a rash and negligent driving. Had the driver taken due care and caution, he would have managed the speed of the vehicle and avoided the accident in which deceased sustained the injuries and succumbed to the same. Gian Chand (PW2) has proved Ext. PW2/A copy of rapat which is proof to the effect that the accident was outcome of tyre bursting.

11. The Tribunal, despite having made the discussion in para 12, 14 and 15 of the impugned award, held that the driver has not driven the vehicle rashly and negligently and the onus was on the claimant to prove the rash and negligent driving of the driver as if it was deciding a criminal case.

12. It is also beaten law of the land that the claim petition is to be determined summarily and that is why the Code of Civil Procedure is not applicable. Some of the provisions of Code of Civil Procedure have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "the Rules") in terms of Sections 169 and 176 (b) of the Motor Vehicles Act, and only some of the provisions of the Code of Civil Procedure have been made applicable.

13. The mandate of Chapter XI of the Motor Vehicles Act provides for the grant of compensation to the victim without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

14. My this view is fortified by the judgment delivered by the apex court in **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354 and Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81.**

15. This Court has also laid down the similar principles of law in **FAO No. 692 of 2008** decided on 4.9.2015 titled **Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others**, **FAO No. 287 of 2014** along with connected matter, decided on 18.9.2015 titled **Tulsi Ram versus Smt. Mena Devi and others**, **FAO No. 72 of 2008** along with connected matter decided on 10.7.2015 titled **Anil Kumar versus Nitim Kumar and others** and **FAO No. 174 of 2013** decided on 5.9.2014 titled **Kusum Kumari versus M.D. U.P Roadways and others.**

16. Having said so, the accident has occurred while using a motor vehicle and because of tyre bursting, the vehicle met with an accident and deceased sustained the injuries and succumbed to the injuries. As discussed hereinabove, there is ample evidence that the claimant is victim of a vehicular accident which was caused by the driver of the vehicle, while driving the vehicle in a rash and negligent manner. Accordingly, the findings returned on issue No. 1 are set aside and it is held that the claimant has proved that the accident was outcome of use of a motor vehicle and due to rash and negligent driving of the driver.

17. Before I deal with issue No.2, I deem it proper to deal with issues No. 3 and 8 at the first instance. It was for the respondents to prove both these issues, have not led any evidence to prove that there was collusion between the claimant and the respondents. Had there been any collusion between the claimant and the driver, the driver would have admitted that he had caused the accident. The insurer has not led any evidence to prove

that there was collusion amongst the claimant, owner and the driver. Insurer- respondent No.1 has also failed to prove that the claim petition was not maintainable.

18. It is apt to record herein that the law on motor accidents claims has gone through a sea change. Now copy of FIR can be treated as claim petition, in terms of the mandate of Sections 158 (6) and 166 (4) of the Motor Vehicles Act, for short "the Act".

19. Accordingly, both these issues are decided in favour of the claimant and against the respondents.

20. Respondents have not pressed issues No. 4 to 7, are not in dispute.

21. **Issue No.2.** The claimant has specifically averred that the deceased was earning Rs.3 lacs per annum and has given details of his income in para 6 of the claim petition. The claimant has stated that the deceased was dealing with building material and was agriculturist and horticulturist by profession. He was a brilliant student and has proved his testimonials Ext. PW3/B and Ext. PW3/C, mention of which has been made in para 10 of the impugned award by the Tribunal. Kunj Lal (PW4) is Tax Assistant. He has given details that deceased was submitting income tax returns.

22. Keeping in view the budding age of the deceased read with the fact that he was a business man, dealing with building material and having fruit orchard, by a guess work he would have been earning Rs.6000/- per month, was a bachelor, one half has to be deducted. Thus, the claimant has lost source of dependency to the tune of Rs.3000/- per month.

23. Admittedly, the deceased was 26 years of age at the time of accident and the multiplier applicable is "16" in view of the ratio laid down in **Sarla Verma and Ors versus Delhi Transport Corporation and anr.** reported in **AIR 2009 SC 3104** which has also been followed and affirmed in **Reshma Kumari and others versus Madan Mohan and anr.** reported in **2013 AIR (SCW) 3120**. Thus, the claimant is entitled to Rs.3000x12x16= Rs.5,76,000/-

24. The claimant has lost her son, is also entitled to Rs.10,000/- under the head "loss of estate", Rs.10,000/- under the head "love and affection" and Rs.10,000/- under the head "funeral expenses". Viewed thus, in all, the claimant is held entitled to Rs.5,76,000/- +30,000/- total Rs.6,06,000/-, with interest @7.5% per annum from the date of claim petition till its realization.

25. The question is who is to be saddled with the liability.

26. The factum of insurance is not in dispute. The learned counsel for the insurer has argued that the father of the deceased and husband of the claimant was owner of the vehicle thus, the insurer is not liable to indemnify. The argument though is attractive, but is devoid of any force for the following reasons.

27. The claimant has filed the claim petition for the grant of compensation on account of death of her son. The vehicle was insured and the insurer has to indemnify. Thus, the insurer has to be saddled with the liability.

28. Having glance of the above discussion, the appeal is allowed, the impugned award is set aside and the claim petition is granted. The claimant is held entitled to compensation to the tune of Rs.6,06,000/- with interest @7.5% per annum from the date of claim petition till its realization and insurer is saddled with the liability.

29. The insurer is directed to deposit the amount along with interest from the date of filing of the claim petition till its realization, within six weeks from today in the Registry. On deposit, the entire amount be released to the claimant, through payees' cheque account.

30. Send down the record forthwith, after placing a copy of this judgment.

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

FAO No.560 of 2008 and
FAO No.171 of 2009
Decided on : 30.10.2015

1.	**FAO No.560 of 2008**	
	Pushp Lata and others	.....Appellants
	Versus	
	Bajaj Allianz General Insurance Co. and another	..... Respondents
2.	**FAO No.171 of 2009**	
	Bajaj Allianz General Insurance Co.	.....Appellant
	Versus	
	Pushp Lata and others	..... Respondents

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was earning Rs. 10,000/- per month from the tuitions- he was also having income from the orchard- applying guess work, income of the deceased cannot be less than Rs. 6,500/- per month from tuitions- 1/3rd amount is to be deducted towards personal expenses and loss of dependency can be taken as Rs. 4334/- per month, say Rs. 4500/- - age of the deceased was 36 years and multiplier of '15' is applicable, thus, compensation of Rs. 8,10,000/- (Rs. 4500 x 12 x 15) awarded towards loss of dependency. (Para-4 to 6)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

Presence for the Parties:
Mr.B.N. Sharma, Advocate, for the claimants.
Mr.Neeraj Gupta, Advocate, for the Insurance Company.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are the outcome of one award, dated 1st July, 2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, the Tribunal), in Claim Petition No.11 of 2007, titled Pushp Lata and others vs. Bajaj Allianz General Insurance Co. and another, whereby compensation to the tune of Rs.8,47,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till

realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the impugned award). Accordingly, both the appeals are taken up together for final disposal.

2. FAO No.560 of 2008 has been filed by the claimants on the ground of adequacy of compensation, while the insurer has laid challenge to the impugned award by filing FAO No.171 of 2009 on the ground that the amount awarded is excessive and the insurer was wrongly saddled with the liability.

3. Thus, the only question needs to be determined is – Whether the amount awarded is just and appropriate?

4. In order to prove the income of the deceased, the claimants have led evidence and have sought to prove that the deceased was earning Rs.10,000/- per month from the tuitions. In addition, it was claimed that the deceased was having income from orchards also. Keeping in view the facts of the case and applying the guess work, I am of the considered view that the deceased was earning not less than Rs.6,500/- per month from tuitions. After deducting 1/3rd towards his personal expenses, it can safely be held that the claimants lost source of dependency to the tune of Rs.4334/- per month, say Rs.4500/-.

5. The age of the deceased was 36 years at the time of the accident and the multiplier applicable was '15' in view of Schedule-II appended to the Motor Vehicles Act, 1988 read with the judgment 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,*** which decision was upheld by the larger Bench of the Apex Court in ***Reshma Kumari & others*** versus ***Madan Mohan and another***, reported in ***2013 AIR (SCW) 3120.***

6. In view of the above, it is held that the Tribunal has wrongly applied the multiplier of 16 and instead multiplier of 15 is just and appropriate multiplier applicable in the present case. Accordingly, the claimants are held entitled to compensation to the tune of Rs.4500X12x15 = 8,10,000/- under the head loss of source of dependency.

7. Mr.Neeraj Gupta, learned counsel for the insurer, during the course of hearing, argued that the deceased was traveling in the offending vehicle as gratuitous passenger. Therefore, the Tribunal has wrongly saddled the insurer with the liability.

8. I have gone through the record. The insurer has not led any evidence to prove issues No.3 to 5, thus has failed to discharge its onus and prove that the deceased was traveling in the offending vehicle as gratuitous passenger. Therefore, the Tribunal has rightly recorded the findings.

9. As a sequel of the above discussion, the amount of compensation is reduced and accordingly, the impugned award is modified, as indicated above and both the appeals are disposed of. The Registry is directed to release the award amount in favour of the claimants, strictly in terms of the impugned award and the excess amount, if any, deposited by the insurer be refunded to the insurer through payee's account cheque.

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

Sunita Sharma and others ...Appellants.
Versus
HRTC and another ...Respondents.

FAO No. 437 of 2008
Decided on: 30.10.2015

Motor Vehicles Act, 1988- Section 166- Tribunal held that deceased was driving the vehicle rashly and negligently - evidence shows that vehicle was being driven by the deceased rashly and negligently at the time of the accident – no evidence was led to show that driver of other vehicle was driving the vehicle in a rash and negligent manner- appeal dismissed. (Para- 7 and 8)

For the appellants: Mr. Alok Ranjan, Advocate.
For the respondents: Mr. Ramesh Sharma, Advocate, for respondent No. 1.
Mr. K.R. Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 03.03.2008, made by the Motor Accident Claims Tribunal (II), Shimla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 33-S/2 of 2005, titled as Sunita Sharma and others versus HRTC and another, whereby the claim petition came to be dismissed (for short "the impugned award").

2. The appellants-claimants have invoked the jurisdiction of the Tribunal for grant of compensation on the grounds taken in the memo of the claim petition.

3. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal:

> *"1. Whether on 09.12.2004 at about 1.30 PM at Bithal, the respondent No. 2 was driving the Bus No. HP-34B-7505 rashly and negligently and as such caused the death of Sh. Sita Ram deceased? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Relief."*

5. Parties have led evidence.

6. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that Malik Kumar had not driven the vehicle rashly and negligently, in fact, it was the deceased, who was himself driving the vehicle rashly and negligently at the time of the accident.

7. I have gone through the evidence. The Tribunal has rightly discussed the evidence in paras 9 to 19 of the impugned award and came to the conclusion that the vehicle was being driven by the deceased rashly and negligently at the time of the accident.

8. There is not even a single iota of evidence on the file, which can be made basis for holding that Malik Kumar was driving the vehicle rashly and negligently.

9. Having said so, the impugned award is well reasoned, needs no interference.

10. Viewed thus, the impugned award is upheld and the appeal is dismissed.

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

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